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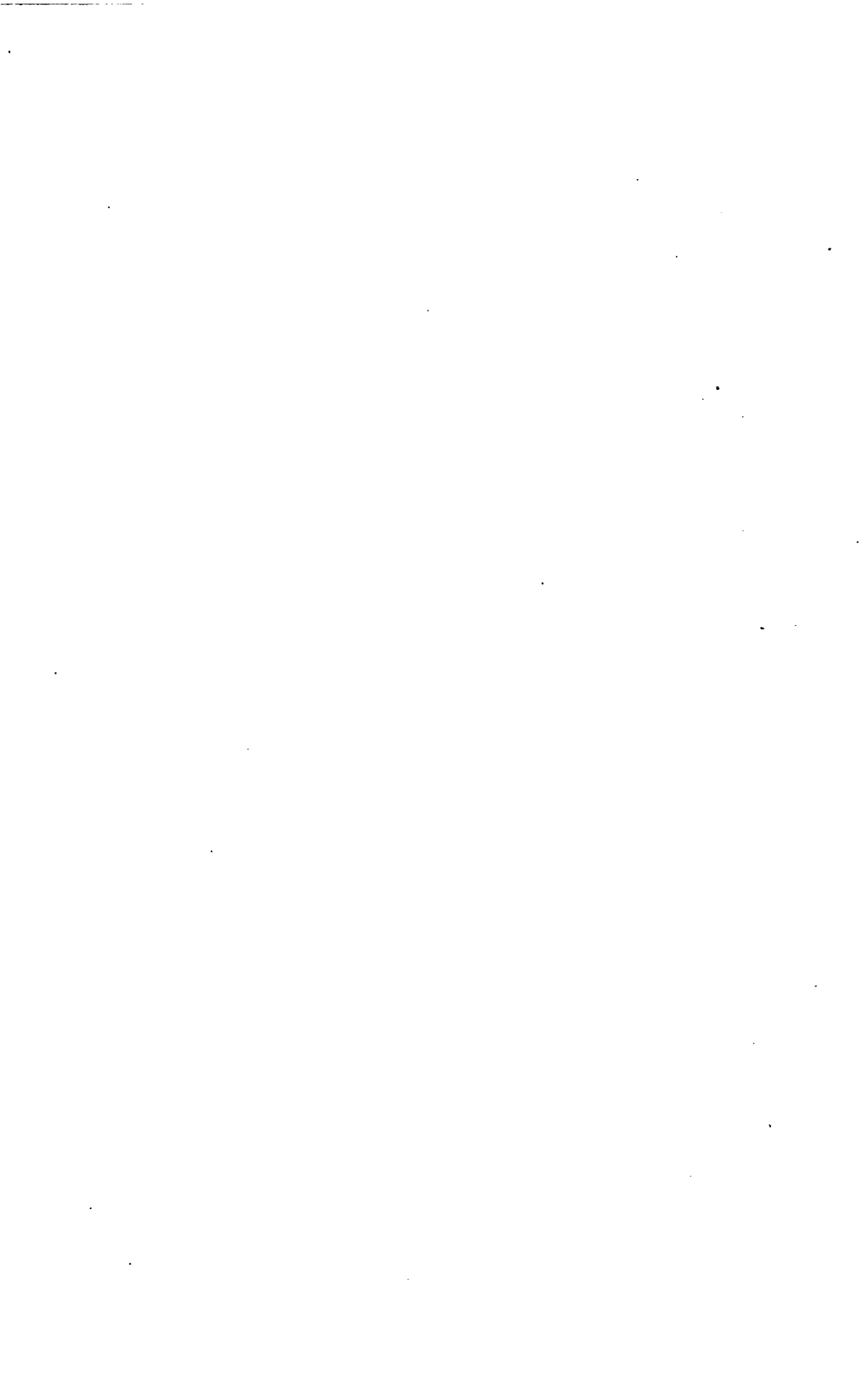


















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THE

FEDERAL STATUTES c7

ANNOTATED

SUPPLEMENT, 1914

Containing all the Laws of a Permanent and General Nature  
enacted by the second and third sessions of the Sixty-  
second Congress and by the first and second  
sessions of the Sixty-third Congress

Between Jan. 1, 1912, and Jan. 1, 1914

WITH

Supplemental Notes continuing the Annotation  
in the prior volumes

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COMPILED UNDER THE EDITORIAL SUPERVISION OF

WILLIAM M. MCKINNEY

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EDWARD THOMPSON COMPANY  
NORTHPORT, LONG ISLAND, NEW YORK  
1914

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Copyright, 1914  
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DEC 17 1914

## PREFACE.

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The statutes collected in this Supplement connect, without break or duplication, with those contained in the 1912 Supplement to FEDERAL STATUTES, ANNOTATED. They are the general, permanent, and public acts passed by Congress between Jan. 1, 1912, and Jan. 1, 1914. As in the 1909 and 1912 Supplements these acts are classified according to the scheme of titles in the main work, and in using this Supplement the reader should examine the corresponding title to locate the late, amendatory, or repealing legislation upon the topic under consideration. The cross-references are unusually abundant, and pains have been taken to prepare an index which is both exhaustive and usable. The notes of cases decided under these recent acts are necessarily few. The usual tables of titles, Revised Statutes sections, and statutes chronologically arranged are included.

The greater part of the volume is devoted to the supplemental notes. These connect with the notes in the 1912 Supplement and annotate the acts found in the original work and in the 1909 and 1912 Supplements. The aim has been to present all the decisions construing any federal statute which have appeared since the editorial work on the earlier volumes was completed. The arrangement is by title, volume, page, and section as the statutes are found in preceding volumes, and the investigator has merely to turn to the corresponding title, volume, page, and section as shown by the captions in this Supplement to find the late cases. The omission of a title or of page and section captions implies that no new cases have been found.



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An Act Authorizing the Secretary of Agriculture to issue certain reports relating to cotton.

[Act of May 27, 1912, ch. 135.]

[SEC. 1.] [*Cotton statistics — report of acres in cultivation.*] That the Secretary of Agriculture be directed to cause the Bureau of Statistics of the Department of Agriculture to issue a report, on or about the first Monday in July of each year, showing by States and in total the number of acres of cotton then in cultivation in the United States. [37 Stat. L. 118.]

SEC. 2. [*Estimate of total production to be issued.*] That the Secretary of Agriculture shall cause the Bureau of Statistics of the Department of Agriculture to issue each year, immediately following the publication of the ginning report of the Census Bureau of December first, an estimate of the total production of cotton in the United States for the current crop year. [37 Stat. L. 118.]

SEC. 3. [*Inconsistent laws repealed.*] That all Acts or parts of Acts inconsistent with the foregoing provisions be, and the same are hereby, repealed. [37 Stat. L. 118.]

An Act To establish a standard barrel and standard grades for apples when packed in barrels, and for other purposes.

[Act of August 3, 1912, ch. 273.]

[SEC. 1.] [*Apples — standard barrel established for — steel barrels.*] That the standard barrel for apples shall be of the following dimensions when measured without distention of its parts: Length of stave, twenty-eight and one-half inches; diameter of head, seventeen and one-eighth inches; distance between heads, twenty-six inches; circumference of bulge, sixty-four inches outside measurement, representing as nearly as possible seven thousand and fifty-six cubic inches: *Provided*, That steel barrels containing the interior dimensions provided for in this section shall be construed as a compliance therewith. [37 Stat. L. 250.]

SEC. 2. [*Grades established for apples in interstate, etc., commerce.*] That the standard grades for apples when packed in barrels which shall be shipped or delivered for shipment in interstate or foreign commerce, or which shall be sold or offered for sale within the District of Columbia or the Territories of the United States shall be as follows: Apples of one variety, which are well-grown specimens, hand picked, of good color for the variety, normal shape, practically free from insect and fungous injury, bruises, and other defects, except such as are necessarily caused in the operation of packing, or apples of one variety which are not more than ten per centum below the foregoing specifications shall be "Standard grade minimum size two and one-half inches," if the minimum size of the apples is two and one-half inches in transverse diameter; "Standard grade minimum size two and one-fourth inches," if the minimum size of the apples is two and one-fourth inches in transverse diameter; or "Standard grade minimum size two inches," if the minimum size of the apples is two inches in transverse diameter. [37 Stat. L. 250.]

SEC. 3. [*Branding of barrels.*] That the barrels in which apples are packed in accordance with the provision of this Act may be branded in accordance with section two of this Act. [37 Stat. L. 251.]

SEC. 4. [*Requirements for barrels — marking.*] That all barrels packed with apples shall be deemed to be below standard if the barrel bears any statement, design, or device indicating that the barrel is a standard barrel of apples, as herein defined, and the capacity of the barrel is less than the capacity prescribed by section one of this Act, unless the barrel shall be plainly marked on end and side with words or figures showing the fractional relation which the actual capacity of the barrel bears to the capacity prescribed by section one of this Act. The marking required by this paragraph shall be in block letters of size not less than seventy-two point one-inch gothic. [37 Stat. L. 251.]

SEC. 5. [*Misbranding — contents below standard — insufficient statements.*] That barrels packed with apples shall be deemed to be misbranded within the meaning of this Act—

First. If the barrel bears any statement, design, or device indicating that the apples contained therein are "Standard" grade and the apples when packed do not conform to the requirements prescribed by section two of this Act.

Second. If the barrel bears any statement, design, or device indicating that the apples contained therein are "Standard" grade and the barrel fails to bear also a statement of the name of the variety, the name of the locality where grown, and the name of the packer or the person by whose authority the apples were packed and the barrel marked. [37 Stat. L. 251.]

SEC. 6. [*Penalty for violations.*] That any person, firm or corporation, or association who shall knowingly pack or cause to be packed apples in barrels or who shall knowingly sell or offer for sale such barrels in violation of the provisions of this Act shall be liable to a penalty of one dollar and costs for each such barrel so sold or offered for sale, to be recovered at the suit of the United States in any court of the United States having jurisdiction. [37 Stat. L. 251.]

SEC. 7. [*In effect July 1, 1913.*] That this Act shall be in force and effect from and after the first day of July, nineteen hundred and thirteen. [37 Stat. L. 251.]

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[*Sale, etc., of animals and products permitted — deposit of receipts.*] \* \* \* And hereafter the Secretary of Agriculture is authorized to sell in the open market or to exchange for other breeding animals or animal products to the best advantage, without the usual condemnation proceedings and public auction, such animals or animal products produced or purchased under the appropriations made by Congress for the use of the Bureau of Animal Industry as may not be needed in the work of that bureau: *Provided*, That all moneys received from the sale of such animals or animal products, or as a bonus in the exchange of the same, shall be deposited in the Treasury as miscellaneous receipts. [37 Stat. L. 274.]

This is from the Agricultural Department Appropriation Act of Aug. 10, 1912, ch. 284.

[*Details of department employees.*] \* \* \* That hereafter employees of the Division of Accounts and Disbursements may be detailed by the Secretary of Agriculture for accounting and disbursing work in any of the bureaus and offices of the department for duty in or out of the city of Washington, and

employees of the bureaus and offices of the department may also be detailed to the Division of Accounts and Disbursements for duty in or out of the city of Washington, traveling expenses of employees so detailed to be paid from the appropriation of the bureau or office in connection with which such travel is performed. [37 Stat. L. 294.]

This is from the Agricultural Department Appropriation Act of Aug. 10, 1912, ch. 284.

[*Purchases for bureaus, etc. — exchange of typewriters, etc.*] \* \* \* That hereafter the Secretary of Agriculture may purchase stationery, supplies, furniture, and miscellaneous materials from this appropriation and transfer the same at actual cost to the various bureaus, divisions, and offices of the Department of Agriculture in the city of Washington, reimbursement therefor to be made to this appropriation by said bureaus, divisions, and offices from their lump-fund appropriations by transfer settlements through the Treasury Department: *Provided further*, That the Secretary of Agriculture may hereafter exchange typewriters and computing, addressing, and duplicating machines purchased from any lump-fund appropriation of the Department of Agriculture. [37 Stat. L. 296.]

This is from the Agricultural Department Appropriation Act of Aug. 10, 1912, ch. 284.

[*Sale of agricultural products — use of receipts.*] \* \* \* and the Secretary of Agriculture is authorized to sell such products as are obtained on the land belonging to the agricultural experiment stations in Alaska, Hawaii, Porto Rico, and the island of Guam, and to apply the money received from the sale of such products to the maintenance of said stations, and this fund shall be available until used. [37 Stat. L. 298.]

This is from the Agricultural Department Appropriation Act of Aug. 10, 1912, ch. 284.

[*Allowance to officials and employees for travel expenses — per diem in lieu of subsistence, etc. — reimbursement for street-car fares.*] \* \* \* That hereafter, when officials and employees of the Department of Agriculture are traveling on official business in the United States, they may be allowed necessary railroad and steamboat fares, sleeping berth, and stateroom on steamboats, livery hire and stage fare, and other means of conveyance between points not accessible by railroad, but in lieu of subsistence and all other traveling expenses they may receive a per diem allowance, to be fixed by the Secretary in each case, in addition to their regular salaries, subject to such rules and regulations as the Secretary of Agriculture may prescribe.

That hereafter officials and employees of the Department of Agriculture may, when authorized by the Secretary of Agriculture, receive reimbursement for moneys expended for street-car fares at their official headquarters when expended in the transaction of official business. [37 Stat. L. 300.]

This is from the Agricultural Department Appropriation Act of Aug. 10, 1912, ch. 284.

[*Detailed estimates of employees — not applicable to meat inspection and insecticide service.*] \* \* \* Hereafter so much of the Act of May twenty-sixth, nineteen hundred and ten (Thirty-sixth Statutes, page four hundred and sixteen), as requires the Secretary of Agriculture to transmit annually to the Secretary of the Treasury, for submission to Congress, detailed estimates for executive officers, clerks, and other employees in the various bureaus, offices, and divisions of the Department of Agriculture shall not apply to such em-

ployees in the meat-inspection service or employees engaged in the enforcement of the insecticide Act of nineteen hundred and ten. [37 Stat. L. 301.]

This is from the the Agricultural Department Appropriation Act of Aug. 10, 1912, ch. 284.

For the provision from the Act of May 26, 1910, above referred to, see 1912 Supp. Fed. Stat. Annot. 7.

**An Act To regulate the importation of nursery stock and other plants and plant products; to enable the Secretary of Agriculture to establish and maintain quarantine districts for plant diseases and insect pests; to permit and regulate the movement of fruits, plants, and vegetables therefrom, and for other purposes.**

[Act of August 20, 1912, ch. 308.]

[SEC. 1.] [*Nursery stock — importing without permit, etc., unlawful — certificate of foreign inspection required.*] That it shall be unlawful for any person to import or offer for entry into the United States any nursery stock unless an[d] until a permit shall have been issued therefor by the Secretary of Agriculture, under such conditions and regulations as the said Secretary of Agriculture may prescribe, and unless such nursery stock shall be accompanied by a certificate of inspection, in manner and form as required by the Secretary of Agriculture, of the proper official of the country from which the importation is made, to the effect that the stock has been thoroughly inspected and is believed to be free from injurious plant diseases and insect pests: *Provided*, That the Secretary of Agriculture shall issue the permit for any particular importation of nursery stock when the conditions and regulations as prescribed in this Act shall have been complied with: *Provided further*, That nursery stock may be imported for experimental or scientific purposes by the Department of Agriculture upon such conditions and under such regulations as the said Secretary of Agriculture may prescribe: *And provided further*, That nursery stock imported from countries where no official system of inspection for such stock is maintained may be admitted upon such conditions and under such regulations as the Secretary of Agriculture may prescribe. [37 Stat. L. 315.]

SEC. 2. [*Notifications of arrival at port of entry — forwarding without notification forbidden — inspection required.*] That it shall be the duty of the Secretary of the Treasury promptly to notify the Secretary of Agriculture of the arrival of any nursery stock at port of entry; that the person receiving such stock at port of entry shall, immediately upon entry and before such stock is delivered for shipment or removed from the port of entry, advise the Secretary of Agriculture or, at his direction, the proper State, Territorial, or District official of the State or Territory or the District to which such nursery stock is destined, or both, as the Secretary of Agriculture may elect, of the name and address of the consignee, the nature and quantity of the stock it is proposed to ship, and the country and locality where the same was grown. That no person shall ship or offer for shipment from one State or Territory or District of the United States into any other State or Territory or District, any nursery stock imported into the United States without notifying the Secretary of Agriculture or, at his direction, the proper State, Territorial, or District official of the State or Territory or District to which such nursery stock is destined, or both, as the Secretary of Agriculture may elect, immediately upon the delivery of the said stock for shipment, of the name and address of the consignee, of the nature and quantity of stock it is proposed to ship, and the country and locality where the same was grown, unless and until such imported stock has been

inspected by the proper official of a State, Territory, or District of the United States. [37 Stat. L. 316.]

SEC. 3. [*Marking, etc., required on goods entered.*] That no person shall import or offer for entry into the United States any nursery stock unless the case, box, package, crate, bale, or bundle thereof shall be plainly and correctly marked to show the general nature and quantity of the contents, the country and locality where the same was grown, the name and address of the shipper, owner, or person shipping or forwarding the same, and the name and address of the consignee. [37 Stat. L. 316.]

SEC. 4. [*Marking, etc., required in interstate shipments.*] That no person shall ship or deliver for shipment from one State or Territory or District of the United States into any other State or Territory or District any such imported nursery stock the case, box, package, crate, bale, or bundle whereof is not plainly marked so as to show the general nature and quantity of the contents, the name and address of the consignee, and the country and locality where such stock was grown, unless and until such imported stock has been inspected by the proper official of a State, Territory, or District of the United States. [37 Stat. L. 316.]

SEC. 5. [*Restriction on importing plants, etc., other than nursery stock.*] That whenever the Secretary of Agriculture shall determine that the unrestricted importation of any plants, fruits, vegetables, roots, bulbs, seeds, or other plant products not included by the term "nursery stock" as defined in section six of this Act may result in the entry into the United States or any of its Territories or Districts of injurious plant diseases or insect pests, he shall promulgate his determination, specifying the class of plants and plant products the importation of which shall be restricted and the country and locality where they are grown, and thereafter, and until such promulgation is withdrawn, such plants and plant products imported or offered for import into the United States or any of its Territories or Districts shall be subject to all the provisions of the foregoing sections of this Act: *Provided*, That before the Secretary of Agriculture shall promulgate his determination that the unrestricted importation of any plants, fruits, vegetables, roots, bulbs, seeds, or other plant products not included by the term "nursery stock" as defined in section six of this Act may result in the entry into the United States or any of its Territories or Districts of injurious plant diseases or insect pests he shall, after due notice, give a public hearing, under such rules and regulations as he shall prescribe, at which hearing any interested party may appear and be heard, either in person or by attorney. [37 Stat. L. 316.]

SEC. 6. [*"Nursery stock" — definition of term.*] That for the purpose of this act the term "nursery stock" shall include all field-grown florists' stock, trees, shrubs, vines, cuttings, grafts, scions, buds, fruit pits and other seeds of fruit and ornamental trees or shrubs, and other plants and plant products for propagation, except field, vegetable, and flower seeds, bedding plants, and other herbaceous plants, bulbs, and roots. [37 Stat. L. 317.]

SEC. 7. [*Plant diseases and insect infestation — determination of existence in country or locality — importations prohibited after promulgation of determination — hearings, etc. — quarantine immediately effective.*] That whenever, in order to prevent the introduction into the United States of any tree,

plant, or fruit disease or of any injurious insect, new to or not theretofore widely prevalent or distributed within and throughout the United States, the Secretary of Agriculture shall determine that it is necessary to forbid the importation into the United States of any class of nursery stock or of any other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products from a country or locality where such disease or insect infestation exists, he shall promulgate such determination, specifying the country and locality and the class of nursery stock or other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products which, in his opinion, should be excluded. Following the promulgation of such determination by the Secretary of Agriculture, and until the withdrawal of the said promulgation by him, the importation of the class of nursery stock or of other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products specified in the said promulgation from the country and locality therein named, regardless of the use for which the same is intended, is hereby prohibited; and until the withdrawal of the said promulgation by the Secretary of Agriculture, and notwithstanding that such class of nursery stock, or other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products be accompanied by a certificate of inspection from the country of importation, no person shall import or offer for entry into the United States from any country or locality specified in such promulgation, any of the class of nursery stock or of other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products named therein, regardless of the use for which the same is intended: *Provided*, That before the Secretary of Agriculture shall promulgate his determination that it is necessary to forbid the importation into the United States of the articles named in this section he shall, after due notice to interested parties, give a public hearing, under such rules and regulations as he shall prescribe, at which hearing any interested party may appear and be heard, either in person or by attorney: *Provided further*, That the quarantine provisions of this section, as applying to the white-pine blister rust, potato wart, and the Mediterranean fruit fly, shall become and be effective upon the passage of this Act. [37 Stat. L. §17.]

SEC. 8. [*Interstate quarantine against plant diseases or insect infestation — shipments from quarantined localities forbidden — movements of nursery stock subject to conditions — rules for inspection, etc., to be issued — hearings, etc.*] That the Secretary of Agriculture is authorized and directed to quarantine any State, Territory, or District of the United States, or any portion thereof, when he shall determine the fact that a dangerous plant disease or insect infestation, new to or not theretofore widely prevalent or distributed within and throughout the United States, exists in such State or Territory or District; and the Secretary of Agriculture is directed to give notice of the establishment of such quarantine to common carriers doing business in or through such quarantined area, and shall publish in such newspapers in the quarantined area as he shall select notice of the establishment of quarantine. That no person shall ship or offer for shipment to any common carrier, nor shall any common carrier receive for transportation or transport, nor shall any person carry or transport from any quarantined State or Territory or District of the United States, or from any quarantined portion thereof, into or through any other State or Territory or District, any class of nursery stock or any other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products specified in the notice of quarantine except as hereinafter provided. That it shall be unlawful to move, or allow to be moved, any class of nursery stock or any other class of plants,

fruits, vegetables, roots, bulbs, seeds, or other plant products specified in the notice of quarantine hereinbefore provided, and regardless of the use for which the same is intended, from any quarantined State or Territory or District of the United States, or quarantined portion thereof, into or through any other State or Territory or District, in manner or method or under conditions other than those prescribed by the Secretary of Agriculture. That it shall be the duty of the Secretary of Agriculture to make and promulgate rules and regulations which shall permit and govern the inspection, disinfection, certification, and method and manner of delivery and shipment of the class of nursery stock or of any other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products specified in the notice of quarantine hereinbefore provided, and regardless of the use for which the same is intended, from a quarantined State or Territory or District of the United States, or quarantined portion thereof, into or through any other State or Territory or District; and the Secretary of Agriculture shall give notice of such rules and regulations as hereinbefore provided in this section for the notice of the establishment of quarantine: *Provided*, That before the Secretary of Agriculture shall promulgate his determination that it is necessary to quarantine any State, Territory, or District of the United States, or portion thereof, under the authority given in this section, he shall, after due notice to interested parties, give a public hearing under such rules and regulations as he shall prescribe, at which hearing any interested party may appear and be heard, either in person or by attorney. [37 Stat. L. 318.]

SEC. 9. [*Duty of Secretary of Agriculture.*] That the Secretary of Agriculture shall make and promulgate such rules and regulations as may be necessary for carrying out the purposes of this Act. [37 Stat. L. 318.]

SEC. 10. [*Punishment for violations.*] That any person who shall violate any of the provisions of this Act, or who shall forge, counterfeit, alter, deface, or destroy any certificate provided for in this Act or in the regulations of the Secretary of Agriculture, shall be deemed guilty of a misdemeanor and shall, upon conviction thereof, be punished by a fine not exceeding five hundred dollars or by imprisonment not exceeding one year, or both such fine and imprisonment, in the discretion of the court: *Provided*, That no common carrier shall be deemed to have violated the provisions of any of the foregoing sections of this Act on proof that such carrier did not knowingly receive for transportation or transport nursery stock or other plants or plant products as such from one State, Territory, or District of the United States into or through any other State, Territory, or District; and it shall be the duty of the United States attorneys diligently to prosecute any violations of this Act which are brought to their attention by the Secretary of Agriculture or which come to their notice by other means. [37 Stat. L. 318.)

SEC. 11. [*"Persons" to include corporations, etc. — corporations, etc., liable for acts of agents.*] That the word "person" as used in this Act shall be construed to import both the plural and the singular, as the case demands, and shall include corporations, companies, societies, and associations. When construing and enforcing the provisions of this Act, the act, omission, or failure of any officer, agent, or other person acting for or employed by any corporation, company, society, or association, within the scope of his employment or office, shall in every case be also deemed to be the act, omission, or failure of

such corporation, company, society, or association as well as that of the person. [37 Stat. L. 319.]

SEC. 12. [*Federal Horticultural Board established — composition.*] That for the purpose of carrying out the provisions of this Act there shall be appointed by the Secretary of Agriculture from existing bureaus and offices in the Department of Agriculture, including the Bureau of Entomology, the Bureau of Plant Industry, and the Forest Service, a Federal Horticultural Board consisting of five members, of whom not more than two shall be appointed from any one bureau or office, and who shall serve without additional compensation. [37 Stat. L. 319.]

SEC. 13. [*Appropriation.*] That there is hereby appropriated, out of the moneys in the Treasury not otherwise appropriated, to be expended as the Secretary of Agriculture may direct, for the purposes and objects of this Act, the sum of twenty-five thousand dollars. [Stat. L. 319.]

SEC. 14. [*In effect October, 1, 1912.*] That this Act shall become and be effective from and after the first day of October, nineteen hundred and twelve, except as herein otherwise provided. [37 Stat. L. 319.]

**An Act To regulate foreign commerce by prohibiting the admission into the United States of certain adulterated grain and seeds unfit for seeding purposes.**

[Act of August 24, 1912, ch. 382.]

[SEC. 1.] [*Grain and seeds — importing adulterated, for seeding, prohibited — regulations to prevent.*] That from and after six months after the passage of this Act the importation into the United States of seeds of alfalfa, barley, Canadian blue grass, Kentucky blue grass, awnless brome grass, buckwheat, clover, field corn, Kafir corn, meadow fescue, flax, millet, oats, orchard grass, rape, redtop, rye, sorghum, timothy, and wheat, or mixtures of seeds containing any of such seeds as one of the principal component parts, which are adulterated or unfit for seeding purposes under the terms of this Act, is hereby prohibited; and the Secretary of the Treasury and the Secretary of Agriculture shall, jointly or severally, make such rules and regulations as will prevent the importation of such seeds into the United States: *Provided, however,* That such seed may be delivered to the owner or consignee thereof under bond, to be recleaned in accordance with and subject to such regulations as the Secretary of the Treasury may prescribe, and when cleaned to the standard of purity specified in this Act for admission into the United States such seed may be released to the owner or consignee thereof after the screenings and other refuse removed from such seed shall have been disposed of in a manner prescribed by the Secretary of Agriculture: *Provided further,* That this Act shall not apply to the importation of barley, buckwheat, field corn, Kafir corn, sorghum, flax, oats, rye, or wheat not intended for seeding purposes, when shipped in bond through the United States or imported for the purpose of manufacture, but such shipment shall be subject to provisions of the Act of August fifth, nineteen hundred and nine. [37 Stat. L. 506.]



SEC. 2. [*Adulterations.*] That seed shall be considered adulterated within the meaning of this Act —

First. When seed of red clover contains more than three per centum by weight of seed of yellow trefoil, or any other seed of similar appearance to and of lower market value than seed of red clover.

Second. When seed of alfalfa contains more than three per centum by weight of seed of yellow trefoil, burr clover and sweet clover, singly or combined.

Third. When any kind or variety of the seeds, or any mixture described in section one of this Act, contains more than five per centum by weight of seed of another kind or variety of lower market value and of similar appearance: *Provided*, That the mixture of the seed of white and alsike clover, red and alsike clover, or alsike clover and timothy, shall not be deemed an adulteration under this section. [37 Stat. L. 507.]

SEC. 3. [*Unfit for seeding.*] That seed shall be considered unfit for seeding purposes within the meaning of this Act —

First. When any kind or variety of clover or alfalfa seed contains more than one seed of dodder to five grams of clover or alfalfa seed, respectively.

Second. When any kind or variety of the seeds or any mixture described in section one of this Act contains more than three per centum by weight of seeds of weeds. [37 Stat. L. 507.]

SEC. 4. [*Penalty.*] That any person or persons who shall knowingly violate the provisions of this Act, shall be deemed guilty of a misdemeanor and shall pay a fine of not exceeding five hundred dollars and not less than two hundred dollars: *Provided*, That any person or persons who shall knowingly sell for seeding purposes seeds or grain which were imported under the provisions of this Act for the purpose of manufacture shall be deemed guilty of a violation of this Act. [37 Stat. L. 507.]

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[*Sale of pathological and zoölogical specimens.*] \* \* \* And hereafter the Secretary of Agriculture is authorized to prepare and sell at cost such pathological and zoological specimens as he may deem of scientific or educational value to scientists or others engaged in the work of hygiene and sanitation: *Provided*, That all moneys received from the sale of such specimens shall be deposited in the Treasury as miscellaneous receipts. [37 Stat. L. 833.]

This and the two paragraphs following are from the Agricultural Department Appropriation Act of March 4, 1913, ch. 145.

[*Lump-sum appropriations — payment for scientific, etc., work allowed — pay of officers and employees established.*] \* \* \* That hereafter section seven of the Act approved August twenty-sixth, nineteen hundred and twelve (Thirty-seventh Statutes, page six hundred and twenty-six), and any amendments thereto, shall not apply to the payment, out of moneys appropriated or which may be hereafter appropriated in lump sum for the Department of Agriculture, for personal services of employees engaged in strictly scientific or technical work: *Provided*, That nothing contained herein shall be construed to authorize the transfer of any person employed at a specific salary and the payment of compensation from lump-sum appropriations at a rate greater than said specific salary.

And hereafter every officer or employee of the Department of Agriculture whose rate of compensation is specified herein shall receive compensation at the rate so specified. [37 Stat. L. 854.]

For sec. 7 of the Act of Aug. 26, 1912, see *post*, p. 140.

[Imports permitted for experiments, etc. — nursery stock.] \* \* \* That hereafter any class of nursery stock or of any other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products of which the importation may be forbidden from any country or locality under the provisions of section seven of the plant quarantine Act approved August twentieth, nineteen hundred and twelve (Thirty-seventh Statutes, page three hundred and fifteen), may be imported for experimental or scientific purposes by the Department of Agriculture upon such conditions and under such regulations as the said Secretary of Agriculture may prescribe. [37 Stat. L. 854.]

For the Plant Quarantine Act of Aug. 20, 1912, see *supra*, p. 6.

## ALASKA.

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#### CROSS-REFERENCE.

See also *AGRICULTURE*.

An Act To modify and amend the mining laws in their application to the Territory of Alaska, and for other purposes.

[Act of August 1, 1912, ch. 269.]

[SEC. 1.] [*Association placer-mining claims limited — assessment required.*] That no association placer-mining claim shall hereafter be located in Alaska in excess of forty acres, and on every placer-mining claim hereafter located in Alaska, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, including the year of location, for each and every twenty acres or excess fraction thereof. [37 Stat. L. 242.]

SEC. 2. [*Location by attorneys — restriction.*] That no person shall hereafter locate any placer-mining claim in Alaska as attorney for another unless he is duly authorized thereto by a power of attorney in writing, duly acknowledged and recorded in any recorder's office in the judicial division where the location is made. Any person so authorized may locate placer-mining claims for not more than two individuals or one association under such power of attorney, but no such agent or attorney shall be authorized or permitted to locate more than two placer-mining claims for any one principal or association during any calendar month, and no placer-mining claim shall hereafter be located in Alaska except under the limitations of this Act. [37 Stat. L. 243.]

SEC. 3. [*Number of locations limited — ownership.*] That no person shall hereafter locate, cause or procure to be located, for himself more than two placer-mining claims in any calendar month: *Provided*, That one or both of such locations may be included in an association claim. [37 Stat. L. 243.]

SEC. 4. [*Area of claims.*] That no placer-mining claim hereafter located in Alaska shall be patented which shall contain a greater area than is fixed by law, nor which is longer than three times its greatest width. [37 Stat. L. 243.]

SEC. 5. [*Effect of violations.*] That any placer-mining claim attempted to be located in violation of this Act shall be null and void, and the whole area thereof may be located by any qualified locator as if no such prior attempt had been made. [37 Stat. L. 243.]

An Act To give effect to the convention between the Governments of the United States, Great Britain, Japan, and Russia for the preservation and protection of the fur seals and sea otter which frequent the waters of the north Pacific Ocean, concluded at Washington July seventh, nineteen hundred and eleven.

[Act of August 24, 1912, ch. 373.]

Whereas the plenipotentiaries of the United States, Great Britain, Japan, and Russia did, on the seventh day of July, anno Domini nineteen hundred and eleven, enter into a convention for the preservation and protection of the fur seals and sea otter which frequent the waters of the north Pacific Ocean, which convention was subsequently ratified by the Governments of the United States, Great Britain, Japan, and Russia and the exchange of ratifications thereof was effected on the twelfth day of December, nineteen hundred and eleven: Now, therefore,

[SEC. 1.] [*Killing, etc., seals in north Pacific Ocean forbidden — sea otters.*] That no citizen of the United States, nor person owing duty of obedience to the laws or the treaties of the United States, nor any of their vessels, nor any vessel of the United States, nor any person belonging to or on board of such vessel, shall kill, capture, or pursue, at any time or in any manner whatever, any fur seal in the waters of the north Pacific Ocean north of the thirtieth parallel of north latitude and including the seas of Bering, Kamchatka, Okhotsk, and Japan: nor shall any such person or vessel kill, capture, or pursue sea otter in any of the waters mentioned beyond the distance of three miles from the shore line of the territory of the United States. [37 Stat. L. 499.]

SEC. 2. [*Equipping, etc., vessels — use of ports, etc., — vessels excluded.*] That no citizen of the United States, nor person above described in the first section, shall equip, use, or employ, or furnish aid in equipping, using, or employing, or furnish supplies to any vessel used or employed, or to be used or employed, in carrying on or taking part in pelagic sealing or in sea-otter hunting in said waters, nor shall any of their vessels nor any vessel of the United States be so used or employed; and no person or vessel shall use any of the ports or harbors of the United States, or any part of the territory of the United States, for any purposes whatsoever connected with the operations of pelagic sealing or sea-otter hunting in the waters named in the first section of this Act; and no vessel which is engaged or employed, or intended to be engaged or employed, for or in connection with pelagic sealing or sea-otter hunting in such waters shall use any of the ports or harbors or any part of the territory of the United States for any purpose whatsoever. [37 Stat. L. 500.]

SEC. 3. [*Killing by natives.*] That the provisions of the first and second sections of this Act shall not apply to Indians, Aleuts, or other aborigines dwelling on the American coast of the waters mentioned in the first section of this Act who carry on pelagic sealing in canoes or undecked boats propelled wholly by paddles, oars, or sails, and not transported by or used in connection with other vessels, and manned by not more than five persons each, in the way hitherto practiced by the said Indians, Aleuts, or other aborigines, and without the use of firearms: *Provided, however,* That the exception made in this section shall not apply to Indians, Aleuts, or other aborigines in the employment of other persons or who shall kill, capture, or pursue fur seals or sea otters under contract to deliver the skins to any person. [37 Stat. L. 500.]

SEC. 4. [*Importing illegally taken skins.*] That the importation or bringing into territory of the United States, by any person whatsoever, of skins of fur seals or sea otters taken in the waters mentioned in the first section of this Act, or of skins identified as those of the species known as *Callorhinus alascanus*, *Callorhinus ursinus*, and *Callorhinus kurilensis*, or belonging to the American, Russian, or Japanese herds, whether raw, dressed, dyed, or manufactured, except such as have been taken under the authority of the respective parties to said convention, to which the breeding grounds of such herds belong, and have been officially marked and certified as having been so taken, is hereby prohibited; and all such articles imported or brought in after this Act shall take effect shall not be permitted to be exported, but shall be seized and forfeited to the United States. [37 Stat. L. 500.]

SEC. 5. [*Regulations to be made by the President.*] That the President shall have power to make regulations to carry this Act and the said convention into effect, and from time to time to add to, modify, amend, or revoke such regulations, as in his judgment may seem expedient. It shall be the duty of the Secretary of Commerce and Labor, under the direction of the President, to see that the said convention, the provisions of this Act, and the regulations made thereunder are executed and enforced; and all officers of the United States engaged in the execution and enforcement of this Act are authorized and directed to cooperate with the proper officers of any of the other parties to the said convention in taking such measures as may be appropriate and available under the said convention, this Act, or the regulations made thereunder for the purpose of preventing pelagic sealing as in this Act prohibited. [37 Stat. L. 500.]

SEC. 6. [*Punishment for violations.*] That every person guilty of a violation of any of the provisions of said convention, or of this Act, or of any regulation made thereunder, shall, for each offense, be fined not less than two hundred dollars or more than two thousand dollars, or imprisoned not more than six months, or both; and every vessel, its tackle, apparel, furniture, and cargo, at any time used or employed in violation of this Act, or of the regulations made thereunder, shall be forfeited to the United States. [37 Stat. L. 501.]

SEC. 7. [*Vessels presumed to be violating law, etc.*] That if any vessel shall be found within the waters to which this Act applies, having on board fur-seal skins or sea-otter skins, or bodies of seals or sea otters, or apparatus or implements for killing or taking seals or sea otter, it shall be presumed that such vessel was used or employed in the killing of said seals or sea otters, or that said apparatus or implements were used in violation of this Act, until the contrary is proved to the satisfaction of the court, in so far as such vessel, apparatus, and implements are subject to the jurisdiction of the United States. [37 Stat. L. 501.]

SEC. 8. [*Prosecutions.*] That any violation of the said convention, or of this Act, or of the regulations thereunder, may be prosecuted either in the district court of Alaska, or in any district court of the United States in California, Oregon, or Washington. [37 Stat. L. 501.]

SEC. 9. [*Naval, etc., guard to be maintained — right of seizure.*] That it shall be the duty of the President to cause a guard or patrol to be maintained in the waters frequented by the seal herd or herds and sea otter, in the pro-

tection of which the United States is especially interested, composed of naval or other public vessels of the United States designated by him for such service; and any officer of any such vessel engaged in such service and any other officers duly designated by the President may search any vessel of the United States, in port, or in territorial waters of the United States, or on the high seas, when suspected of having violated, or being about to violate, the provisions of said convention, or of this Act, or of any regulation made thereunder, and may seize such vessel and the officers and crew thereof and bring them into the most accessible port of the Territory or of any of the States mentioned in the eighth section of this Act for trial. [37 Stat. L. 501.]

SEC. 10. [*Seizure outside of territorial jurisdiction — delivery to proper officials — seizures by other than United States officers — proclamation to issue.*] That any vessel or person described in the first section of this Act offending or being about to offend against the prohibitions of the said convention, or of this Act, or of the regulations made thereunder, may be seized and detained by the naval or other duly commissioned officers of any of the parties to the said convention other than the United States, except within the territorial jurisdiction of one of the other of said parties, on condition, however, that when such vessel or person is so seized and detained by officers of any party other than the United States such vessel or person shall be delivered as soon as practicable at the nearest point to the place of seizure, with the witnesses and proofs necessary to establish the offense so far as they are under the control of such party, to the proper official of the United States, whose courts alone shall have jurisdiction to try the offense and impose the penalties for the same: *Provided, however,* That the said officers of any party to said convention other than the United States shall arrest and detain vessels and persons, as in this section specified, only after such party, by appropriate legislation or otherwise, shall have authorized the naval or other officers of the United States duly commissioned and instructed by the President to that end to arrest, detain, and deliver to the proper officers of such party vessels and subjects under the jurisdiction of that Government offending against said convention or any statute or regulation made by that Government to enforce said convention. The President of the United States shall determine by proclamation when such authority has been given by the other parties to said convention, and his determination shall be conclusive upon the question; and such proclamation may be modified, amended, or revoked by proclamation of the President whenever, in his judgment, it is deemed expedient. [37 Stat. L. 501.]

SEC. 11. [*Killing fur seals on Pribilof Islands suspended for five years.*] That from and after the approval of this Act all killing of fur seals on the Pribilof Islands, or anywhere within the jurisdiction of the United States in Alaska, shall be suspended for a period of five years, and shall be, and is hereby, declared to be unlawful; and all punishments and penalties heretofore enacted for the illegal killing of fur seals shall be applicable and inflicted upon offenders under this section: *Provided,* That this prohibition shall not apply to the annual killing on the Pribilof Islands of such male seals as are needed to supply food, clothing, and boat skins for the natives on the islands, as is provided for in article eleven of said convention; the skins of all seals so used for food shall be preserved and annually sold by the Government, and proceeds of such annual sales shall be covered into the Treasury of the United States: *Provided further,* That at the expiration of the said five years' suspension of

all commercial killing as above provided, said killing may be resumed under authority of the Secretary of Commerce and Labor: *Provided, however,* That the number of three-year-old males selected from among the finest and most perfect seals of that age found on the hauling grounds, to be reserved for breeding purposes, in each year ending August first, shall not be fewer than the following: In nineteen hundred and seventeen, and in each year thereafter until nineteen hundred and twenty-six, inclusive, five thousand. The Secretary of Commerce and Labor, or his authorized agents, shall have authority to receive on behalf of the United States any and all fur-seal skins taken as provided in the thirteenth and fourteenth articles of said convention and tendered for delivery by the Governments of Japan and Great Britain in accordance with the terms of said articles; and all skins which are or shall become the property of the United States from any source whatsoever shall be sold by the Secretary of Commerce and Labor in such market, at such times, and in such manner as he may deem most advantageous; and the proceeds of such sale or sales shall be paid into the Treasury of the United States. The Secretary of Commerce and Labor shall likewise have authority to deliver to the authorized agents of the Canadian Government and the Japanese Government the skins to which they are entitled under the provisions of the tenth article of said convention; to pay to Great Britain and Japan such sums as they are entitled to receive, respectively, under the provisions of the eleventh article of said convention; to retain such skins as the United States may be entitled to retain under the provisions of the eleventh article of said convention; and to do or perform, or cause to be done or performed, any and every act which the United States is authorized or obliged to do or perform by the provisions of the tenth, eleventh, thirteenth, and fourteenth articles of said convention; and to enable the Secretary of Commerce and Labor to carry out the provisions of the said eleventh article there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of four hundred thousand dollars. [37 Stat. L. 502.]

SEC. 12. [*"Pelagic sealing" defined — "person" construed.*] That the term "pelagic sealing" where used in this Act shall be taken to mean the killing, capturing, or pursuing in any manner whatsoever of fur seals while the same are in the water. The word "person" where used in this Act shall extend and be applied to partnerships and corporations. [37 Stat. L. 502.]

SEC. 13. [*Effect and duration.*] That this Act shall take effect immediately, and shall continue in force until the termination of the said convention. [37 Stat. L. 502.]

**An Act To create a legislative assembly in the Territory of Alaska, to confer legislative power thereon, and for other purposes.**

[Act of August 24, 1912, ch. 387.]

[SEC. 1.] *Alaska Territory organized.* — That the territory ceded to the United States by Russia by the treaty of March thirtieth, eighteen hundred and sixty-seven, and known as Alaska, shall be and constitute the Territory of Alaska under the laws of the United States, the government of which shall be organized and administered as provided by said laws. [37 Stat. L. 512.]



SEC. 2. *Capital at Juneau.* — That the capital of the Territory of Alaska shall be at the city of Juneau, Alaska, and the seat of government shall be maintained there. [37 Stat. L. 512.]

SEC. 3. *Constitution and laws of United States extended.* — That the Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States; that all the laws of the United States heretofore passed establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by Act of Congress; that except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the legislature: *Provided*, That the authority herein granted to the legislature to alter, amend, modify, and repeal laws in force in Alaska shall not extend to the customs, internal-revenue, postal, or other general laws of the United States or to the game, fish, and fur-seal laws and laws relating to fur-bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade, or to the Act entitled "An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the District of Alaska, and for other purposes," approved January twenty-seventh, nineteen hundred and five, and the several Acts amendatory thereof: *Provided further*, That this provision shall not operate to prevent the legislature from imposing other and additional taxes or licenses. And the legislature shall pass no law depriving the judges and officers of the district court of Alaska of any authority, jurisdiction, or function exercised by like judges or officers of district courts of the United States. [37 Stat. L. 512.]

For the Act of Jan. 27, 1905, see 10 Fed. Stat. Annot. 20. And see the Act of Feb. 6, 1909, 1909 Supp. Fed. Stat. Annot. 31.

SEC. 4. *The legislature.* — That the legislative power and authority of said Territory shall be vested in a legislature, which shall consist of a senate and a house of representatives. The senate shall consist of eight members, two from each of the four judicial divisions into which Alaska is now divided by Act of Congress, each of whom shall have at the time of his election the qualifications of an elector in Alaska, and shall have been a resident and an inhabitant in the division from which he is elected for at least two years prior to the date of his election. The term of office of each member of the senate shall be four years: *Provided*, That immediately after they shall be assembled in consequence of the first election they shall, by lot or drawing, be divided in each division into two classes; the seats of the members of the first class shall be vacated at the end of two years and the seats of the members of the second class shall be vacated at the end of four years, so that one member of the senate shall, after the first election, be elected biennially at the regular election from each division. The house of representatives shall consist of sixteen members, four from each of the four judicial divisions into which Alaska is now divided by Act of Congress. The term of office of each representative shall be for two years and each representative shall possess the same qualifications as are prescribed for members of the senate and the persons receiving the highest number of legal votes in each judicial division cast in said election for senator or representative shall be deemed and declared elected to such office: *Provided*, That in the event of a tie vote the candidates thus affected shall settle the

question by lot. In case of a vacancy in either branch of the legislature the governor shall order an election to fill such vacancy, giving due and proper notice thereof. That each member of the legislature shall be paid by the United States the sum of fifteen dollars per day for each day's attendance while the legislature is in session, and mileage, in addition, at the rate of fifteen cents per mile for each mile from his home to the capital and return by the nearest traveled route. [37 Stat. L. 513.]

SEC. 5. *Election of members of the legislature.* — That the first election for members of the Legislature of Alaska shall be held on the Tuesday next after the first Monday in November, nineteen hundred and twelve, and all subsequent elections for the election of such members shall be held on the Tuesday next after the first Monday in November biennially thereafter; that the qualifications of electors, the regulations governing the creation of voting precincts, the appointment and qualifications of election officers, the supervision of elections, the giving of notices thereof, the forms of ballots, the register of votes, the challenging of voters, and the returns and the canvass of the returns of the result of all such elections for members of the legislature shall be the same as those prescribed in the Act of Congress entitled "An Act providing for the election of a Delegate to the House of Representatives from the Territory of Alaska," approved May seventh, nineteen hundred and six, and all the provisions of said Act which are applicable are extended to said elections for members of the legislature, and shall govern the same, and the canvassing board created by said Act shall canvass the returns of such elections and issue certificates of election to each member elected to the said legislature; and all the penal provisions contained in section fifteen of the said Act shall apply to elections for members of the legislature as fully as they now apply to elections for Delegate from Alaska to the House of Representatives. [37 Stat. L. 513.]

For the Act of May 7, 1906, see 1909 Supp. Fed. Stat. Annot. 11.

SEC. 6. *Convening and sessions of legislature.* — That the Legislature of Alaska shall convene at the capitol at the city of Juneau, Alaska, on the first Monday in March in the year nineteen hundred and thirteen, and on the first Monday in March every two years thereafter; but the said legislature shall not continue in session longer than sixty days in any two years unless again convened in extraordinary session by a proclamation of the governor, which shall set forth the object thereof and give at least thirty days' written notice to each member of said legislature, and in such case shall not continue in session longer than fifteen days. The governor of Alaska is hereby authorized to convene the legislature in extraordinary session for a period not exceeding fifteen days when requested to do so by the President of the United States, or when any public danger or necessity may require it. [37 Stat. L. 514.]

SEC. 7. *Organization of the legislature.* — That when the legislature shall convene under the law, the senate and house of representatives shall each organize by the election of one of their number as presiding officer, who shall be designated in the case of the senate as "president of the senate" and in the case of the house of representatives as "speaker of the house of representatives," and by the election by each body of the subordinate officers provided for in section eighteen hundred and sixty-one of the United States Revised Statutes of eighteen hundred and seventy-eight, and each of said subordinate officers shall receive the compensation provided in that section: *Provided*, That no

person shall be employed for whom salary, wages, or compensation is not provided in the appropriation made by Congress. [37 Stat. L. 514.]

For R. S. sec. 1861, see 7 Fed. Stat. Annot. 259.

SEC. 8. *Enacting clause — Subject of act.* — That the enacting clause of all laws passed by the legislature shall be "Be it enacted by the Legislature of the Territory of Alaska." No law shall embrace more than one subject, which shall be expressed in its title. [37 Stat. L. 514.]

SEC. 9. *Legislative power — Limitations.* — The legislative power of the Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States, but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents; nor shall the legislature grant to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise without the affirmative approval of Congress; nor shall the legislature pass local or special laws in any of the cases enumerated in the Act of July thirtieth, eighteen hundred and eighty-six; nor shall it grant private charters or special privileges, but it may, by general act, permit persons to associate themselves together as bodies corporate for manufacturing, mining, agricultural, and other industrial pursuits, and for the conduct of business of insurance, savings banks, banks of discount and deposit (but not of issue), loans, trust, and guaranty associations, for the establishment and conduct of cemeteries, and for the construction and operation of railroads, wagon roads, vessels, and irrigating ditches, and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any other benevolent, charitable, or scientific association, but the authority embraced in this section shall only permit the organization of corporations or associations whose chief business shall be in the Territory of Alaska; no divorce shall be granted by the legislature, nor shall any divorce be granted by the courts of the Territory, unless the applicant therefor shall have resided in the Territory for two years next preceding the application, which residence and all causes for divorce shall be determined by the court upon evidence adduced in open court; nor shall any lottery or the sale of lottery tickets be allowed; nor shall the legislature or any municipality interfere with or attempt in anywise to limit the Acts of Congress to prevent and punish gambling, and all gambling implements shall be seized by the United States marshal or any of his deputies, or any constable or police officer, and destroyed; nor shall spirituous or intoxicating liquors be manufactured or sold, except under such regulations and restrictions as Congress shall provide; nor shall any public money be appropriated by the Territory or any municipal corporation therein for the support or benefit of any sectarian, denominational, or private school, or any school not under the exclusive control of the Government; nor shall the Government of the Territory of Alaska or any political or municipal corporation or subdivision of the Territory make any subscription to the capital stock of any incorporated company, or in any manner lend its credit for the use thereof; nor shall the Territory, or any municipal corporation therein, have power or authority to create or assume any bonded indebtedness whatever; nor to borrow money in the name of the Territory or of any municipal division thereof; nor to pledge the faith of the people of the same for any loan whatever, either directly or indirectly; nor to create, nor to assume, any indebtedness, ex-

cept for the actual running expenses thereof; and no such indebtedness for actual running expenses shall be created or assumed in excess of the actual income of the Territory or municipality for that year, including as a part of such income appropriations then made by Congress, and taxes levied and payable and applicable to the payment of such indebtedness and cash and other money credits on hand and applicable and not already pledged for prior indebtedness: *Provided*, That all authorized indebtedness shall be paid in the order of its creation; all taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessments shall be according to the actual value thereof. No tax shall be levied for Territorial purposes in excess of one per centum upon the assessed valuation of property therein in any one year; nor shall any incorporated town or municipality levy any tax, for any purpose, in excess of two per centum of the assessed valuation of property within the town in any one year: *Provided*, That the Congress reserves the exclusive power for five years from the date of the approval of this Act to fix and impose any tax or taxes upon railways or railway property in Alaska, and no acts or laws passed by the Legislature of Alaska providing for a county form of government therein shall have any force or effect until it shall be submitted to and approved by the affirmative action of Congress; and all laws passed, or attempted to be passed, by such legislature in said Territory inconsistent with the provisions of this section shall be null and void: *Provided further*, That nothing herein contained shall be held to abridge the right of the legislature to modify the qualifications of electors by extending the elective franchise to women. [37 Stat. L. 514.]

SEC. 10. *Rules, quorum, and majority.* — That the senate and house of representatives shall each choose its own officers, determine the rules of its own proceedings not inconsistent with this Act, and keep a journal of its proceedings; that the ayes and noes of the members of either house on any question shall, at the request of one-fifth of the members present, be entered upon the journal; that a majority of the members to which each house is entitled shall constitute a quorum of such house for the conduct of business, of which quorum a majority vote shall suffice; that a smaller number than a quorum may adjourn from day to day and compel the attendance of absent members, in such manner and under such penalties as each house may provide; that for the purpose of ascertaining whether there is a quorum present the presiding officer shall count and report the actual number of members present. [37 Stat. L. 515.]

SEC. 11. *Legislator shall not hold other office.* — That no member of the legislature shall hold or be appointed to any office which has been created, or the salary or emoluments of which have been increased, while he was a member, during the term for which he was elected and for one year after the expiration of such term; and no person holding a commission or appointment under the United States shall be a member of the legislature or shall hold any office under the government of said Territory. [37 Stat. L. 516.]

SEC. 12. *Exemptions of legislators.* — That no member of the legislature shall be held to answer before any other tribunal for any words uttered in the exercise of his legislative functions. That the members of the legislature shall, in all cases except treason, felony, or breach of the peace, be privileged from arrest during their attendance upon the sessions of the respective houses, and in

going to and returning from the same: *Provided*, That such privilege as to going and returning shall not cover a period of more than ten days each way, except in the second division, when it shall extend to twenty days each way, and the fourth division to fifteen days each way. [37 Stat. L. 516.]

SEC. 13. *Passage of laws.* — That a bill in order to become a law shall have three separate readings in each house, the final passage of which in each house shall be by a majority vote of all the members to which such house is entitled, taken by ayes and noes, and entered upon its journal. That every bill, when passed by the house in which it originated or in which amendments thereto shall have originated, shall immediately be enrolled and certified by the presiding officer and the clerk and sent to the other house for consideration. [37 Stat. L. 516.]

SEC. 14. *The veto power.* — That, except as herein provided, all bills passed by the legislature shall, in order to be valid, be signed by the governor. That every bill which shall have passed the legislature shall be certified by the presiding officers and clerks of both houses, and shall thereupon be presented to the governor. If he approves it, he shall sign it and it shall become a law at the expiration of ninety days thereafter, unless sooner given effect by a two-thirds vote of said legislature. If the governor does not approve such bill, he may return it, with his objections, to the legislature. He may veto any specific item or items in any bill which appropriates money for specific purposes, but shall veto other bills, if at all, only as a whole. That upon the receipt of a veto message from the governor each house of the legislature shall enter the same at large upon its journal and proceed to reconsider such bill, or part of a bill, and again vote upon it by ayes and noes, which shall be entered upon its journal. If, after such reconsideration, such bill or part of a bill shall be approved by a two-thirds vote of all the members to which each house is entitled, it shall thereby become a law. That if the governor neither signs nor vetoes a bill within three days (Sundays excepted) after it is delivered to him, it shall become a law without his signature, unless the legislature adjourns sine die prior to the expiration of such three days. If any bill shall not be returned by the governor within three days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the legislature, by its adjournment, prevents the return of the bill, in which case it shall not be a law. [37 Stat. L. 516.]

SEC. 15. *Payment of legislative expenses.* — That there shall be annually appropriated by Congress a sum sufficient to pay the salaries of members and authorized employees of the Legislature of Alaska, the printing of the laws, and other incidental expenses thereof; the said sums shall be disbursed by the governor of Alaska, under sole instructions from the Secretary of the Treasury, and he shall account quarterly to the Secretary for the manner in which the said funds shall have been expended; and no expenditure, to be paid out of money appropriated by Congress, shall be made by the governor or by the legislature for objects not authorized by the Acts of Congress making the appropriations, nor beyond the sums thus appropriated for such objects. [37 Stat. L. 516.]

SEC. 16. *Laws transmitted to President and printed.* — That the governor of Alaska shall, within ninety days after the close of each session of the Legislature of the Territory of Alaska, transmit a correct copy of all the laws and

resolutions passed by the said legislature, certified to by the secretary of the Territory, with the seal of the Territory attached; one copy to the President of the United States, and one to the Secretary of State of the United States; and the legislature shall make provisions for printing the session laws and resolutions within ninety days after the close of each session and for their distribution to public officials and sale to the people of the Territory. [37 Stat. L. 517.]

SEC. 17. *Election of Delegates.* — That after the year nineteen hundred and twelve the election for Delegate from the Territory of Alaska, provided by "An Act providing for the election of a Delegate to the House of Representatives from the Territory of Alaska," approved May seventh, nineteen hundred and six, shall be held on the Tuesday next after the first Monday in November in the year nineteen hundred and fourteen, and every second year thereafter on the said Tuesday next after the first Monday in November, and all of the provisions of the aforesaid Act shall continue to be in full force and effect and shall apply to the said election in every respect as is now provided for the election to be held in the month of August therein: *Provided*, That the time for holding an election in said Territory for Delegate in Alaska to the House of Representatives to fill a vacancy, whether such vacancy is caused by failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by an act passed by the Legislature of the Territory of Alaska: *Provided further*, That when such election is held it shall be governed in every respect by the laws passed by Congress governing such election. [37 Stat. L. 517.]

For the Act of May 7, 1906, see 1909 Supp. Fed. Stat. Annot. 11.

SEC. 18. *Creating railroad commission.* — That an officer of the Engineer Corps of the United States Army, a geologist in charge of Alaska surveys, an officer in the Engineer Corps of the United States Navy, and a civil engineer who has had practical experience in railroad construction and has not been connected with any railroad enterprise in said Territory be appointed by the President as a commission hereby authorized and instructed to conduct an examination into the transportation question in the Territory of Alaska; to examine railroad routes from the seaboard to the coal fields and to the interior and navigable waterways; to secure surveys and other information with respect to railroads, including cost of construction and operation; to obtain information in respect to the coal fields and their proximity to railroad routes; and to make report of the facts to Congress on or before the first day of December, nineteen hundred and twelve, or as soon thereafter as may be practicable, together with their conclusions and recommendations in respect to the best and most available routes for railroads in Alaska which will develop the country and the resources thereof for the use of the people of the United States: *Provided further*, That the sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated to defray the expenses of said commission. [37 Stat. L. 517.]

SEC. 19. [*Laws relating to Alaska — compilation to be made.*] That the Committee on Territories of the Senate and the Committee on Territories of the House of Representatives are hereby authorized, empowered, and directed to jointly codify, compile, publish, and annotate all the laws of the United

States applicable to the Territory of Alaska, and said committees are jointly authorized to employ such assistance as may be necessary for that purpose; and the sum of five thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to cover the expenses of said work, which shall be paid upon vouchers properly signed and approved by the chairmen of said committees. [37 Stat. L. 518.]

SEC. 20. *Laws shall be submitted to Congress.* — That all laws passed by the Legislature of the Territory of Alaska shall be submitted to the Congress by the President of the United States, and, if disapproved by Congress, they shall be null and of no effect. [37 Stat. L. 518.]

**An Act To amend section twenty-three hundred and twenty-four of the Revised Statutes of the United States relating to mining claims.**

[Act of December 1, 1913, ch. 39.]

[*Assessment work on mining claims, Seward Peninsula.*] That the provision of section twenty-three hundred and twenty-four of the Revised Statutes of the United States, which requires that on each claim located after the tenth day of May, eighteen hundred and seventy-two, and until patent has been issued therefor, not less than \$100 worth of labor shall be performed or improvements made during each year, be suspended for the year nineteen hundred and thirteen as to mining claims situated on Seward Peninsular [*sic*], in the district or Territory of Alaska west of longitude one hundred and fifty-eight west and north of latitude sixty-four, so that no mining claim which has been regularly located and recorded as required by the local laws and mining regulations within such area so described shall be subject to forfeiture for nonperformance of the annual assessment for the year nineteen hundred and thirteen: *Provided*, That the claimant or claimants of any mining location in order to secure the benefits of this Act shall cause to be recorded in the office where the location notice and certificate is filed on or before December thirty-first, nineteen hundred and thirteen, a notice that he, she, or they in good faith intend to hold or work said claim: *And provided further*, That this amendment shall in no way annul, modify, or repeal said section as to any mining claims, either in the district of Alaska or elsewhere, except those said mining claims within the area herein particularly described. [38 Stat. L. 235.]

For R. S. sec. 2324, see 5 Fed. Stat. Annot. 19.

**An Act To provide assistance to persons in Alaska who are indigent and incapacitated through nonage, old age, sickness, or accident, and for other purposes.**

[Act of March 3, 1913, ch. 109.]

[*Alaska fund.*] That section one of an Act entitled "An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the District of Alaska, and for other purposes," approved January twenty-seventh, nineteen hundred and five, as amended by an Act approved May fourteenth, nineteen hundred and six, and as further amended by an Act approved February sixth, nineteen hundred and nine, be, and the same is hereby, amended so as to read as follows:

"SECTION 1. That all moneys derived from and collected for liquor licenses, occupation or trade licenses, outside of the incorporated towns in the Territory of Alaska, shall be deposited in the Treasury Department of the United States, there to remain as a separate and distinct fund, to be known as the 'Alaska fund,' and to be wholly devoted to the purposes hereinafter stated in the Territory of Alaska. Twenty-five per centum of said fund, or so much thereof as may be necessary, shall be devoted to the establishment and maintenance of public schools in said Territory; ten per centum of said fund shall be, and is hereby, appropriated and authorized to be expended for the relief of persons in Alaska who are indigent and incapacitated through nonage, old age, sickness, or accident; and all the residue of said fund shall be devoted to the construction and maintenance of wagon roads, bridges, and trails in said Territory: *Provided*, That the clerk of the court of each judicial division of said Territory is authorized, and he is hereby directed, whenever considered necessary, to call upon the United States marshal of said judicial division to aid in the collection of said license moneys by designating regular or special deputies of his office to act as temporary license inspectors, and it shall be the duty of said United States marshal to render such aid; and the said regular or special deputies while actually engaged in the performance of this duty shall receive the same fees and allowances and be paid in the same manner as when performing their regular duties.

"That at the end of each fiscal quarter the Secretary of the Treasury of the United States shall divide the amount of said ten per centum of said fund so received during the quarter just ended into four equal parts, and transmit to each of the four United States district judges in Alaska one of said equal amounts.

"That each of said judges is hereby authorized to expend so much of the money received by him under this Act as may, in his discretion, be required for the relief of those persons in his division who are incapacitated through nonage, old age, sickness, or accident, and who are indigent and unable to assist and protect themselves: *Provided*, That each judge shall quarterly submit to the Secretary of the Treasury an itemized statement, with proper vouchers, of all expenditures made by him under this Act, and he shall at the time transmit a copy of said statement to the governor of the Territory: *Provided further*, That any unexpended balance remaining in the hands of any judge at the end of any quarter shall be returned to the Secretary of the Treasury of the United States, and by him deposited in the said 'Alaska fund,' and the said sum shall be subsequently devoted, first, to meeting any actual requirements for the care and relief of such persons as are provided for in this Act in any other division in said Territory wherein the amount allotted for that purpose has proved insufficient; and, second, if there shall be any remainder thereof, said remainder shall be devoted to the construction and maintenance of wagon roads, bridges, and trails in said Territory." [37 Stat. L. 728.]

For the Act of Jan. 27, 1905, see 10 Fed. Stat. Annot. 20.

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## ALCOHOL.

See INTERNAL REVENUE.



## **ALIENS.**

See *CHINESE EXCLUSION; IMMIGRATION.*

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## **AMBASSADORS.**

See *DIPLOMATIC AND CONSULAR OFFICES.*

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## **AMERICAN NATIONAL RED CROSS.**

See *CHARITIES.*

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## **ANIMALS.**

Act of March 4, 1913, Ch. 145, 27.

*Live Stock — Quarantine Regulations Extended, 27.*

### **CROSS-REFERENCES.**

*Importation of Cattle and Hides, see CUSTOMS DUTIES.*

*Sale of Animals and Products by Secretary of Agriculture, see AGRICULTURE.*

*Viruses, Serums and Toxins, Trade in, see HEALTH AND QUARANTINE.*

[*Live stock — quarantine regulations extended.*] \* \* \* That hereafter all the provisions of the said Act approved March third, nineteen hundred and five, shall apply to any railroad company or other common carrier, whose road or line forms any part of a route over which cattle or other live stock are transported in the course of shipment from any quarantined State or Territory of the District of Columbia, or from the quarantined portion of any State or Territory or the District of Columbia, into any other State or Territory or the District of Columbia. [37 Stat. L. 831.]

This is from the Agricultural Department Appropriation Act of March 4, 1913, ch. 145.

For the provisions from the Act of March 3, 1905, above referred to, see 10 Fed. Stat. Annot. 35.

## **ANTI-TRUST LAWS.**

See *TRADE UNIONS AND COMBINATIONS AND TRUSTS.*

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## **APPLES.**

*Standard Barrels for, see AGRICULTURE.*

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## **APPRAISER.**

See *CUSTOMS DUTIES.*

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## **APPROPRIATIONS.**

See *ESTIMATES, APPROPRIATIONS, AND REPORTS.*

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## **ARBITRATION.**

See *LABOR.*

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## **ARCHITECTS.**

See *PUBLIC PROPERTY, BUILDINGS, AND GROUNDS; TREASURY DEPARTMENT.*

## ARID LANDS.

See *PUBLIC LANDS*.

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## ARMY.

*Forfeiture of Citizenship by Desertion*, see *CITIZENSHIP*.

*Improper Military Enlistments*, see *ARTICLES FOR GOVERNMENT OF THE NAVY*.

See also *ARTICLES OF WAR; WAR DEPARTMENT AND MILITARY ESTABLISHMENT*.

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## ARTICLES FOR THE GOVERNMENT OF THE NAVY.

Act of August 22, 1912, Ch. 336, 29.

*Punishment of Officer for Improper Enlistment*, 29.

[*Punishment of officer for improper enlistment.*] That section sixteen hundred and twenty-four, article nineteen, of the Revised Statutes, as amended by the Act of Congress approved May twelfth, eighteen hundred and seventy-nine, be, and the same is hereby, amended to read as follows:

“**Sec. 1624.** Article 19. Any officer who knowingly enlists into the naval service any person who has deserted in time of war from the naval or military service of the United States, or any insane or intoxicated person, or any minor between the ages of fourteen and eighteen years, without the consent of his parents or guardian, or any minor under the age of fourteen years, shall be punished as a court-martial may direct.” [37 Stat. L. 356.]

This is the latter part of sec. 2 of the Act of Aug. 22, 1912, ch. 336. The first part of sec. 2 amends R. S. sec. 1420. See the title *NAVY*, *post*. Section 1 of the Act of Aug. 22, 1912, ch. 336, amends R. S. sec. 1998

and is given under the title *CITIZENSHIP*, *post*.

For R. S. sec. 1624, art. 19, as it read prior to this amendment, see 1 Fed. Stat. Annot. 467.

## ARTICLES OF WAR.

Act of March 2, 1913, Ch. 93, 30.  
*Courts-martial*, 30.

[*Courts-martial*.] \* \* \* On and after July first, nineteen hundred and thirteen, courts-martial shall be of three kinds, namely: First, general courts-martial; second, special courts-martial; and third, summary courts-martial.

General courts-martial may consist of any number of officers from five to thirteen, inclusive.

Special courts-martial may consist of any number of officers from three to five, inclusive.

A summary court-martial shall consist of one officer.

The President of the United States, the commanding officer of a territorial division or department, the Superintendent of the Military Academy, the commanding officer of an army, a field army, an army corps, a division, or a separate brigade, and when empowered by the President, the commanding officer of any district or of any force or body of troops, may appoint general courts-martial whenever necessary; but when any such commander is the accuser or the prosecutor of the person or persons to be tried the court shall be appointed by superior competent authority, and no officer shall be eligible to sit as a member of such court when he is the accuser, or a witness for the prosecution.

The commanding officer of a district, garrison, fort, camp, or other place where troops are on duty, and the commanding officer of a brigade, regiment, detached battalion, or other detached command, may appoint special courts-martial for his command; but such special courts-martial may in any case be appointed by superior authority when by the latter deemed desirable, and no officer shall be eligible to sit as a member of such court when he is the accuser or a witness for the prosecution.

The commanding officer of a garrison, fort, camp, or other place where troops are on duty, and the commanding officer of a regiment, detached battalion, detached company, or other detachment may appoint summary courts-martial for his command; but such summary courts-martial may in any case be appointed by superior authority when by the latter deemed desirable: *Provided*, That when but one officer is present with a command he shall be the summary court-martial of that command and shall hear and determine cases brought before him.

General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by the Articles of War and any other person who by statute or by the law of war is subject to trial by military tribunals: *Provided*, That no officer shall be brought to trial before a general court-martial appointed by the Superintendent of the Military Academy.

Special courts-martial shall have power to try any person subject to military law, except an officer, for any crime or offense not capital made punishable by the Articles of War: *Provided*, That the President may by regulations, which he may modify from time to time, except from the jurisdiction of special courts-martial any class or classes of persons subject to military law.

Special courts-martial shall have power to adjudge punishment not to exceed confinement at hard labor for six months or forfeiture of six months' pay, or both, and in addition thereto reduction to the ranks in the cases of noncommissioned officers, and reduction in classification in the cases of first-class privates.

Summary courts-martial shall have power to try any soldier, except one who is holding the privileges of a certificate of eligibility to promotion, for any crime or offense not capital made punishable by the Articles of War: *Provided*, That noncommissioned officers shall not, if they object thereto, be brought to trial before a summary court-martial without the authority of the officer competent to bring them to trial before a general court-martial.

Summary courts-martial shall have power to adjudge punishment not to exceed confinement at hard labor for three months or forfeiture of three months' pay, or both, and in addition thereto reduction to the ranks in the cases of noncommissioned officers and reduction in classification in the cases of first-class privates: *Provided*, That when the summary court officer is also the commanding officer no sentence of such summary court-martial adjudging confinement at hard labor or forfeiture of pay, or both, for a period in excess of one month shall be carried into execution until the same shall have been approved by superior authority.

Articles seventy-two, seventy-three, seventy-five, eighty-one, eighty-two, and eighty-three of section thirteen hundred and forty-two of the Revised Statutes; the first section of an Act entitled "An Act to promote the administration of justice in the Army," approved October first, eighteen hundred and ninety, as amended by the first section of an Act approved June eighteenth, eighteen hundred and ninety-eight (Thirtieth Statutes, four hundred and eighty-three, four hundred and eighty-four), are hereby repealed, but courts-martial duly and regularly convened in orders issued prior to the date when this Act takes effect and in existence on that date, under Articles of War hereby repealed, may continue as legal courts for the trial of cases referred to them prior to that date with the same effect as if this Act has [*sic*] not been passed: *Provided*, That prior to July first, nineteen hundred and thirteen, the President may, when deemed by him necessary, empower any officer competent under the terms of this Act to appoint the general courts-martial which it authorizes, to appoint general courts-martial authorized by existing law. [37 Stat. L. 721.]

This is from the Army Appropriation Act of March 2, 1913, ch. 93.  
For the Articles of War, see 1 Fed. Stat. Annot. 478.

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## ASPHALT LANDS.

See *INDIANS*.

## **ASYLUMS.**

See *HOSPITALS AND ASYLUMS.*

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## **ATTORNEYS.**

See *JUDICIAL OFFICERS.*

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## **AVIATION.**

See *WAR DEPARTMENT AND MILITARY ESTABLISHMENT.*

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## **BANKS.**

*Federal Reserve Banks, see NATIONAL BANKS.*

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## **BARRELS.**

*Standard Barrels for Apples, see AGRICULTURE.*

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## **BIRDS.**

See *GAME ANIMALS AND BIRDS.*

## **BONDED WAREHOUSES.**

*See CUSTOMS DUTIES.*

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## **BOOK OF ESTIMATES.**

*See ESTIMATES, APPROPRIATIONS, AND REPORTS.*

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## **BRANDING.**

*See FOOD AND DRUGS.*

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## **BUILDINGS.**

*See PUBLIC PROPERTY, BUILDINGS, AND GROUNDS.*

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## **BUREAU OF ANIMAL INDUSTRY.**

*See AGRICULTURE.*

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## **BUREAU OF MINES.**

*See MINERAL LANDS, MINES, AND MINING.*

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## **BUREAU OF STATISTICS.**

*See STATISTICS.*

## **BUTTER.**

See *FOOD AND DRUGS.*

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## **CADETS.**

See *MILITARY ACADEMY.*

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## **CALAVERAS BIG TREE FOREST.**

See *TIMBER LANDS AND FOREST RESERVES.*

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## **CANALS.**

See *RIVERS, HARBORS, AND CANALS.*

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## **CANAL ZONE.**

See *RIVERS, HARBORS, AND CANALS.*

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## **CARRIERS.**

*Detention of Aliens, see IMMIGRATION.*

*Larceny of Goods in Interstate Commerce, see INTERSTATE COMMERCE.*

*Live Stock Quarantine Regulations, see ANIMALS.*

*Physical Valuation of Property, see INTERSTATE COMMERCE.*

*Shipment of Liquors into Prohibition States, see INTOXICATING LIQUORS.*

See also *RAILROADS; STEAM VESSELS.*



## CEMETERIES.

Act of July 30, 1912, Ch. 258, 35.

*National Cemeteries — Salaries of Superintendents, 35.*

Act of August 24, 1912, Ch. 355, 35.

*Burials of Confederate Veterans — Conditions — Supervision, etc., 35.*

*Encroachments by Railroads Forbidden, 35.*

An Act To amend section forty-eight hundred and seventy-five of the Revised Statutes, to provide a compensation for superintendents of national cemeteries.

[Act of July 30, 1912, ch. 258.]

[*National cemeteries — salaries of superintendents.*] That section forty-eight hundred and seventy-five of the Revised Statutes be amended to read as follows:

“Sec. 4875. The superintendents of the national cemeteries shall receive for their compensation from sixty dollars to seventy-five dollars a month each, according to the extent and importance of the cemeteries to which they may be respectively assigned, to be determined by the Secretary of War, except the superintendent of the Arlington, Virginia, Cemetery, whose compensation may be one hundred dollars per month, at the discretion of the Secretary of War; and they shall also be furnished with quarters and fuel at the several cemeteries.” [37 Stat. L. 240.]

For R. S. sec. 4875 as it read prior to this amendment see 1 Fed. Stat. Annot. 731.

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[*Burials of Confederate veterans — conditions — supervision, etc.*] \* \* \* Hereafter persons dying in the District of Columbia or in the immediate vicinity thereof who have served in the Confederate Armies during the Civil War may be buried in the Confederate section of the Arlington National Cemetery without additional expense to the United States upon the certificate of Camp Numbered One hundred and seventy-one, United Confederate Veterans of the District of Columbia, that such persons are entitled to burial under the authority herein given: *Provided*, That all such interments shall be under the supervision and subject to the approval of the Secretary of War. [37 Stat. L. 440.]

This and the following paragraph are from the Sundry Civil Appropriation Act of Aug. 24, 1912, ch. 355.

[*Encroachments by railroads forbidden.*] \* \* \* That no railroad shall be permitted upon the right of way which may have been acquired by the United States to a national cemetery, or to encroach upon any roads or walks constructed thereon and maintained by the United States. [37 Stat. L. 440.]

## CENSUS.

Act of April 30, 1912, Ch. 102, 36.

*Sec. 1. Tobacco Statistics — Semiannual Reports of Leaf Tobacco in Hands of Dealers, etc. — Quantities Exempt — Amounts to Be Reported, 36.*

*2. Types to be Specified — Blanks, etc., 37.*

*3. Reports Required — Penalty for Failure — Notice — Officers Liable, 37.*

*4. Punishment for False Reports, etc. — Officers Liable, 38.*

*5. "Person" Construed, 38.*

*6. Information Not to Be Divulged, 38.*

*7. Coöperation of Census and Internal-Revenue Officials, 38.*

*8. Publication, 38.*

Act of July 22, 1912, Ch. 249, 38.

*Sec. 1. Cotton Statistics — Director of Census to Collect and Publish Specified, 38.*

*2. Cotton Ginned — Periods — Monthly Reports of Other Statistics — Details — Distribution of Publications — Publication by Agricultural Department with Crop Reports, 38.*

*3. Information Considered Confidential — Punishment for Divulging by Employees, 39.*

*4. Information to Be Furnished by Gineries, etc., 39.*

*5. Compilation of Information from Foreign Countries — Abstract to Be Published with Reports, 40.*

*6. Former Laws Repealed, 40.*

Act of August 23, 1912, Ch. 350, 40.

*Census Office — Appointments, 40.*

### CROSS-REFERENCE.

*Cotton Reports, see AGRICULTURE.*

**An Act To authorize the Director of the Census to collect and publish additional statistics of tobacco.**

**[Act of April 30, 1912, ch. 102.]**

[SEC. 1.] *[Tobacco statistics — semiannual reports of leaf tobacco in hands of dealers, etc., — quantities exempt — amounts to be reported.]* That the Director of the Census be, and he is hereby, authorized and directed to collect and publish, in addition to the tobacco reports now being made by him, statistics of the quantity of leaf tobacco in all forms in the United States in the possession of all persons who are dealers or manufacturers, other than the original growers of tobacco, to be summarized and returned by the holder to the Director of the Census as of the dates

of October first and April first of each year, provided that the Director of the Census shall not be required to collect statistics of leaf tobacco from any manufacturer of tobacco who in the preceding calendar year, according to the returns to the Commissioner of Internal Revenue, manufactured less than fifty thousand pounds of tobacco, or from any manufacturer of cigars who during the preceding calendar year manufactured less than two hundred and fifty thousand cigars, or from any manufacturer of cigarettes who during the preceding calendar year manufactured less than one million cigarettes, or from any dealer in leaf tobacco who, on the average, had less than fifty thousand pounds in stock at the ends of the four quarters of the preceding calendar year, and every manufacturer of tobacco who, in the preceding calendar year, according to the return of the Commissioner of Internal Revenue manufactured more than fifty thousand pounds of tobacco, and every manufacturer of cigars who, during the preceding calendar year, manufactured more than two hundred and fifty thousand cigars, and every manufacturer of cigarettes who, during the preceding calendar year, manufactured more than one million cigarettes, and every dealer in or manufacturer of leaf tobacco who, on an average, during the preceding calendar year, had more than fifty thousand pounds in stock, at the ends of the four quarters of the preceding calendar year, shall, under oath, make written reports of the amounts held by them, as herein provided. [*§7 Stat. L. 106.*]

SEC. 2. [*Types to be specified — blanks, etc.*] That the Director of the Census shall specify the types of tobacco to be included in the reports of the holders thereof, and he shall specify the several types separately in making his reports. In securing reports by types, the Director of the Census shall follow substantially the classification of general types as recognized and adopted by the Department of Agriculture. That the Director of the Census shall prepare appropriate blanks upon which such reports shall be made and shall send a copy of same to any person subject to make reports under this Act, not more than fifteen nor less than ten days prior to the first days of October and April in each year, together with a written or printed demand that such person make the report required. [*§7 Stat. L. 107.*]

SEC. 3. [*Reports required — penalty for failure — notice — officers liable.*] That all persons subject to the provisions of this Act shall, within ten days after the first day of October and first day of April in each year, make written report to the Director of the Census the number of pounds of each of the several types of leaf tobacco owned by him as of the said dates, respectively. If any such person shall fail to make said report within the time prescribed, he shall be guilty of a misdemeanor, and upon conviction shall be fined not less than three hundred dollars or more than one thousand dollars. If any such person so liable to make such reports shall fail to make the same within the dates above specified, and thereafter the Director of the Census shall demand such report in writing, which demand shall be forwarded by registered mail, then if such person shall fail to make such report within twenty days after such demand so made, he shall also be deemed guilty of a misdemeanor, and upon conviction shall be imprisoned for not more than six months, in the discretion of the court. The depositing of the notice by the Director of Census in any post office shall be held to be prima facie evidence of the delivery of the notice to the holder of tobacco, from which date the period of twenty days shall begin to run. The president, general manager, or other chief officer of any cor-

poration failing to make such reports as required by this Act shall be subject to the same penalties as are herein prescribed. [37 Stat. L. 107.]

SEC. 4. [*Punishment for false reports, etc. — officers liable.*] That any person who shall make a false report to the Director of the Census as to the types or amounts of tobacco held or owned by him shall be guilty of a misdemeanor, and upon conviction shall be punished by imprisonment for not more than six months, in the discretion of the court. The president, general manager, or other officer of any corporation making such false report shall be subject to the same penalty as prescribed in this section. [37 Stat. L. 107.]

SEC. 5. [*"Person" construed.*] That the word "person" as used in this Act shall be held to embrace also any partnership, corporation, or association. [37 Stat. L. 107.]

SEC. 6. [*Information not to be divulged.*] That the information furnished under the provisions of this Act shall be used only for the statistical purposes for which it is supplied. No publication shall be made by the Director of the Census whereby the data furnished by any particular establishment can be identified, nor shall the Director of the Census permit anyone other than the sworn employees of the Census Office to examine the individual reports. [37 Stat. L. 107.]

SEC. 7. [*Coöperation of Census and Internal-Revenue officials.*] That the Director of the Census shall have access to the records of the Commissioner of Internal Revenue for the purpose of obtaining the information herein required, and the Commissioner of Internal Revenue shall cooperate with the Director of the Census in effectuating the purposes and provisions of this Act. [37 Stat. L. 107.]

SEC. 8. [*Publication.*] That the Director of the Census shall make his first report under this Act as of the first day of October, nineteen hundred and twelve, and he shall publish the same and all subsequent reports at a date as early as practicable after the first day of October and the first of April in each year. [37 Stat. L. 108.]

**An Act Authorizing the Director of the Census to collect and publish statistics of cotton.**

[Act of July 22, 1912, ch. 249.]

[SEC. 1.] [*Cotton statistics — Director of Census to collect and publish specified.*] That the Director of the Census be, and he is hereby, authorized and directed to collect and publish statistics concerning the amount of cotton ginned; the quantity of raw cotton consumed in manufacturing establishments of every character; the quantity of baled cotton on hand; the number of active consuming cotton spindles; and the quantity of cotton imported and exported, with the country of origin and destination. [37 Stat. L. 198.]

SEC. 2. [*Cotton ginned — periods — monthly reports of other statistics — details — distribution of publications — publication by Agricultural Department with crop reports.*] That the statistics of the quantity of cotton ginned shall show the quantity ginned from each crop prior to September first, September twenty-fifth, October eighteenth, November first, November fourteenth,

December first, December thirteenth, January first, January sixteenth, and March first, and shall be published as soon as possible after these respective dates. The quantity of cotton consumed in manufacturing establishments, the quantity of baled cotton on hand, the number of active consuming cotton spindles, and the statistics of cotton imported and exported shall relate to each calendar month, and shall be published as soon as possible after the close of the month. Each report published by the Bureau of the Census of the quantity of cotton ginned shall carry with it the latest available statistics concerning the quantity of cotton consumed, stocks of baled cotton on hand, the number of cotton-consuming spindles, and the quantity of cotton imported and exported. All of these publications containing statistics of cotton shall be mailed by the Director of the Census to all cotton ginners, cotton manufacturers, and cotton warehousemen, and to all daily newspapers throughout the United States. The Director of the Census shall furnish to the Bureau of Statistics of the Department of Agriculture, immediately prior to the publication of each report of that bureau regarding the cotton crop, the latest available statistics hereinbefore mentioned, and the said Bureau of Statistics shall publish the same in connection with each of its reports concerning cotton. [37 Stat. L. 198.]

SEC. 3. [*Information considered confidential — punishment for divulging by employees.*] That the information furnished by any individual establishment under the provisions of this Act shall be considered as strictly confidential and shall be used only for the statistical purpose for which it is supplied. Any employee of the Bureau of the Census who, without the written authority of the Director of the Census, shall publish or communicate any information given into his possession by reason of his employment under the provisions of this Act shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not less than three hundred dollars or more than one thousand dollars or imprisoned for a period of not exceeding one year, or both so fined and imprisoned, at the discretion of the court. [37 Stat. L. 198.]

SEC. 4. [*Information to be furnished by ginneries, etc.*] That it shall be the duty of every owner, president, treasurer, secretary, director, or other officer or agent of any cotton ginnery, manufacturing establishment, warehouse, or other place where cotton is ginned, manufactured, or stored, whether conducted as a corporation, firm, limited partnership, or by individuals, when requested by the Director of the Census or by any special agent or other employee of the Bureau of the Census acting under the instructions of said director, to furnish completely and correctly, to the best of his knowledge, all of the information concerning the quantity of cotton ginned, consumed, or on hand, and the number of cotton-consuming spindles. The request of the Director of the Census for information concerning the quantity of cotton ginned or consumed, stocks of cotton on hand, and number of spindles may be made in writing or by a visiting representative, and if made in writing shall be forwarded by registered mail, and the registry receipt of the Post Office Department shall be accepted as evidence of such demand. Any owner, president, treasurer, secretary, director, or other officer or agent of any cotton ginnery, manufacturing establishment, warehouse, or other place where cotton is ginned or stored, who, under the conditions hereinbefore stated, shall refuse or willfully neglect to furnish any of the information herein provided for or shall willfully give answers that are false shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than three hundred dollars or more than

one thousand dollars or imprisoned for a period of not exceeding one year, or both so fined and imprisoned, at the discretion of the court. [37 Stat. L. 198.]

SEC. 5. [*Compilation of information from foreign countries — abstract to be published with reports.*] That in addition to the information regarding cotton in the United States hereinbefore provided for, the Director of the Census shall compile, by correspondence or the use of published reports and documents, any available information concerning the production, consumption, and stocks of cotton in foreign countries, and the number of cotton-consuming spindles in such countries. Each report published by the Bureau of the Census regarding cotton shall contain an abstract of the latest available information obtained under the provisions of this section, and the Director of the Census shall furnish the same to the Department of Agriculture for publication in connection with the reports of that department concerning cotton in the same manner as in the case of statistics relating to the United States. [37 Stat. L. 199.]

SEC. 6. [*Former laws repealed.*] That the joint resolution authorizing the Director of the Census to collect and publish additional statistics, approved February ninth, nineteen hundred and five, and the joint resolution approved March second, nineteen hundred and nine, and all other laws and parts of laws inconsistent with the provisions of this Act are hereby repealed. [37 Stat. L. 199.]

For the Joint Resolution of Feb. 9, 1905, see 10 Fed. Stat. Annot. 53.

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[*Census office — appointments.*] In certifying eligibles from the civil-service registers for the purpose of appointment to positions of clerkships in the Census Office hereinbefore provided for at salaries of \$1,200 or less, the Civil Service Commission shall, so far as practicable under the law of apportionment, certify those who have had at least one year's experience in census work. [37 Stat. L. 406.]

This is from the Legislative, Executive, and Judicial Appropriation Act of Aug. 23, 1912, ch. 350.

## CHARITIES.

Act of April 24, 1912, Ch. 90, 41.

*Sec. 1. American National Red Cross — Use of Services in Time of War,*  
41.

*2. Payment of Transportation and Subsistence — Supplies,* 41.

Act of December 10, 1912, Ch. 1, 41.

*Sec. 1. American National Red Cross — Time of Annual Meeting Changed,*  
41.

*2. In Effect,* 41.

**An Act To provide for the use of the American National Red Cross in aid of the land and naval forces in time of actual or threatened war.**

[*Act of April 24, 1912, ch. 90.*]

[SEC. 1.] [*American National Red Cross — use of services in time of war.*] That whenever in time of war, or when war is imminent, the President may deem the cooperation and use of the American National Red Cross with the sanitary services of the land and naval forces to be necessary, he is authorized to accept the assistance tendered by the said Red Cross and to employ the same under the sanitary services of the Army and Navy in conformity with such rules and regulations as he may prescribe. [37 Stat. L. 90.]

SEC. 2. [*Payment of transportation and subsistence — supplies.*] That when the Red Cross cooperation and assistance with the land and naval forces in time of war or threatened hostilities shall have been accepted by the President, the personnel entering upon the duty specified in section one of this Act shall, while proceeding to their place of duty, while serving thereat, and while returning therefrom, be transported and subsisted at the cost and charge of the United States as civilian employees employed with the said forces, and the Red Cross supplies that may be tendered as a gift and accepted for use in the sanitary service shall be transported at the cost and charge of the United States. [37 Stat. L. 91.]

See 1 Fed. Stat. Annot. 751.

**An Act To amend section five of the Act entitled "An Act to incorporate the American Red Cross," approved January fifth, nineteen hundred and five.**

[*Act of December 10, 1912, ch. 1.*]

[SEC. 1.] [*American National Red Cross — time of annual meeting changed.*] That section five of the Act for the incorporation of the American National Red Cross, approved January fifth, nineteen hundred and five, be, and the same hereby is, amended so that the annual meeting of the said organization shall hereafter be held on Wednesday preceding the second Thursday in the month of December in each and every year. [37 Stat. L. 647.]

For the Act of Jan. 5, 1905, see 1909 Supp. Fed. Stat. Annot. 64.

SEC. 2. [*In effect.*] That this Act shall take effect immediately. [37 Stat. L. 647.]

## **CHILDREN'S BUREAU.**

See *LABOR*.

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## **CHINESE EXCLUSION.**

Act of August 24, 1912, Ch. 355, 42.

*Maintenance and Return of Chinese Persons, 42.*

[*Maintenance and return of Chinese persons.*] \* \* \* That all charges for maintenance or return of Chinese persons applying for admission to the United States shall hereafter be paid or reimbursed to the United States by the person, company, partnership, or corporation bringing such Chinese to a port of the United States as applicants for admission. [*37 Stat. L. 476.*]

This is from the Sundry Civil Appropriation Act of Aug. 24, 1912, ch. 355.

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## **CIGARETTES.**

See *INTERNAL REVENUE*.

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## **CIGARS.**

See *INTERNAL REVENUE*.

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## **CIRCUIT COURTS.**

See *JUDICIARY*.



## CITIZENSHIP.

Act of August 12, 1912, Ch. 336, 43.

*Forfeiture by Desertion, etc., from Army or Navy, 43.*

### CROSS-REFERENCE.

*Philippine Citizenship, see PHILIPPINE ISLANDS.*

[*Forfeiture by desertion, etc., from army or navy.*] That section nineteen hundred and ninety-eight of the Revised Statutes of the United States be, and the same is hereby, amended to read as follows:

**"Sec. 1998.** That every person who hereafter deserts the military or naval service of the United States, or who, being duly enrolled, departs the jurisdiction of the district in which he is enrolled, or goes beyond the limits of the United States, with intent to avoid any draft into the military or naval service, lawfully ordered, shall be liable to all the penalties and forfeitures of section nineteen hundred and ninety-six of the Revised Statutes of the United States: *Provided*, That the provisions of this section and said section nineteen hundred and ninety-six shall not apply to any person hereafter deserting the military or naval service of the United States in time of peace: *And provided further*, That the loss of rights of citizenship heretofore imposed by law upon deserters from the military or naval service may be mitigated or remitted by the President where the offense was committed in time of peace and where the exercise of such clemency will not be prejudicial to the public interests: *And provided further*, That the provisions of section eleven hundred and eighteen of the Revised Statutes of the United States that no deserter from the military service of the United States shall be enlisted or mustered into the military service, and the provisions of section two of the Act of Congress approved August first, eighteen hundred and ninety-four, entitled 'An Act to regulate enlistments in the Army of the United States,' shall not be construed to preclude the reenlistment or muster into the Army of any person who has deserted, or may hereafter desert, from the military service of the United States in time of peace, or of any soldier whose service during his last preceding term of enlistment has not been honest and faithful, whenever the reenlistment or muster into the military service of such person or soldier shall, in view of the good conduct of such person or soldier subsequent to such desertion or service, be authorized by the Secretary of War." [37 Stat. L. 356.]

The above constitutes sec. 1 of the Act of Aug. 12, 1912, ch. 336.

For R. S. secs. 1996 and 1998 as originally enacted see 1 Fed. Stat. Annot. 788. For

R. S. sec. 1118 see 7 Fed. Stat. Annot. 960. For Act of Aug. 1, 1894, sec. 2, see 7 Fed. Stat. Annot. 961.

## CIVIL SERVICE.

Act of August 23, 1912, Ch. 350, 44.

*Sec. 4. Civil Service Commission — Classified Service, D. C. — Ratings for Promotion, Demotion and Retention, 44.*

*5. Employees — Punishment for Violating Law Requiring Specific Appropriations for, etc., 44.*

Act of October 22, 1913, Ch. 32, 45.

*Collectors of Internal Revenue and Marshals May Appoint Bonded Deputies without Regard to Civil Service Provisions, 45.*

### CROSS-REFERENCE.

See also *CENSUS*.

SEC. 4. [*Civil Service Commission — classified service, D. C. — ratings for promotion, demotion, and retention.*] The Civil Service Commission shall, subject to the approval of the President, establish a system of efficiency ratings for the classified service in the several executive departments in the District of Columbia based upon records kept in each department and independent establishment with such frequency as to make them as nearly as possible records of fact. Such system shall provide a minimum rating of efficiency which must be attained by an employee before he may be promoted; it shall also provide a rating below which no employee may fall without being demoted; it shall further provide for a rating below which no employee may fall without being dismissed for inefficiency. All promotions, demotions, or dismissals shall be governed by provisions of the civil service rules. Copies of all records of efficiency shall be furnished by the departments and independent establishments to the Civil Service Commission for record in accordance with the provisions of this section: *Provided*, That in the event of reductions being made in the force in any of the executive departments no honorably discharged soldier or sailor whose record in said department is rated good shall be discharged or dropped, or reduced in rank or salary. Any person knowingly violating the provisions of this section shall be summarily removed from office, and may also upon conviction thereof be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year. [*37 Stat. L. 413.*]

SEC. 5. [*Employees — punishment for violating law requiring specific appropriations for, etc.*] That any person violating section four of the legislative, executive, and judicial appropriation Act approved August fifth, eighteen hundred and eighty-two (Statutes at Large, volume twenty-two, page two hundred and fifty-five), shall be summarily removed from office, and may also upon conviction thereof be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year. [*37 Stat. L. 414.*]

The above secs. 4 and 5 are from the Legislative, Executive and Judicial Appropriation Act of Aug. 23, 1912, ch. 350.

Sec. 4 of the Act of Aug. 5, 1882, above referred to, is given in 1 Fed. Stat. Annot. 822.

[*Collectors of internal revenue and marshals may appoint bonded deputies without regard to civil service provisions.*] \* \* \* That hereafter any deputy collector of internal revenue or deputy marshal who may be required by law or by authority or direction of the collector of internal revenue or the United States marshal to execute a bond to the collector of internal revenue or United States marshal to secure faithful performance of official duty may be appointed by the said collector or marshal, who may require such bond without regard to the provisions of an Act of Congress entitled "An Act to regulate and improve the civil service of the United States," approved January sixteenth, eighteen hundred and eighty-three, and amendments thereto, or any rule or regulation made in pursuance thereof, and the officer requiring said bond shall have power to revoke the appointment of any subordinate officer or employee and appoint his successor at his discretion without regard to the Act, amendments, rules, or regulations aforesaid. [38 Stat. L. 203.]

This is from the Deficiencies Appropriation Act of Oct. 22, 1913, ch. 32.

For the Act of Jan. 16, 1883, above referred to, and amendments thereto, see the title *CIVIL SERVICE* in previous volumes.

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## COAL LANDS.

See *INDIANS; PUBLIC LANDS.*

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## COINAGE, MINTS, AND ASSAY OFFICES.

Act of August 23, 1912, Ch. 350, 45.

*Coiner, and Melter and Refiner — Positions Abolished — Employees to Be Appointed by Secretary, 45.*

### CROSS-REFERENCE.

*Device, etc., Similar to Coins, see PENAL LAWS.*

[*Coiner, and melter and refiner — positions abolished — employees to be appointed by Secretary.*] \* \* \* The position of coiner, which has heretofore existed in each of the coinage mints, and the position of melter and refiner, which has heretofore existed in each of the coinage mints and in the United States assay office at New York, are hereby abolished, to take effect on and after July first, nineteen hundred and twelve, and on and after that date the duties and responsibilities heretofore imposed by law on the officers holding said positions in each of said mints and the assay office shall devolve upon the superintendents of said institutions; and all assistants and employees of the mints and assay offices of the United States shall, from and after July first, nineteen hundred and twelve, be appointed by the Secretary of the Treasury. [37 Stat. L. 384.]

This is from the Legislative, Executive, and Judicial Appropriation Act of Aug. 23, 1912, ch. 350.

## **COMBINATIONS.**

See *TRADE UNIONS AND COMBINATIONS AND TRUSTS.*

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## **COMMERCE.**

See *INTERSTATE COMMERCE.*

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## **COMMERCE AND LABOR.**

*Children's Bureau in*, see *LABOR.*

*Pleasure Yachts*, see *YACHTS.*

See also *IMMIGRATION; LABOR; LIGHTS AND BUOYS.*

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## **COMMERCE COURT.**

See *JUDICIARY.*

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## **CONCILIATION.**

See *LABOR.*

## CONFEDERATE VETERANS.

See *CEMETERIES*.

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## CONGRESS.

Act of August 23, 1912, Ch. 350, 47.

*Janitors — Appointment and Duties, 47.*

*Clerks to Members — To Be Placed on Roll of Employees — Appointments, 47.*

### CROSS-REFERENCE.

*Political Contributions at Elections, see ELECTIONS.*

[*Janitors — appointment and duties.*] \* \* \* Janitors under the foregoing shall be appointed by the chairmen, respectively, of said committees, and shall perform under the direction of the Doorkeeper all of the duties heretofore required of messengers detailed to said committees by the Doorkeeper, and shall be subject to removal by the Doorkeeper at any time after the termination of the Congress during which they were appointed. [37 Stat. L. 366.]

[*Clerks to members — to be placed on roll of employees — appointments.*]  
\* \* \* That all clerks to Members, Delegates, and Resident Commissioners shall be placed on the roll of employees of the House and be subject to be removed at the will of the Member, Delegate, or Resident Commissioner by whom they are appointed; and any Member, Delegate, or Resident Commissioner may appoint one or more clerks, who shall be placed on the roll as the clerk of such Member, Delegate, or Resident Commissioner making such appointments. [37 Stat. L. 368.]

These two paragraphs are from the Legislative, Executive, and Judicial Appropriation Act of Aug. 23, 1912, ch. 350.

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## CONTRACTS.

See *PUBLIC CONTRACTS*.

## COPYRIGHT.

Act of August 24, 1912, Ch. 356, 48.

*Act of 1909 Amended — Classification of Applications — Works not Reproduced for Sale — Infringements, 48.*

Act of March 2, 1913, Ch. 97, 50.

*Certificate of Registration, 50.*

An Act To amend sections five, eleven, and twenty-five of an Act entitled "An Act to amend and consolidate the Acts representing copyrights," approved March fourth, nineteen hundred and nine.

[Act of August 24, 1912, ch. 356.]

[Act of 1909 amended.] That sections five, eleven, and twenty-five of the Act entitled "An Act to amend and consolidate the Acts respecting copyrights," approved March fourth, nineteen hundred and nine, be amended to read as follows:

"SEC. 5. [*Classification of applications.*] That the application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

"(a) Books, including composite and cyclopedic works, directories, gazetteers, and other compilations;

"(b) Periodicals, including newspapers;

"(c) Lectures, sermons, addresses (prepared for oral delivery);

"(d) Dramatic or dramatico-musical compositions;

"(e) Musical compositions;

"(f) Maps;

"(g) Works of art; models or designs for works of art;

"(h) Reproductions of a work of art;

"(i) Drawings or plastic works of a scientific or technical character;

"(j) Photographs;

"(k) Prints and pictorial illustrations;

"(l) Motion-picture photoplays;

"(m) Motion pictures other than photoplays:

"*Provided, nevertheless,* That the above specifications shall not be held to limit the subject matter of copyright as defined in section four of this Act, nor shall any error in classification invalidate or impair the copyright protection secured under this Act."

For sec. 5 of the Copyright Act of March 4, 1909, as originally enacted, see 1909 Supp. Fed. Stat. Annot. 83.

"SEC. 11. [*Works not reproduced for sale.*] That copyright may also be had of the works of an author, of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete copy of such work if it be a lecture or similar production or a dramatic, musical, or dramatico-musical composition; of a title and description, with one print taken from each scene or act,

if the work be a motion-picture photoplay; of a photographic print if the work be a photograph; of a title and description, with not less than two prints taken from different sections of a complete motion picture, if the work be a motion picture other than a photoplay; or of a photograph or other identifying reproduction thereof, if it be a work of art or a plastic work or drawing. But the privilege of registration of copyright secured hereunder shall not exempt the copyright proprietor from the deposit of copies, under sections twelve and thirteen of this Act, where the work is later reproduced in copies for sale."

For sec. 11 of the Copyright Act of March 4, 1909, as it read prior to this amendment, see 1909 Supp. Fed. Stat. Annot. 84.

"SEC. 25. [*Infringements.*] That if any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

"(a) To an injunction restraining such infringement;

"(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but in case of a newspaper reproduction of a copyrighted photograph such damages shall not exceed the sum of two hundred dollars nor be less than the sum of fifty dollars, and in the case of the infringement of an undramatized or nondramatic work by means of motion pictures, where the infringer shall show that he was not aware that he was infringing, and that such infringement could not have been reasonably foreseen, such damages shall not exceed the sum of one hundred dollars; and in the case of an infringement of a copyrighted dramatic or dramatico-musical work by a maker of motion pictures and his agencies for distribution thereof to exhibitors, where such infringer shows that he was not aware that he was infringing a copyrighted work, and that such infringements could not reasonably have been foreseen, the entire sum of such damages recoverable by the copyright proprietor from such infringing maker and his agencies for the distribution to exhibitors of such infringing motion picture shall not exceed the sum of five thousand dollars nor be less than two hundred and fifty dollars, and such damages shall in no other case exceed the sum of five thousand dollars nor be less than the sum of two hundred and fifty dollars, and shall not be regarded as a penalty. But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under this law, nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him.

"First. In the case of a painting, statue, or sculpture, ten dollars for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

"Second. In the case of any work enumerated in section five of this Act, except a painting, statue, or sculpture, one dollar for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

"Third. In the case of a lecture, sermon, or address, fifty dollars for every infringing delivery;

"Fourth. In the case of a dramatic or dramatico-musical or a choral or orchestral composition, one hundred dollars for the first and fifty dollars for every subsequent infringing performance; in the case of other musical compositions, ten dollars for every infringing performance;

"(c) To deliver up on oath, to be impounded during the pendency of the action, upon such terms and conditions as the court may prescribe, all articles alleged to infringe a copyright;

"(d) To deliver up on oath for destruction all the infringing copies or devices, as well as all plates, molds, matrices, or other means for making such infringing copies as the court may order.

"(e) Whenever the owner of a musical copyright has used or permitted the use of the copyrighted work upon the parts of musical instruments serving to reproduce mechanically the musical work, then in case of infringement of such copyright by the unauthorized manufacture, use, or sale of interchangeable parts, such as disks, rolls, bands, or cylinders for use in mechanical music-producing machines adapted to reproduce the copyrighted music, no criminal action shall be brought, but in a civil action an injunction may be granted upon such terms as the court may impose, and the plaintiff shall be entitled to recover in lieu of profits and damages a royalty as provided in section one, subsection (e), of this Act: *Provided also*, That whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this Act, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office, sending to the copyright office a duplicate of such notice; and in case of his failure so to do the court may, in its discretion, in addition to sums hereinabove mentioned, award the complainant a further sum, not to exceed three times the amount provided by section one, subsection (e), by way of damages, and not as a penalty, and also a temporary injunction until the full award is paid.

"Rules and regulations for practice and procedure under this section shall be prescribed by the Supreme Court of the United States." [37 Stat. L. 488.]

For sec. 25 of the Copyright Act of March 4, 1909, as originally enacted, see 1909 Supp. Fed. Stat. Annot. 87.

**An Act To amend section fifty-five of "An Act to amend and consolidate the Acts respecting copyright," approved March fourth, nineteen hundred and nine.**

[Act of March 2, 1913, ch. 97.]

[*Certificate of registration.*] That section fifty-five of the Act entitled "An Act to amend and consolidate the Acts respecting copyright," approved March fourth, nineteen hundred and nine, be amended to read as follows:

"SEC. 55. That in the case of each entry the person recorded as the claimant of the copyright shall be entitled to a certificate of registration under seal of the copyright office, to contain the name and address of said claimant, the name of the country of which the author of the work is a citizen or subject, and when an alien author domiciled in the United States at the time of said registration, then a statement of that fact, including his place of domicile, the name of the author (when the records of the copyright office shall show the same), the title of the work which is registered for which copyright is claimed, the date of the deposit of the copies of such work, the date of publication if the work has been



reproduced in copies for sale, or publicly distributed, and such marks as to class designation and entry number as shall fully identify the entry. In the case of a book, the certificate shall also state the receipt of the affidavit, as provided by section sixteen of this Act, and the date of the completion of the printing, or the date of the publication of the book, as stated in the said affidavit. The register of copyrights shall prepare a printed form for the said certificate, to be filled out in each case as above provided for in the case of all registrations made after this Act goes into effect, and in the case of all previous registrations so far as the copyright office record books shall show such facts, which certificate, sealed with the seal of the copyright office, shall, upon payment of the prescribed fee, be given to any person making application for the same. Said certificate shall be admitted in any court as prima facie evidence of the facts stated therein. In addition to such certificate the register of copyrights shall furnish, upon request, without additional fee, a receipt for the copies of the work deposited to complete the registration." [37 Stat. L. 724.]

For the Act of March 4, 1909, sec. 55 of which is here amended, see 1909 Supp. Fed. Stat. Annot. 30.

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## CORPORATE TRUSTS.

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## CORPORATIONS.

*Excise Tax on*, see *INTERNAL REVENUE*.

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## CORPORATION TAX.

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## CORRUPT PRACTICES.

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*Cotton Statistics*, see *CENSUS*.

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## CROSS-REFERENCES.

See also *IMPORTS AND EXPORTS; REVENUE CUTTER SERVICE.*

An Act To make the special examiner of drugs, medicines, and chemicals an assistant appraiser at the port of Boston.

[*Act of May 10, 1912, ch. 117.*]

[*Examiner of drugs, etc., Boston, made assistant appraiser.*] That the special examiner of drugs, medicines, and chemicals in the district of Boston and Charlestown, Massachusetts, shall, in addition to his duties as special examiner, for which he shall be appointed with special reference to his qualifications, perform the duties and hold the rank of an assistant appraiser. [37 Stat. L. 110.]

An Act To establish Holeb, Maine, a subport of entry in the customs collection district of Bangor, Maine, and for other purposes.

[*Act of May 10, 1912, ch. 118.*]

[SEC. 1.] [*Bangor, Me., customs district — Holeb made subport of entry.*] That Holeb, Maine, be, and the same is hereby, established a subport of entry in the customs collection district of Bangor, Maine, and that the privileges of the first section of the Act approved June tenth, eighteen hundred and eighty, governing the immediate transportation of dutiable merchandise without appraisement, be, and the same are hereby, extended to the said subport of Holeb, Maine. [37 Stat. L. 110.]

SEC. 2. [*Lowelltown may be discontinued.*] That the Secretary of the Treasury is hereby authorized to discontinue Lowelltown as a subport of entry whenever he may be satisfied that the maintenance of such subport is no longer necessary to the transaction of the public business. [37 Stat. L. 110.]

An Act To establish Ashtabula, Ohio, a subport of entry in the customs collection district of Cuyahoga, Ohio, and for other purposes.

[*Act of May 27, 1912, ch. 131.*]

[*Cuyahoga, Ohio, customs district — Ashtabula made subport of entry.*] That Ashtabula, Ohio, be, and the same is hereby, established a subport of entry in the customs collection district of Cuyahoga, Ohio, and that the privileges of the first section of the act approved June tenth, eighteen hundred and eighty, governing the immediate transportation of dutiable merchandise without appraisement, be, and the same are hereby, extended to the said subport of Ashtabula, Ohio. [37 Stat. L. 116.]

An Act To designate Walhalla, Neche, and Saint John, in the State of North Dakota, subports of entry, and to extend the privileges of the first section of the Act of Congress approved June tenth, eighteen hundred and eighty, to said subports.

[*Act of June 7, 1912, ch. 159.*]

[SEC. 1.] [*Walhalla, Neche, and Saint John, N. Dak., made subports of entry.*] That Walhalla, Neche, and Saint John, in the State of North Dakota,

be, and the same are hereby, designated subports of entry in the customs collection district of North and South Dakota. [37 Stat. L. 129.]

SEC. 2. [*Immediate transportation privileges granted.*] That the privileges of the first section of the Act approved June tenth, eighteen hundred and eighty, entitled "An Act to amend the statutes in relation to immediate transportation of dutiable goods, and for other purposes," be, and the same are hereby, extended to the said subports. [37 Stat. L. 129.]

SEC. 3. [*Discontinuance authorized.*] That the Secretary of the Treasury is hereby authorized to discontinue the said subports of entry, or to withdraw the privileges of the first section of the Act of June tenth, eighteen hundred and eighty, therefrom, at any time when he shall be satisfied that the interests of commerce or of the revenue no longer require their continuance. [37 Stat. L. 130.]

**An Act To establish a subport of entry and delivery at Indiana Harbor, in the State of Indiana.**

[Act of June 15, 1912, ch. 168.]

[*Indiana Harbor, Ind., made subport of entry, etc.*] That Indiana Harbor, in the State of Indiana, on the southern shore of Lake Michigan, be, and the same is hereby, constituted a subport of entry and delivery within the district of Chicago, Illinois, and customs officers shall be stationed at said subport with authority to enter and clear vessels, receive duties, fees, and other moneys, and perform such other services, and receive such compensation as in the judgment of the Secretary of the Treasury the exigencies of commerce may require. [37 Stat. L. 133.]

**An Act To make Bay City, Michigan, a subport of entry.**

[Act of June 15, 1912, ch. 169.]

[*Bay City, Mich., made subport of entry — immediate transportation facilities.*] That Bay City, in the State of Michigan, be, and is hereby, constituted a subport of entry in the customs collection district of Huron, and that the privileges of the first section of the immediate transportation Act, approved June tenth, eighteen hundred and eighty, entitled "An Act to amend the statutes in relation to immediate transportation of dutiable goods, and for other purposes," be, and the same are hereby, extended to said subport. And such customs officers may, in the discretion of the Secretary of the Treasury, be stationed at said subport as, in his judgment, the interests of the service may require, who shall receive such compensation as may be fixed by him. [37 Stat. L. 133.]

For the Act of June 10, 1880, see 2 Fed. Stat. Annot. 712.

**An Act To extend the limits of the port of entry of Galveston, Texas, to include Port Bolivar, in that State.**

[Act of August 20, 1912, ch. 305.]

[*Galveston, Tex., customs district — Port Bolivar included.*] That the

limits of the port of entry of Galveston, Texas, be, and the same are hereby, extended to include Port Bolivar, in that State. [37 Stat. L. 313.]

**An Act To make Fort Covington, New York, a subport of entry.**

[Act of August 22, 1912, ch. 332.]

[*Champlain customs district, N. Y. — Fort Covington made subport of entry.*] That Fort Covington, in the State of New York, be, and is hereby, constituted a subport of entry in the customs collection district of Champlain, State of New York, and that the privileges of the first section of the act approved June tenth, eighteen hundred and eighty, relating to the transportation of dutiable merchandise without appraisement, be, and the same are hereby, extended to said subport. [37 Stat. L. 326.]

For the Act of June 10, 1880, see 2 Fed. Stat. Annot. 712.

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[*Collecting customs revenue — additional — detection of frauds increased — permanent appropriation repealed from June 30, 1913 — reorganization of service directed — estimates for reduced cost — scope of reductions — communication to Congress.*] \* \* \* To defray the expenses of collecting the revenue from customs, \$4,650,000, being additional to the permanent appropriation for this purpose for the fiscal year ending June thirtieth, nineteen hundred and thirteen. And the provisions of the Act of March third, eighteen hundred and seventy-nine (Twentieth Statutes, page three hundred and eighty-six), as amended by the Act of April twenty-seventh, nineteen hundred and four (Thirty-third Statutes, page three hundred and ninety-six), authorizing the Secretary of the Treasury to expend out of the appropriation for defraying the expenses of collecting the revenue from customs such amount as he may deem necessary, not exceeding \$150,000 per annum, for the detection and prevention of frauds upon the customs revenue, are hereby further amended so as to increase the amount to be so expended for the fiscal year nineteen hundred and thirteen to \$200,000.

Section thirty-six hundred and eighty-seven of the Revised Statutes of the United States is repealed to take effect from and after June thirtieth, nineteen hundred and thirteen.

The President is authorized to reorganize the customs service and cause estimates to be submitted therefor on account of the fiscal year nineteen hundred and fourteen bringing the total cost of said service for said fiscal year within a sum not exceeding \$10,150,000 instead of \$10,500,000, the amount authorized to be expended therefor on account of the current fiscal year nineteen hundred and twelve; in making such reorganization and reduction in expenses he is authorized to abolish or consolidate collection districts, ports, and subports of entry and delivery, to discontinue needless offices and employments, to reduce excessive rates of compensation below amounts fixed by law or Executive order, and to do all such other and further things that in his judgment may be necessary to make such organization effective and within the limit of cost herein fixed; such reorganization shall be communicated to Congress at its next regular session and shall constitute for the fiscal year nineteen hundred and fourteen

and until otherwise provided by Congress the permanent organization of the customs service. [37 Stat. L. 434.]

This is from the Sundry Civil Appropriation Act of Aug. 24, 1912, ch. 355.  
For R. S. sec. 3687, see 2 Fed. Stat. Annot. 903.

**An Act To extend the limits of the port of entry of New Orleans, Louisiana.**

[Act of August 24, 1912, ch. 372.]

[*New Orleans, La., port limits extended — boundaries.*] That the limits of the port of entry of New Orleans, Louisiana, be, and the same are hereby, extended to include that portion of the parish of Saint Bernard within the following boundaries: Beginning at a point where the boundary line between the parishes of Orleans and Saint Bernard intersect the east bank of the Mississippi River; thence along said east bank to where the boundary line between lots sixteen and seventeen of the Corinne and Myrtle Grove plantations (according to a plan by A. C. Bell, civil engineer, July eleventh, eighteen hundred and ninety-three, and annexed to an act of sale by A. L. Richardson to Jules Mereaux, passed before Charles T. Soniat, esquire, notary public in the parish of Orleans, January second, eighteen hundred and ninety-four) intersects said east bank, said point of intersection being at a distance of four miles and four thousand two hundred and eighty feet below the point at which the boundary between the parishes of Orleans and Saint Bernard intersects said east bank; thence along said boundary between said lots sixteen and seventeen a distance of four thousand feet; thence along a line parallel to the Mississippi River to the point where said boundary line intersects the boundary between the parishes of Orleans and Saint Bernard; thence along said boundary line to the point of beginning. [37 Stat. L. 499.]

**An Act To extend the authority to receive certified checks drawn on national and State banks and trust companies in payment for duties on imports and internal taxes and all public dues.**

[Act of March 3, 1913, ch. 119.]

[*Certified checks — may be accepted for all public dues.*] That it shall be lawful for collecting officers to receive certified checks drawn on national and State banks and trust companies, during such time and under such regulations as the Secretary of the Treasury may prescribe, in payment for duties on imports, internal taxes, and all public dues, including special customs deposits; and the Act of March second, nineteen hundred and eleven, entitled "An Act to authorize the receipt of certified checks for duties on imports and internal taxes," is hereby amended accordingly. [37 Stat. L. 733.]

For the Act of March 2, 1911, hereby amended, see 1912 Supp. Fed. Stat. Annot. 53.

**An Act Extending to the port of Dallas, Texas, the privileges of section seven of the Act approved June tenth, eighteen hundred and eighty, governing the immediate transportation of dutiable merchandise without appraisement.**

[Act of September 18, 1913, ch. 13.]

[*Dallas, Tex., granted immediate transportation privileges.*] That the privileges of section seven of the Act approved June tenth, eighteen hundred and



eighty, governing the immediate transportation of dutiable merchandise without appraisement, be, and the same are hereby, extended to the port of Dallas, in the State of Texas. [38 Stat. L. 112.]

For sec. 7 of the Act of June 10, 1880, see 2 Fed. Stat. Annot. 715.

An Act To reduce tariff duties and to provide revenue for the Government, and for other purposes.

[Act of October 3, 1913, ch. 16; 38 Stat. L. 114.]

### [SECTION I. THE TARIFF.]

That on and after the day following the passage of this Act, except as otherwise specially provided for in this Act, there shall be levied, collected, and paid upon all articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands and the islands of Guam and Tutuila) the rates of duty which are by the schedules and paragraphs of the dutiable list of this section prescribed, namely:

#### DUTIABLE LIST.

##### SCHEDULE A—CHEMICALS, OILS, AND PAINTS.

1. Acids: Boracic acid,  $\frac{3}{4}$  cent per pound; citric acid, 5 cents per pound; formic acid,  $1\frac{1}{2}$  cents per pound; gallic acid, 6 cents per pound; lactic acid,  $1\frac{1}{2}$  cents per pound; oxalic acid,  $1\frac{1}{2}$  cents per pound; pyrogallie acid, 12 cents per pound; salicylic acid,  $2\frac{1}{2}$  cents per pound; tannic acid and tannin, 5 cents per pound; tartaric acid,  $3\frac{1}{2}$  cents per pound; all other acids and acid anhydrides not specially provided for in this section, 15 per centum ad valorem.

2. Acetic anhydrid,  $2\frac{1}{2}$  cents per pound.

3. Acetone, 1 cent per pound.

4. Dried egg albumen, 3 cents per pound.

5. Alkalies, alkaloids, and all chemical and medicinal compounds, preparations, mixtures and salts, and combinations thereof not specially provided for in this section, 15 per centum ad-valorem.

6. Alumina, hydrate of, or refined bauxite; alum, alum cake, patent alum, sulphate of alumina, and aluminous cake, and all other manufactured compounds of alumina, not specially provided for in this section, 15 per centum ad valorem.

7. Ammonia, carbonate of, and muriate of,  $\frac{3}{4}$  of 1 cent per pound; phosphate of, 1 cent per pound; liquid anhydrous,  $2\frac{1}{2}$  cents per pound; ammoniacal gas liquor, 10 per centum ad valorem.

8. Argols or crude tartar or wine lees crude or partly refined, containing not more than 90 per centum of potassium bitartrate, 5 per centum ad valorem; containing more than 90 per centum of potassium bitartrate, cream of tartar, and Rochelle salts or tartrate of soda and potassa,  $2\frac{1}{2}$  cents per pound; calcium tartrate crude, 5 per centum ad valorem.

9. Balsams: Copaiba, fir or Canada, Peru, tolu, and all other balsams, which are natural and uncompounded and not suitable for the manufacture of

perfumery and cosmetics, if in a crude state, not advanced in value or condition by any process or treatment whatever beyond that essential to the proper packing of the balsams and the prevention of decay or deterioration pending manufacture, all the foregoing not specially provided for in this section, 10 per centum ad valorem; if advanced in value or condition by any process or treatment whatever beyond that essential to the proper packing of the balsams and the prevention of decay or deterioration pending manufacture, all the foregoing not specially provided for in this section, 15 per centum ad valorem: *Provided*, That no article containing alcohol shall be classified for duty under this paragraph.

10. Barium, chloride of,  $\frac{1}{4}$  cent per pound; dioxide of,  $1\frac{1}{2}$  cents per pound; carbonate of, precipitated, 15 per centum ad valorem.

11. Blacking of all kinds, polishing powders, and all creams and preparations for cleaning or polishing, not specially provided for in this section, 15 per centum ad valorem: *Provided*, That no preparations containing alcohol shall be classified for duty under this paragraph.

12. Bleaching powder, or chloride of lime,  $\frac{1}{2}$  cent per pound.

13. Caffein, \$1 per pound; compounds of caffein, 25 per centum ad valorem; impure tea, tea waste, tea siftings or sweepings, for manufacturing purposes in bond, pursuant to the provisions of the Act of May sixteenth, nineteen hundred and eight, 1 cent per pound.

14. Calomel, corrosive sublimate, and other mercurial preparations, 15 per centum ad valorem.

15. Chalk, precipitated, suitable for medicinal or toilet purposes; chalk put up in the form of cubes, blocks, sticks, or disks, or otherwise, including tailors', billiard, red, and other manufactures of chalk not specially provided for in this section, 25 per centum ad valorem.

16. Chemical and medicinal compounds and preparations, including mixtures and salts, distilled oils, essential oils, expressed oils, rendered oils, greases, ethers, flavoring and other extracts and fruit essences, all the foregoing and their combinations when containing alcohol, and all articles consisting of vegetable or mineral objects immersed or placed in, or saturated with, alcohol, except perfumery and spirit varnishes, and all alcoholic compounds not specially provided for in this section, if containing 20 per centum of alcohol or less, 10 cents per pound and 20 per centum ad valorem; containing more than 20 per centum and not more than 50 per centum of alcohol, 20 cents per pound and 20 per centum ad valorem; containing more than 50 per centum of alcohol, 40 cents per pound and 20 per centum ad valorem.

17. Chemical and medicinal compounds, combinations and all similar articles dutiable under this section, except soap, whether specially provided for or not, put up in individual packages of two and one-half pounds or less gross weight (except samples without commercial value) shall be dutiable at a rate not less than 20 per centum ad valorem: *Provided*, That chemicals, drugs, medicinal and similar substances, whether dutiable or free, imported in capsules, pills, tablets, lozenges, troches, ampoules, jubes, or similar forms, shall be dutiable at not less than 25 per centum ad valorem.

18. Chloral hydrate, salol, phenolphthalein, urea, terpin hydrate, acetanilid, acetphenetidin, antipyrine, glycerophosphoric acid and salts and compounds thereof, acetylsalicylic acid, aspirin, guaiacol carbonate, and thymol, 25 per centum ad valorem.

19. Chloroform, 2 cents per pound; carbon tetrachloride, 1 cent per pound.

20. Coal-tar dyes or colors, not specially provided for in this section, 30 per centum ad valorem.

21. All other products or preparations of coal tar, not colors or dyes, not specially provided for in this section, 15 per centum ad valorem.

22. Coal-tar distillates, not specially provided for in this section; benzol, naphthol, resorcin, toluol, xylol; all the foregoing not medicinal and not colors or dyes, 5 per centum ad valorem.

23. Coal-tar products known as anilin oil and salts, toluidine, xyloidin, cumidin, binitrotoluol, binitrobenzol, lenzidin, tolidin, dianisidin, naphthylamin, diphenylamin, benzaldehyde, benzyl chloride, nitro-benzol and nitrotoluol, naphthylaminsulfoacids and their sodium or potassium salts, naphtholsulfoacids and their sodium or potassium salts, amidonaphtholsulfoacids and their sodium or potassium salts, amidosalicylic acid, binitrochlorbenzol, diamidostilbendisulfoacid, metanilic acid, paranitranilin, dimethylanilin; all the foregoing not medicinal and not colors or dyes, 10 per centum ad valorem.

24. Cobalt, oxide of, 10 cents per pound.

25. Collodion and all other liquid solutions of pyroxylin, or of other cellulose esters, or of cellulose, 15 per centum ad valorem; compounds of pyroxylin or of other cellulose esters, whether known as celluloid or by any other name, if in blocks, sheets, rods, tubes, or other forms not polished, wholly or partly, and not made into finished or partly finished articles, 25 per centum ad valorem; if polished, wholly or partly, or if finished or partly finished articles, of which collodion or any compound of pyroxylin or other cellulose esters, by whatever name known, is the component material of chief value, 40 per centum ad valorem.

26. Coloring for brandy, wine, beer, or other liquors, 40 per centum ad valorem.

27. Drugs, such as barks, beans, berries, buds, bulbs, bulbous roots, excrescences, fruits, flowers, dried fibers, dried insects, grains, gums, herbs, leaves, lichens, mosses, roots, stems, vegetables, seeds (aromatic, not garden seeds), seeds of morbid growth, and weeds; any of the foregoing which are natural and uncompounded drugs and not edible, and not specially provided for in this section, but which are advanced in value or condition by shredding, grinding, chipping, crushing, or any other process or treatment whatever beyond that essential to the proper packing of the drugs and the prevention of decay or deterioration pending manufacture, 10 per centum ad valorem: *Provided*, That no article containing alcohol shall be classified for duty under this paragraph.

28. Ergot, 10 cents per pound.

29. Ethers: Sulphuric, 4 cents per pound; amyl nitrite, 20 per centum ad valorem; amyl acetate and ethyl acetate or acetic ether, 5 cents per pound; ethyl chloride, 20 per centum ad valorem; ethers and esters of all kinds not specially provided for in this section, 20 per centum ad valorem: *Provided*, That no article containing more than 10 per centum of alcohol shall be classified for duty under this paragraph.

30. Leaves and roots: Buchu leaves, 10 cents per pound; coca leaves, 10 and other dyewoods, and all extracts of vegetable origin suitable for dyeing, coloring, or staining, not specially provided for in this section; all the foregoing not containing alcohol and not medicinal,  $\frac{3}{4}$  of 1 cent per pound.

31. Extract of chlorophyll, 15 per centum ad valorem; saffron and safflower, and extract of, and saffron cake, 10 per centum ad valorem: *Provided*, That no article containing alcohol shall be classified for duty under this paragraph.

32. Formaldehyde solution containing not more than 40 per centum of formaldehyde, or formaline, 1 cent per pound.

33. Fusel oil, or amylic alcohol,  $\frac{1}{4}$  cent per pound.

34. Gelatin, glue, and glue size, valued not above 10 cents per pound, 1 cent per pound; valued above 10 cents per pound and not above 25 cents per pound, 15 per centum ad valorem; valued above 25 cents per pound, 25 per centum ad valorem; manufactures of gelatin or manufactures of which gelatin is the component material of chief value, 25 per centum ad valorem; isinglass and prepared fish sounds, 25 per centum ad valorem; agar-agar, 20 per centum ad valorem.

35. Glycerin, crude, not purified, 1 cent per pound; refined, 2 cents per pound.

36. Gums: Amber, and amberoid unmanufactured, or crude gum, not specially provided for in this section, \$1 per pound; arabic, or senegal,  $\frac{1}{2}$  cent per pound; camphor, crude, natural, 1 cent per pound; camphor, refined and synthetic, 5 cents per pound; chicle, crude, 15 cents per pound; refined or advanced in value by drying, straining, or any other process or treatment whatever beyond that essential to the proper packing, 20 cents per pound; dextrine, made from potato starch or potato flour,  $1\frac{1}{4}$  cents per pound; dextrine, not otherwise provided for, burnt starch or British gum, dextrine substitutes, and soluble or chemically treated starch,  $\frac{3}{4}$  of 1 cent per pound.

37. Ink and ink powders, 15 per centum ad valorem.

38. Iodoform, and potassium iodide, 15 cents per pound.

39. Leaves and roots: Buchu leaves, 10 cents per pound; coca leaves, 10 cents per pound; gentian,  $\frac{1}{4}$  cent per pound; licorice root,  $\frac{1}{4}$  cent per pound; sarsaparilla root, 1 cent per pound.

40. Licorice, extracts of, in pastes, rolls, or other forms, 1 cent per pound.

41. Lime, citrate of, 1 cent per pound.

42. Magnesia: Calcined,  $3\frac{1}{2}$  cents per pound; carbonate of, precipitated,  $1\frac{1}{2}$  cents per pound; sulphate of, or Epsom salts,  $\frac{1}{2}$  cent per pound.

43. Menthol, 50 cents per pound.

44. Oils, rendered: Sod [*sic*], seal, herring, and other fish oil, not specially provided for in this section, 3 cents per gallon; whale oil, 5 cents per gallon; sperm oil, 8 cents per gallon; wool grease, including that known commercially as degreas or brown wool grease, crude and not refined or improved in value or condition,  $\frac{1}{4}$  cent per pound; refined or improved in value or condition, and not specially provided for in this section,  $\frac{1}{2}$  cent per pound; lanolin, 1 cent per pound; all other animal oils, rendered oils and greases, and all combinations of the same, not specially provided for in this section, 15 per centum ad valorem.

45. Oils, expressed: Alizarin assistant, sulphoricinoleic acid, and ricinoleic acid, and soaps containing castor oil, any of the foregoing in whatever form, and all other alizarin assistants and all soluble greases used in the processes of softening, dyeing, or finishing, not specially provided for in this section, 25 per centum ad valorem; castor oil, 12 cents per gallon; flaxseed and linseed oil, raw, boiled, or oxidized, 10 cents per gallon of  $7\frac{1}{2}$  pounds; poppy-seed oil, raw, boiled, or oxidized, rapeseed oil, and peanut oil, 6 cents per gallon; hempseed oil, 3 cents per gallon; almond oil, sweet, 5 cents per pound; sesame or sesamum seed or bean oil, 1 cent per pound; olive oil, not specially provided for in this section, 20 cents per gallon; olive oil, in bottles, jars, kegs, tins, or other packages having a capacity of less than five standard gallons each, 30 cents per gallon; all other expressed oils and all combinations of the same, not specially provided for in this section, 15 per centum ad valorem.

46. Oils, distilled and essential: Orange and lemon, 10 per centum ad valorem; peppermint, 25 cents per pound; mace oil, 6 cents per pound; almond, bitter; amber; ambergris; anise or anise seed; bergamot; camomile; caraway; cassia; cinnamon; cedrat; citronella and lemon-grass; civet; fennel; jasmine or jasimine; juniper; lavender, and aspic or spike lavender; limes; neroli or orange flower; origanum, red or white; rosemary or anthoss; attar of roses; thyme; and valerian; all the foregoing oils, and all fruit ethers, oils, and essences, and essential and distilled oils and all combinations of the same, not specially provided for in this section, 20 per centum ad valorem: *Provided*, That no article containing alcohol shall be classified for duty under this paragraph.

47. Opium, crude or unmanufactured, and not adulterated, containing 9 per centum and over of morphia, \$3 per pound; opium of the same composition, dried to contain 15 per centum or less of moisture, powdered, or otherwise advanced beyond the condition of crude or unmanufactured, \$4 per pound; morphia or morphine, sulphate of, and all alkaloids of opium, and salts and esters thereof, \$3 per ounce; cocaine, ecgonine, and all salts and derivatives of the same, \$2 per ounce; aqueous extract of opium, for medicinal uses, and tincture of, as laudanum, and other liquid preparations of opium, not specially provided for in this section, 60 per centum ad valorem; opium containing less than 9 per centum of morphia, \$6 per pound; but preparations of opium deposited in bonded warehouses shall not be removed therefrom without payment of duties, and such duties shall not be refunded: *Provided*, That nothing herein contained shall be so construed as to repeal or in any manner impair or affect the provisions of an Act entitled "An Act to prohibit the importation and use of opium for other than medicinal purposes," approved February ninth, nineteen hundred and nine.

48. Perfumery, including cologne and other toilet waters, articles of perfumery, whether in sachets or otherwise, and all preparations used as applications to the hair, mouth, teeth, or skin, such as cosmetics, dentifrices, including tooth soaps, pastes, including theatrical grease paints, and pastes, pomades, powders, and other toilet preparations, all the foregoing, if containing alcohol, 40 cents per pound and 60 per centum ad valorem; if not containing alcohol, 60 per centum ad valorem; floral or flower waters containing no alcohol, not specially provided for in this section, 20 per centum ad valorem.

49. Ambergris, enfleurage greases and floral essences by whatever method obtained; flavoring extracts, musk, grained or in pods, civet, and all natural or synthetic odoriferous or aromatic substances, preparations, and mixtures used in the manufacture of, but not marketable as, perfumes or cosmetics; all the foregoing not containing alcohol and not specially provided for in this section, 20 per centum ad valorem.

50. Plasters, healing or curative, of all kinds, and court-plaster, 15 per centum ad valorem.

51. Baryta, sulphate of, or barytes, including barytes earth, unmanufactured, 15 per centum ad valorem; manufactured, 20 per centum ad valorem; blanché, or artificial sulphate of barytes, and satin white, or artificial sulphate of lime, 20 per centum ad valorem.

52. Blues, such as Berlin, Prussian, Chinese, and all others, containing ferrocyanide of iron, in pulp, dry or ground in or mixed with oil or water, 20 per centum ad valorem; ultramarine blue, whether dry, in pulp, or ground in or mixed with oil or water, and wash blue containing ultramarine, 15 per centum ad valorem.

53. Black pigments, made from bone, ivory, or vegetable substance, by what-

ever name known; gas black and lampblack, dry or ground in or mixed with oil or water, 15 per centum ad valorem.

54. Chrome yellow, chrome green, and all other chromium colors in the manufacture of which lead and bichromate of potash or soda are used, in pulp, dry, or ground in or mixed with oil or water, 20 per centum ad valorem.

55. Ocher and ochery earths, sienna and sienna earths, and umber and umber earths, 5 per centum ad valorem; Spanish brown, venetian red, Indian red, and colcothar or oxide of iron, not specially provided for in this section, 10 per centum ad valorem.

56. Lead pigments: Litharge, orange mineral, red lead, white lead, and all pigments containing lead, dry or in pulp, and ground or mixed with oil or water, not specially provided for in this section, 25 per centum ad valorem.

57. Lead, acetate of, white, and nitrate of,  $1\frac{1}{4}$  cents per pound; acetate of, brown, gray, or yellow, 1 cent per pound; all other lead compounds not specially provided for in this section, 20 per centum ad valorem.

58. Varnishes, including so-called gold size or japan, 10 per centum ad valorem: *Provided*, That spirit varnishes containing less than 10 per centum of methyl alcohol of the total alcohol contained therein, shall be dutiable at \$1.32 per gallon and 15 per centum ad valorem.

59. Vermilion reds, containing quicksilver, dry or ground in oil or water, 15 per centum ad valorem; when not containing quicksilver but made of lead or containing lead, 25 per centum ad valorem.

60. Whiting and Paris white, dry, and chalk, ground or bolted,  $\frac{1}{10}$  cent per pound; whiting and Paris white, ground in oil, or putty, 15 per centum ad valorem.

61. Zinc, oxide of, and pigments containing zinc but not containing more than 5 per centum of lead, ground dry, 10 per centum ad valorem; when ground in or mixed with oil or water, lithopone and white sulphide of zinc, 15 per centum ad valorem.

62. Zinc, chloride of and sulphate of,  $\frac{1}{2}$  cent per pound.

63. Enamel paints, and all paints, colors, pigments, stains, crayons, including charcoal crayons or fusains, smalts, and frostings, and all ceramic and glass fluxes, glazes, enamels, and colors, whether crude, dry, mixed, or ground with water or oil or with solutions other than oil, not specially provided for in this section, 15 per centum ad valorem; all paints, colors, and pigments commonly known as artists' paints or colors, whether in tubes, pans, cakes, or other forms, 20 per centum ad valorem; all color lakes, whether dry or in pulp, not specially provided for in this section, 20 per centum ad valorem.

64. Potash: Bicarbonate of, refined, and chlorate of,  $\frac{1}{2}$  cent per pound; chromate and bichromate of, 1 cent per pound; nitrate of, or saltpeter, refined, \$7 per ton; permanganate of, 1 cent per pound; prussiate of, red, 2 cents per pound; yellow,  $1\frac{1}{4}$  cents per pound.

65. Salts and all other compounds and mixtures of which bismuth, gold, platinum, rhodium, silver, or tin constitute the element of chief value, 10 per centum ad valorem.

66. Soaps: Perfumed toilet soaps, 30 per centum ad valorem; medicinal soaps, 20 per centum ad valorem; castile soap, and unperfumed toilet soap, 10 per centum ad valorem; all other soaps and soap powder not specially provided for in this section, 5 per centum ad valorem.

67. Soda: Benzoate of, 5 cents per pound; chlorate of, and nitrite of,  $\frac{1}{2}$  cent per pound; bicarbonate of, or supercarbonate of, or saleratus, and other alkalies containing 50 per centum or more of bicarbonate of soda; hydrate of, or caus-

tic; phosphate of; hyposulphite of; sulphid of, and sulphite of,  $\frac{1}{4}$  cent per pound; chromate and bichromate of, and yellow prussiate of,  $\frac{3}{4}$  cent per pound; borate of, or borax refined; crystal carbonate of, monohydrate, and sesquicarbonate of; sal soda, and soda crystals,  $\frac{1}{8}$  cent per pound; and sulphate of soda crystallized, or Glauber salts, \$1 per ton.

68. Sponges: Trimmed or untrimmed but not advanced in value by chemical processes, 10 per centum ad valorem; bleached sponges and sponges advanced in value by processes involving chemical operations, manufactures of sponges, or of which sponge is the component material of chief value, not specially provided for in this section, 15 per centum ad valorem.

69. Talcum, ground talc, steatite, and French chalk, cut, powdered, washed, or pulverized, 15 per centum ad valorem.

70. Vanillin, 10 cents per ounce; vanilla beans, 30 cents per pound; tonka beans, 25 cents per pound.

#### SCHEDULE B—EARTHS, EARTHENWARE, AND GLASSWARE.

71. Fire brick, magnesite brick, chrome brick, and brick not specially provided for in this section, not glazed, enameled, painted, vitrified, ornamented, or decorated in any manner, 10 per centum ad valorem; if glazed, enameled, painted, vitrified, ornamented, or decorated in any manner, and bath brick, 15 per centum ad valorem.

72. Tiles, plain unglazed, one color, exceeding two square inches in size,  $1\frac{1}{2}$  cents per square foot; glazed, ornamented, hand-painted, enameled, vitrified, semivitrified, decorated, encaustic, ceramic mosaic, flint, spar, embossed, gold decorated, grooved and corrugated, and all other earthenware tiles and tiling, except pill tiles and so-called quarries or quarry tiles, but including tiles wholly or in part of cement, 5 cents per square foot; so-called quarries or quarry tiles, 20 per centum ad valorem; mantels, friezes, and articles of every description or parts thereof, composed wholly or in chief value of earthenware tiles or tiling, except pill tiles, 30 per centum ad valorem.

73. Lime, 5 per centum ad valorem.

74. Plaster rock or gypsum, crude, ground or calcined, pearl hardening for paper makers' use; white, non-staining Portland cement, Keene's cement, or other cement of which gypsum is the component material of chief value, and all other cements not specially provided for in this section, 10 per centum ad valorem.

75. Pumice stone, unmanufactured, 5 per centum ad valorem; wholly or partially manufactured,  $\frac{1}{4}$  cent per pound; manufactures of pumice stone, or of which pumice stone is the component material of chief value, not specially provided for in this section, 25 per centum ad valorem.

76. Clays or earths, unwrought or unmanufactured, not specially provided for in this section, 50 cents per ton; wrought or manufactured, not specially provided for in this section, \$1 per ton; china clay or kaolin, \$1.25 per ton; fuller's earth, unwrought and unmanufactured, 75 cents per ton; wrought or manufactured, \$1.50 per ton; fluorspar, \$1.50 per ton: *Provided*, That the weight of the casks or other containers shall be included in the dutiable weight.

77. Mica, unmanufactured, valued at not above 15 cents per pound, 4 cents per pound; valued above 15 cents per pound, 25 per centum ad valorem; cut mica, mica splittings, built-up mica, and all manufactures of mica, or of which mica is the component material of chief value, 30 per centum ad valorem; ground mica, 15 per centum ad valorem.

78. Common yellow, brown, or gray earthenware made of natural unwashed and unmixed clay; plain or embossed, common salt-glazed stoneware; stoneware and earthenware crucibles; all the foregoing, not ornamented, incised, or decorated in any manner, 15 per centum ad valorem; if ornamented, incised, or decorated in any manner and manufactures wholly or in chief value of such ware, not specially provided for in this section, 20 per centum ad valorem; Rockingham earthenware, 30 per centum ad valorem.

79. Earthenware and crockery ware composed of a nonvitrified absorbent body, including white granite and semiporcelain earthenware, and cream-colored ware, and stoneware, including clock cases with or without movements, pill tiles, plaques, ornaments, toys, charms, vases, statues, statuettes, mugs, cups, steins, lamps, and all other articles composed wholly or in chief value of such ware; if plain white, plain yellow, plain brown, plain red, or plain black, not painted, colored, tinted, stained, enameled, gilded, printed, ornamented or decorated in any manner, and manufactures in chief value of such ware not specially provided for in this section, 35 per centum ad valorem; if painted, colored, tinted, stained, enameled, gilded, printed, or ornamented or decorated in any manner, and manufactures in chief value of such ware not specially provided for in this section, 40 per centum ad valorem.

80. China and porcelain wares composed of a vitrified nonabsorbent body which when broken shows a vitrified or vitreous, or semivitrified or semivitreous fracture, and all bisque and parian wares, including clock cases with or without movements, plaques, ornaments, toys, charms, vases, statues, statuettes, mugs, cups, steins, lamps, and all other articles composed wholly or in chief value of such ware, if plain white, or plain brown, not painted, colored, tinted, stained, enameled, gilded, printed, or ornamented or decorated in any manner; and manufactures in chief value of such ware not specially provided for in this section, 50 per centum ad valorem; if painted, colored, tinted, stained, enameled, gilded, printed, or ornamented or decorated in any manner and manufactures in chief value of such ware not specially provided for in this section, 55 per centum ad valorem.

81. Earthy or mineral substances wholly or partially manufactured and articles and wares composed wholly or in chief value of earthy or mineral substances, not specially provided for in this section, whether susceptible of decoration or not, if not decorated in any manner, 20 per centum ad valorem; if decorated, 25 per centum ad valorem; unmanufactured carbon, not specially provided for in this section, 15 per centum ad valorem; electrodes for electric furnaces, electrolytic and battery purposes, brushes, plates, and disks, all the foregoing composed wholly or in chief value of carbon, 25 per centum ad valorem; manufactures of carbon not specially provided for in this section, 20 per centum ad valorem.

82. Gas retorts, 10 per centum ad valorem; lava tips for burners, 15 per centum ad valorem; carbons for electric lighting, wholly or partly finished, made entirely from petroleum coke, 15 cents per hundred feet; if composed chiefly of lampblack or retort carbon, 40 cents per hundred feet; carbons for flaming arc lamps, not specially provided for in this section, and filter tubes, 30 per centum ad valorem; porous carbon pots for electric batteries, 15 per centum ad valorem.

83. Plain green or colored, molded or pressed, and flint, lime, or lead glass bottles, vials, jars, and covered and uncovered demijohns, and carboys, any of the foregoing, filled or unfilled, not otherwise specially provided for in this section, and whether their contents be dutiable or free (except such as contain



merchandise subject to an ad valorem rate of duty, or to a rate of duty based in whole or in part upon the value thereof which shall be dutiable at the rate applicable to their contents), 30 per centum ad valorem: *Provided*, That the terms bottles, vials, jars, demijohns, and carboys, as used herein, shall be restricted to such articles when suitable for use as and of the character ordinarily employed as containers for the holding or transportation of merchandise, and not as appliances or implements in chemical or other operations.

84. Glass bottles, decanters, and all articles of every description composed wholly or in chief value of glass, ornamented or decorated in any manner, or cut, engraved, painted, decorated, ornamented, colored, stained, silvered, gilded, etched, sand blasted, frosted, or printed in any manner, or ground (except such grinding as is necessary for fitting stoppers or for purposes other than ornamentation), and all articles of every description, including bottles and bottle glassware, composed wholly or in chief value of glass blown either in a mold or otherwise; all of the foregoing, not specially provided for in this section, filled or unfilled, and whether their contents be dutiable or free, 45 per centum ad valorem: *Provided*, That for the purposes of this Act, bottles with cut-glass stoppers shall, with the stoppers, be deemed entireties.

85. Unpolished, cylinder, crown, and common window glass, not exceeding one hundred and fifty square inches,  $\frac{2}{3}$  of 1 cent per pound; above that, and not exceeding three hundred and eighty-four square inches, 1 cent per pound; above that, and not exceeding seven hundred and twenty square inches,  $1\frac{1}{2}$  cents per pound; above that, and not exceeding one thousand two hundred square inches,  $1\frac{1}{2}$  cents per pound; above that, and not exceeding two thousand four hundred square inches,  $1\frac{1}{2}$  cents per pound; above that, 2 cents per pound: *Provided*, That unpolished, cylinder, crown, and common window glass, imported in boxes, shall contain fifty square feet, as nearly as sizes will permit, and the duty shall be computed thereon according to the actual weight of glass.

86. Cylinder and crown glass, polished, not exceeding three hundred and eighty-four square inches, 3 cents per square foot; above that, and not exceeding seven hundred and twenty square inches, 4 cents per square foot; above that, and not exceeding one thousand four hundred and forty square inches, 7 cents per square foot; above that, 10 cents per square foot.

87. Fluted, rolled, ribbed, or rough plate glass, or the same containing a wire netting within itself, not including crown, cylinder, or common window glass, not exceeding three hundred and eighty-four square inches,  $\frac{1}{2}$  cent per square foot; all above that, 1 cent per square foot; and all fluted, rolled, ribbed, or rough plate glass, weighing over one hundred pounds per one hundred square feet, shall pay an additional duty on the excess at the same rates herein imposed: *Provided*, That all of the above plate glass, when ground, smoothed, or otherwise obscured, shall be subject to the same rate of duty as cast polished plate glass unsilvered.

88. Cast polished plate glass, finished or unfinished and unsilvered, or the same containing a wire netting within itself, not exceeding three hundred and eighty-four square inches, 6 cents per square foot; above that, and not exceeding seven hundred and twenty square inches, 8 cents per square foot; all above that, 12 cents per square foot.

89. Cast polished plate glass, silvered, cylinder and crown glass, silvered, and looking-glass plates exceeding in size one hundred and forty-four square inches, shall be subject to a duty of 1 cent per square foot in addition to the rates otherwise chargeable on such glass unsilvered: *Provided*, That no looking-glass plates or glass silvered, when framed, shall pay a less rate of duty than

that imposed upon similar glass of like description not framed, but shall pay in addition thereto upon such frames the rate of duty applicable thereto when imported separate.

90. Cast polished plate glass, silvered or unsilvered, and cylinder, crown, or common window glass, silvered or unsilvered, polished or unpolished, when bent, ground, obscured, frosted, sanded, enameled, beveled, etched, embossed, engraved, flashed, stained, colored, painted, ornamented, or decorated, shall be subject to a duty of 4 per centum ad valorem in addition to the rates otherwise chargeable thereon.

91. Spectacles, eyeglasses, and goggles, and frames for the same, or parts thereof, finished or unfinished, 35 per centum ad valorem.

92. Lenses of glass or pebble, molded or pressed, or ground and polished to a spherical, cylindrical, or prismatic form, and ground and polished plano or coquill glasses, wholly or partly manufactured, strips of glass, not more than three inches wide, ground or polished on one or both sides to a cylindrical or prismatic form, including those used in the construction of gauges, and glass slides for magic lanterns, 25 per centum ad valorem.

93. Opera and field glasses, optical instruments and frames and mountings for the same; all the foregoing not specially provided for in this section, 35 per centum ad valorem.

94. Surveying instruments, telescopes, microscopes, photographic and projection lenses, and frames and mountings for the same, 25 per centum ad valorem.

95. Stained or painted glass windows, or parts thereof, and all mirrors, not exceeding in size one hundred and forty-four square inches, with or without frames or cases; incandescent electric-light bulbs and lamps, with or without filaments; and all glass or manufactures of glass or paste or of which glass or paste is the component material of chief value, not specially provided for in this section, 30 per centum ad valorem.

96. Fusible and glass enamel, not specially provided for in this section, 20 per centum ad valorem; opal or cylinder glass tiles or tiling, 30 per centum ad valorem.

97. Marble, breccia, and onyx, in block, rough or squared only, 50 cents per cubic foot; marble, breccia, and onyx, sawed or dressed, over two inches in thickness, 75 cents per cubic foot; slabs or paving tiles of marble or onyx, containing not less than four superficial inches, if not more than one inch in thickness, 6 cents per superficial foot; if more than one inch and not more than one and one-half inches in thickness, 8 cents per superficial foot; if more than one and one-half inches and not more than two inches in thickness, 10 cents per superficial foot; if rubbed in whole or in part, 2 cents per superficial foot in addition; mosaic cubes of marble or onyx, not exceeding two cubic inches in size, if loose, 20 per centum ad valorem; if attached to paper or other material, 35 per centum ad valorem.

98. Marble, breccia, onyx, alabaster, and jet, wholly or partly manufactured into monuments, benches, vases, and other articles, or of which these substances or either of them is the component material of chief value, and all articles composed wholly or in chief value of agate, rock crystal, or other semiprecious stones, except such as are cut into shapes and forms fitting them expressly for use in the construction of jewelry, not specially provided for in this section, 45 per centum ad valorem.

99. Freestone, granite, sandstone, limestone, lava, and all other stone suitable for use as monumental or building stone, except marble, breccia, and onyx,

not specially provided for in this section, hewn, dressed, or polished, or otherwise manufactured, 25 per centum ad valorem; unmanufactured, or not dressed, hewn, or polished, 3 cents per cubic foot.

100. Grindstones, finished or unfinished, \$1.50 per ton.

101. Slates, slate chimney pieces, mantels, slabs for tables, roofing slates, and all other manufactures of slate, not specially provided for in this section, 10 per centum ad valorem.

#### SCHEDULE C—METALS AND MANUFACTURES OF.

102. Chrome or chromium metal, ferrochrome or ferrochromium, ferromolybdenum, ferrophosphorus, ferrotitanium, ferrotungsten, ferrovandium, molybdenum, titanium, tantalum, tungsten or wolfram metal, and ferrosilicon, and other alloys used in the manufacture of steel, not specially provided for in this section, 15 per centum ad valorem.

103. Muck bars, bar iron, square iron, rolled or hammered, round iron, in coils or rods, bars or shapes of rolled or hammered iron not specially provided for in this section, 5 per centum ad valorem.

104. Beams, girders, joists, angles, channels, car-truck channels, T. columns and posts or parts or sections of columns and posts, deck and bulb beams, sashes, frames, and building forms, together with all other structural shapes of iron or steel, whether plain, punched, or fitted for use, or whether assembled or manufactured, 10 per centum ad valorem.

105. Boiler or other plate iron or steel, and strips of iron or steel, not specially provided for in this section; sheets of iron or steel, common or black, of whatever dimensions, whether plain, corrugated or crimped, including crucible plate steel and saw plates, cut or sheared to shape or otherwise, or unsheared, and skelp iron or steel, whether sheared or rolled in grooves, or otherwise, 12 per centum ad valorem.

106. Iron or steel anchors or parts thereof; forgings of iron or steel, or of combined iron and steel, but not machined, tooled, or otherwise advanced in condition by any process or operation subsequent to the forging process, not specially provided for in this section, 12 per centum ad valorem; antifriction balls, ball bearings, and roller bearings, of iron or steel or other metal, finished or unfinished, and parts thereof, 35 per centum ad valorem.

107. Hoop, band, or scroll iron or steel not otherwise provided for in this section, and barrel hoops of iron or steel, wholly or partly manufactured, 10 per centum ad valorem.

108. Railway fishplates or splice bars made of iron or steel, 10 per centum ad valorem.

109. All iron or steel sheets, plates, or strips, and all hoop, band, or scroll iron or steel, when galvanized or coated with zinc, spelter, or other metals, or any alloy of those metals; sheets or plates composed of iron, steel, copper, nickel, or other metal with layers of other metal or metals imposed thereon by forging, hammering, rolling, or welding; sheets of iron or steel, polished, planished, or glanced, by whatever name designated, including such as have been pickled or cleaned by acid, or by any other material or process, or which are cold rolled, smoothed only, not polished, and such as are cold hammered, blued, brightened, tempered, or polished by any process to such perfected surface finish or polish better than the grade of cold rolled, smoothed only; and sheets or plates of iron or steel, or taggers iron or steel, coated with tin or lead, or with a mixture of which these metals, or either of them is a com-

ponent part, by the dipping or any other process, and commercially known as tin plates, terne plates, and taggers tin, and tin plates coated with metal, and metal sheets decorated in colors or coated with nickel or other metals by dipping, printing, stenciling, or other process, 15 per centum ad valorem.

110. Steel bars, and tapered or beveled bars; mill shafting; pressed, sheared, or stamped shapes, not advanced in value or condition by any process or operation subsequent to the process of stamping; hammer molds or swaged steel; gun-barrel molds not in bars; all descriptions and shapes of dry sand, loam, or iron molded steel castings, sheets, and plates; all the foregoing, if made by the Bessemer, Siemens-Martin, open-hearth, or similar processes, not containing alloys, such as nickel, cobalt, vanadium, chromium, tungsten or wolfram, molybdenum, titanium, iridium, uranium, tantalum, boron, and similar alloys, 8 per centum ad valorem; steel ingots, cogged ingots, blooms and slabs, die blocks or blanks; billets and bars and tapered or beveled bars; pressed, sheared, or stamped shapes not advanced in value or condition by any process or operation subsequent to the process of stamping; hammer molds or swaged steel; gun-barrel molds not in bars; alloys used as substitutes for steel in the manufacture of tools; all descriptions and shapes of dry sand, loam, or iron molded castings, sheets, and plates; rolled wire rods in coils or bars not smaller than twenty one-hundredths of one inch in diameter, and steel not specially provided for in this section, all the foregoing when made by the crucible, electric, or cementation process, either with or without alloys, and finished by rolling, hammering, or otherwise, and all steels by whatever process made, containing alloys such as nickel, cobalt, vanadium, chromium, tungsten, wolfram, molybdenum, titanium, iridium, uranium, tantalum, boron, and similar alloys, 15 per centum ad valorem.

111. Steel wool or steel shavings, 20 per centum ad valorem.

112. Grit, shot, and sand made of iron or steel, that can be used as abrasives, 30 per centum ad valorem.

113. Rivet, screw, fence, nail, and other iron or steel wire rods, whether round, oval, or square, or in any other shape, and flat rods up to six inches in width ready to be drawn or rolled into wire or strips, all the foregoing in coils or otherwise, including wire rods and iron or steel bars, cold rolled, cold drawn, cold hammered, or polished in any way in addition to the ordinary process of hot rolling or hammering, not specially provided for in this section, 10 per centum ad valorem: *Provided*, That all round iron or steel rods smaller than twenty one-hundredths of one inch in diameter shall be classed and dutiable as wire.

114. Round iron or steel wire; wire composed of iron, steel, or other metal, except gold or silver, covered with cotton, silk, or other material; corset clasps, corset-steels, dress steels, and all flat wires and steel in strips not thicker than number fifteen wire gauge and not exceeding five inches in width, whether in long or short lengths, in coils or otherwise, and whether rolled or drawn through dies or rolls, or otherwise produced; telegraph, telephone, and other wires and cables composed of metal and rubber, or of metal, rubber, and other materials; iron and steel wire coated by dipping, galvanizing, or similar process with zinc, tin, or other metal; all other wire not specially provided for in this section and articles manufactured wholly or in chief value of any wire or wires provided for in this section; all the foregoing 15 per centum ad valorem; wire heddles and healds, 25 per centum ad valorem; wire rope, 30 per centum ad valorem.

115. No article not specially provided for in this section, which is wholly

or partly manufactured from tin plate, terne plate, or the sheet, plate, hoop, band, or scroll iron or steel herein provided for, or of which such tin plate, terne plate, sheet, plate, hoop, band, or scroll iron or steel shall be the material of chief value, shall pay a lower rate of duty than that imposed on the tin plate, terne plate, or sheet, plate, hoop, band, or scroll iron or steel from which it is made, or of which it shall be the component thereof of chief value.

116. No allowance or reduction of duties for partial loss or damage in consequence of rust or of discoloration shall be made upon any description of iron or steel, or upon any article wholly or partly manufactured of iron or steel, or upon any manufacture of iron or steel.

117. All metal produced from iron or its ores, which is cast and malleable, of whatever description or form, without regard to the percentage of carbon contained therein, whether produced by cementation, or converted, cast, or made from iron or its ores, by the crucible, Bessemer, Clapp-Griffith, pneumatic, Thomas-Gilchrist, basic, Siemens-Martin, or open-hearth process, or by the equivalent of either, or by a combination of two or more of the processes, or their equivalents, or by any fusion or other process which produces from iron or its ores a metal either granular or fibrous in structure, which is cast and malleable, excepting what is known as malleable-iron castings, shall be classed and denominated as steel.

118. Anvils of iron or steel, or of iron and steel combined, by whatever process made, or in whatever stage of manufacture, 15 per centum ad valorem.

119. Automobiles, valued at \$2,000 or more, and automobile bodies, 45 per centum ad valorem; automobiles valued at less than \$2,000, 30 per centum ad valorem; automobile chassis, and finished parts of automobiles, not including tires, 30 per centum ad valorem.

120. Bicycles, motor cycles, and finished parts thereof, not including tires, 25 per centum ad valorem.

121. Axles, or parts thereof, axle bars, axle blanks, or forgings for axles, whether of iron or steel, without reference to the stage or state of manufacture, not otherwise provided for in this section, 10 per centum ad valorem: *Provided*, That when iron or steel axles are imported fitted in wheels, or parts of wheels, of iron or steel, they shall be dutiable at the same rate as the wheels in which they are fitted.

122. Blacksmiths' hammers, tongs, and sledges, track tools, wedges, and crowbars, whether of iron or steel, 10 per centum ad valorem.

123. Nuts or nut blanks, and washers, 5 per centum ad valorem; bolts of iron or steel, with or without threads or nuts, or bolts blanks, finished hinges or hinge blanks, 10 per centum ad valorem; spiral nut locks and lock washers, whether of iron or steel, 30 per centum ad valorem.

124. Card clothing not actually and permanently fitted to and attached to carding machines or to parts thereof at the time of importation, when manufactured with round iron or untempered round steel wire, 10 per centum ad valorem; when manufactured with tempered round steel wire, or with plated wire or other than round iron or steel wire, or with felt face, or wool face, or rubber face cloth containing wool, 35 per centum ad valorem.

125. Cast iron pipe of every description, cast-iron andirons, plates, stove plates, sadirons, tailor's irons, hatter's irons, and castings and vessels wholly of cast iron, including all castings of iron or cast-iron plates which have been chiseled, drilled, machined, or otherwise advanced in condition by processes or operations subsequent to the casting process but not made up into articles or finished machine parts; castings of malleable iron not specially provided for

in this section; cast hollow ware, coated, glazed, or tinned, 10 per centum ad valorem.

126. Chain or chains of all kinds, made of iron or steel, not specially provided for in this section, 20 per centum ad valorem; sprocket and machine chains, 25 per centum ad valorem.

127. Lap-welded, butt-welded, seamed, or jointed iron or steel tubes, pipes, flues, or stays; cylindrical or tubular tanks or vessels, for holding gas, liquids, or other material, whether full or empty; flexible metal tubing or hose, not specially provided for in this section, whether covered with wire or other material, or otherwise, including any appliances or attachments affixed thereto; welded cylindrical furnaces, tubes or flues made from plate metal, and corrugated, ribbed, or otherwise reenforced against collapsing pressure, and all other iron or steel tubes, finished, not specially provided for in this section, 20 per centum ad valorem.

128. Penknives, pocketknives, clasp knives, pruning knives, budding knives, erasers, manicure knives, and all knives by whatever name known, including such as are denominatively mentioned in this section, which have folding or other than fixed blades or attachments, and razors, all the foregoing, whether assembled but not fully finished or finished; valued at not more than \$1 per dozen, 35 per centum ad valorem; valued at more than \$1 per dozen, 55 per centum ad valorem: *Provided*, That blades, handles, or other parts of any of the foregoing knives, razors, or erasers shall be dutiable at not less than the rate herein imposed upon the knives, razors, and erasers, of which they are parts. Scissors and shears, and blades for the same, finished or unfinished, 30 per centum ad valorem: *Provided further*, That all articles specified in this paragraph shall, when imported, have the name of the maker or purchaser and beneath the same the name of the country of origin die-sunk conspicuously and indelibly on the blade, shank, or tang of at least one or, if practicable, each and every blade thereof.

129. Sword blades, and swords and side arms, irrespective of quality or use, in part of metal, 30 per centum ad valorem.

130. Table, butchers', carving, cooks', hunting, kitchen, bread, butter, vegetable, fruit, cheese, carpenters' bench, curriers', drawing, farriers', fleshing, hay, tanners', plumbers', painters', palette, artists', and shoe knives, forks and steels, finished or unfinished, without handles, 25 per centum ad valorem; with handles, 30 per centum ad valorem: *Provided*, That all the articles specified in this paragraph, when imported, shall have the name of the maker or purchaser, and beneath the same the name of the country of origin indelibly stamped or branded thereon in a place that shall not be covered thereafter.

131. Files, file blanks, rasps, and floats, of all cuts and kinds, 25 per centum ad valorem.

132. Muskets, air-rifles, muzzle-loading shotguns and rifles, and parts thereof, 15 per centum ad valorem.

133. Breech-loading shotguns and rifles, combination shotguns and rifles, and parts thereof and fittings therefor, including barrels further advanced than rough bored only; pistols, whether automatic, magazine, or revolving, or parts thereof and fittings therefor, 35 per centum ad valorem.

134. Table, kitchen, and hospital utensils or other similar hollow ware composed of iron or steel, enameled or glazed with vitreous glasses; table, kitchen, and hospital utensils or other similar hollow ware composed wholly or in chief value of aluminum; all the foregoing not especially provided for in this section, 25 per centum ad valorem.

135. Needles for knitting or sewing machines, latch needles, crochet needles, and tape needles, knitting and all other needles not specially provided for in this section, bodkins of metal, and needle cases or needle books furnished with assortments of needles or combinations of needles and other articles, 20 per centum ad valorem; but no articles other than the needles which are specifically named in this section shall be dutiable as needles unless having an eye and fitted and used for carrying a thread.

136. Fishhooks, fishing rods and reels, artificial flies, artificial baits, snelled hooks, and all other fishing tackle or parts thereof, not specially provided for in this section, except fishing lines, fishing nets and seines, 30 per centum ad valorem: *Provided*, That any prohibition of the importation of feathers in this section shall not be construed as applying to artificial flies used for fishing.

137. Steel plates engraved, stereotype plates, electrotypes plates, halftone plates, photogravure plates, photo-engraved plates, and plates of other materials, engraved for printing, plates of iron or steel engraved or fashioned for use in the production of designs, patterns, or impressions on glass in the process of manufacturing plate or other glass, 15 per centum ad valorem; lithographic plates of stone or other material engraved, drawn, or prepared, and wet transfer paper or paper prepared wholly with glycerin, or glycerin combined with other materials, containing the imprints taken from lithographic plates, 25 per centum ad valorem.

138. Rivets, studs, and steel points, lathed, machined, or brightened, and rivets or studs for nonskidding automobile tires, and rivets of iron or steel, not specially provided for in this section, 20 per centum ad valorem.

139. Crosscut saws, mill saws, pit and drag saws, circular saws, steel band saws, finished or further advanced than tempered and polished, hand, back, and all other saws, not specially provided for in this section, 12 per centum ad valorem.

140. Screws, commonly called wood screws, made of iron or steel, 25 per centum ad valorem.

141. Umbrella and parasol ribs and stretchers, composed in chief value of iron, steel, or other metal, in frames or otherwise, and tubes for umbrellas, wholly or partially finished, 35 per centum ad valorem.

142. Wheels for railway purposes, or parts thereof, made of iron or steel, and steel-tired wheels for railway purposes, whether wholly or partly finished, and iron or steel locomotive, car, or other railway tires or parts thereof, wholly or partly manufactured, 20 per centum ad valorem: *Provided*, That when wheels for railway purposes, or parts thereof, of iron or steel, are imported with iron or steel axles fitted in them, the wheels and axles together shall be dutiable at the same rate as is provided for the wheels when imported separately.

143. Aluminum, aluminum scrap, and alloys of any kind in which aluminum is the component material of chief value, in crude form, 2 cents per pound; aluminum in plates, sheets, bars, strips, and rods,  $3\frac{1}{2}$  cents per pound; barium, calcium, magnesium, sodium, and potassium, and alloys of which said metals are the component material of chief value, 25 per centum ad valorem.

144. Antimony, as regulus or metal, and matte containing antimony but not containing more than 10 per centum of lead, 10 per centum ad valorem; antimony oxide, salts, and compounds of, 25 per centum ad valorem.

145. Argentine, albata, or German silver, unmanufactured, 15 per centum ad valorem.

146. Bronze powder, brocades, flitters, and metallics; bronze, or Dutch-metal or aluminum, in leaf, 25 per centum ad valorem.

147. Copper, in rolled plates, called braziers' copper, sheets, rods, strips, pipes, and copper bottoms, sheathing or yellow metal of which copper is the component material of chief value, and not composed wholly or in part of iron ungalvanized, 5 per centum ad valorem.

148. Gold leaf, 35 per centum ad valorem.

149. Silver leaf, 30 per centum ad valorem.

150. Tinsel wire, lame or lahn, made wholly or in chief value of gold, silver, or other metal, 6 per centum ad valorem; bullions and metal threads, made wholly or in chief value of tinsel wire, lame or lahn, 25 per centum ad valorem; fabrics, ribbons, beltings, toys, or other articles, made wholly or in chief value of tinsel wire, lame or lahn, or of tinsel wire, lame, or lahn, and india rubber, bullions, or metal threads, not specially provided for in this section, 40 per centum ad valorem.

151. Belt buckles, trousers buckles, waistcoat buckles, snap fasteners and clasps by whatever name known, any of the foregoing made wholly or in chief value of iron or steel; hooks and eyes, metallic; steel trousers buttons, and metal buttons; all the foregoing and parts thereof, not otherwise specially provided for in this section, 15 per centum ad valorem.

152. Lead-bearing ores of all kinds containing more than 3 per centum of lead,  $\frac{3}{4}$  cent per pound on the lead contained therein: *Provided*, That on all importations of lead-bearing ores the duties shall be estimated at the port of entry, and a bond given in double the amount of such estimated duties for the transportation of the ores by common carriers bonded for the transportation of appraised or unappraised merchandise to properly equipped sampling or smelting establishments, whether designated as bonded warehouses or otherwise. On the arrival of the ores at such establishments they shall be sampled according to commercial methods under the supervision of Government officers, who shall be stationed at such establishments, and who shall submit the samples thus obtained to a Government assayer, designated by the Secretary of the Treasury, who shall make a proper assay of the sample and report the result to the proper customs officers, and the import entries shall be liquidated thereon, except in case of ores that shall be removed to a bonded warehouse to be refined for exportation as provided by law. And the Secretary of the Treasury is authorized to make all necessary regulations to enforce the provisions of this paragraph.

153. Lead dross, lead bullion or base bullion, lead in pigs and bars, lead in any form not specially provided for in this section, old refuse lead run into blocks and bars, and old scrap lead fit only to be remanufactured; lead in sheets, pipe, shot, glaziers' lead, and lead wire; all the foregoing, 25 per centum ad valorem, on the lead contained therein.

154. Metallic mineral substances in a crude state, and metals unwrought, whether capable of being wrought or not, not specially provided for in this section, 10 per centum ad valorem; monazite sand and thorite; thorium, oxide of and salts of; gas, kerosene, or alcohol mantles treated with chemicals or metallic oxides, 25 per centum ad valorem; and gas-mantle scrap consisting in chief value of metallic oxides, 10 per centum ad valorem.

155. Nickel, nickel oxide, alloy of any kind in which nickel is a component material of chief value, in pigs, ingots, bars, rods, or plates, 10 per centum ad valorem; sheets or strips, 20 per centum ad valorem.



156. Pens, metallic, not specially provided for in this section, 8 cents per gross; with nib and barrel in one piece, 12 cents per gross.

157. Penholder tips, penholders and parts thereof, gold pens, fountain pens, and stylographic pens; combination penholders, comprising penholder, pencil, rubber eraser, automatic stamp, or other attachment, 25 per centum ad valorem: *Provided*, That pens and penholders shall be assessed for duty separately.

158. Pins with solid heads, without ornamentation, including hair, safety, hat, bonnet, and shawl pins; any of the foregoing composed wholly of brass, copper, iron, steel, or other base metal, not plated with gold or silver, and not commonly known as jewelry, 20 per centum ad valorem.

159. Quicksilver, 10 per centum ad valorem. The flasks, bottles, or other vessels in which quicksilver is imported shall be subject to the same rate of duty as they would be subjected to if imported empty.

160. Type metal, and types, 15 per centum ad valorem.

161. Watch movements, whether imported in cases or not, watch-cases and parts of watches, chronometers, box or ship, and parts thereof, lever clock movements having jewels in the escapement, and clocks containing such movements, all other clocks and parts thereof, not otherwise provided for in this section, whether separately packed or otherwise, not composed wholly or in chief value of china, porcelain, parian, bisque, or earthenware, 30 per centum ad valorem; all jewels for use in the manufacture of watches, clocks, or meters, 10 per centum ad valorem; time detectors, 15 per centum ad valorem; enameled dials and dial plates for watches or other instruments, 30 per centum ad valorem: *Provided*, That all watch and clock dials, whether attached to movements or not, shall have indelibly painted or printed thereon the name of the country of origin, and that all watch movements, and plates, lever clock movements with jewels in the escapement, whether imported assembled or knocked down for reassembling, and cases of foreign manufacture, shall have the name of the manufacturer and country of manufacture cut, engraved, or die-sunk conspicuously and indelibly on the plate of the movement and the inside of the case, respectively, and the movements and plates shall also have marked thereon by one of the methods indicated the number of jewels and adjustments, said numbers to be expressed either in words or in Arabic numerals; and if the movement is not adjusted, the word "unadjusted" shall be marked thereon by one of the methods indicated; and none of the aforesaid articles shall be delivered to the importer unless marked in exact conformity to this direction.

162. Zinc-bearing ores of all kinds, including calamine, 10 per centum ad valorem upon the zinc contained therein: *Provided*, That on all importations of zinc-bearing ores the duties shall be estimated at the port of entry, and a bond given in double the amount of such estimated duties for the transportation of the ores by common carriers bonded for the transportation of appraised or unappraised merchandise to properly equipped sampling or smelting establishments, whether designated as bonded warehouses or otherwise. On the arrival of the ores at such establishments they shall be sampled according to commercial methods under the supervision of Government officers, who shall be stationed at such establishments, and who shall submit the samples thus obtained to a Government assayer, designated by the Secretary of the Treasury, who shall make a proper assay of the sample and report the result to the proper custom officers, and the import entries shall be liquidated thereon, except in case of ores that shall be removed to a bonded warehouse to be refined for exportation as provided by law. And the Secretary of the Treasury is au-

thorized to make all necessary regulations to enforce the provisions of this paragraph.

163. Zinc in blocks, pigs, or sheets, and zinc dust; and old and worn-out zinc fit only to be remanufactured, 15 per centum ad valorem.

164. Bottle caps of metal, collapsible tubes, and sprinkler tops, if not decorated, colored, waxed, lacquered, enameled, lithographed, electroplated, or embossed in color, 30 per centum ad valorem; if decorated, colored, waxed, lacquered, enameled, lithographed, electroplated, or embossed in color, 40 per centum ad valorem.

165. All steam engines, steam locomotives, printing presses, and machine tools, 15 per centum ad valorem; embroidering machines, and lace-making machines, including machines for making lace curtains, nets, or nettings, 25 per centum ad valorem; machine tools as used in this paragraph shall be held to mean any machine operated by other than hand power which employs a tool for working on metal.

166. Nippers and pliers of all kinds wholly or partly manufactured, 30 per centum ad valorem.

167. Articles or wares not specially provided for in this section; if composed wholly or in part of platinum, gold, or silver, and articles or wares plated with gold or silver, and whether partly or wholly manufactured, 50 per centum ad valorem; if composed wholly or in chief value of iron, steel, lead, copper, brass, nickel, pewter, zinc, aluminum, or other metal, but not plated with gold or silver; and whether partly or wholly manufactured, 20 per centum ad valorem.

#### SCHEDULE D—WOOD AND MANUFACTURES OF.

168. Briar root or briar wood, ivy or laurel root, and similar wood unmanufactured, or not further advanced than cut into blocks suitable for the articles into which they are intended to be converted, 10 per centum ad valorem.

169. Cedar commercially known as Spanish cedar, *lignum-vitæ*, lancewood, ebony, box, granadilla, mahogany, rosewood, and satinwood; all the foregoing when sawed into boards, planks, deals, or other forms, and not specially provided for in this section, and all cabinet woods not further manufactured than sawed, 10 per centum ad valorem; veneers of wood, 15 per centum ad valorem.

170. Paving posts, railroad ties, and telephone, trolley, electric-light, and telegraph poles of cedar or other woods, 10 per centum ad valorem.

171. Casks, barrels, and hogsheads (empty), sugar-box shooks, and packing boxes (empty), and packing-box shooks, of wood, not specially provided for in this section, 15 per centum ad valorem.

172. Boxes, barrels, or other articles containing oranges, lemons, limes, grapefruit, shaddock, or pomelos, 15 per centum ad valorem: *Provided*, That the thin wood, so called, comprising the sides, tops and bottoms of fruit boxes of the growth and manufacture of the United States, exported as fruit box shooks, may be reimported in completed form, filled with fruit, without the payment of duty; but proof of the identity of such shooks shall be made under regulations to be prescribed by the Secretary of the Treasury.

173. Chair cane or reeds wrought or manufactured from rattans or reeds, 10 per centum ad valorem; osier or willow, including chip of and split willow, prepared for basket makers' use, 10 per centum ad valorem; manufactures of osier or willow and willow furniture, 25 per centum ad valorem.

174. Toothpicks of wood or other vegetable substance, 25 per centum ad valorem; butchers' and packers' skewers of wood, 10 cents per thousand.

175. Blinds, curtains, shades, or screens any of the foregoing in chief value of bamboo, wood, straw, or compositions of wood, not specially provided for in this section, 20 per centum ad valorem; if stained, dyed, painted, printed, polished, grained, or creosoted, and baskets in chief value of like material, 25 per centum ad valorem.

176. House or cabinet furniture wholly or in chief value of wood, wholly or partly finished, and manufactures of wood or bark, or of which wood or bark is the component material of chief value, not specially provided for in this section, 15 per centum ad valorem.

#### SCHEDULE E—SUGAR, MOLASSES, AND MANUFACTURES OF.

177. Sugars, tank bottoms, sirups of cane juice, melada, concentrated melada, concrete and concentrated molasses, testing by the polariscope not above seventy-five degrees, seventy-one one-hundredths of 1 cent per pound, and for every additional degree shown by the polariscopic test, twenty-six one-thousandths of 1 cent per pound additional, and fractions of a degree in proportion; molasses testing not above forty degrees, 15 per centum ad valorem; testing above forty degrees and not above fifty-six degrees,  $2\frac{1}{2}$  cents per gallon; testing above fifty-six degrees,  $4\frac{1}{2}$  cents per gallon; sugar drainings and sugar sweepings shall be subject to duty as molasses or sugar, as the case may be, according to polariscopic test: *Provided*, That the duties imposed in this paragraph shall be effective on and after the first day of March, nineteen hundred and fourteen, until which date the rates of duty provided by paragraph two hundred and sixteen of the tariff Act approved August fifth, nineteen hundred and nine, shall remain in force: *Provided, however*, That so much of paragraph two hundred and sixteen of an Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes, approved August fifth, nineteen hundred and nine, as relates to the color test denominated as Number Sixteen Dutch standard in color, shall be and is hereby repealed: *Provided further*, That on and after the first day of May, nineteen hundred and sixteen, the articles hereinbefore enumerated in this paragraph shall be admitted free of duty.

178. Maple sugar and maple sirup, 3 cents per pound; glucose or grape sugar,  $1\frac{1}{2}$  cents per pound; sugar cane in its natural state, or unmanufactured, 15 per centum ad valorem: *Provided*, That on and after the first day of May, nineteen hundred and sixteen, the articles hereinbefore enumerated in this paragraph shall be admitted free of duty.

179. Saccharin, 65 cents per pound.

180. Sugar candy and all confectionery not specially provided for in this section, valued at 15 cents per pound or less, 2 cents per pound; valued at more than 15 cents per pound, 25 per centum ad valorem. The weight and the value of the immediate coverings, other than the outer packing case or other covering, shall be included in the dutiable weight and the value of the merchandise.

#### SCHEDULE F—TOBACCO AND MANUFACTURES OF.

181. Wrapper tobacco, and filler tobacco when mixed or packed with more than 15 per centum of wrapper tobacco, and all leaf tobacco the product of two

or more countries or dependencies when mixed or packed together, if unstemmed, \$1.85 per pound; if stemmed, \$2.50 per pound; filler tobacco not specially provided for in this section, if unstemmed, 35 cents per pound; if stemmed, 50 cents per pound.

182. The term wrapper tobacco as used in this section means that quality of leaf tobacco which has the requisite color, texture, and burn, and is of sufficient size for cigar wrappers, and the term filler tobacco means all other leaf tobacco. Collectors of customs shall not permit entry to be made, except under regulations to be prescribed by the Secretary of the Treasury, of any leaf tobacco, unless the invoices of the same shall specify in detail the character of such tobacco, whether wrapper or filler, its origin and quality. In the examination for classification of any imported leaf tobacco, at least one bale, box, or package in every ten, and at least one in every invoice, shall be examined by the appraiser or person authorized by law to make such examination, and at least ten hands shall be examined in each examined bale, box, or package.

183. All other tobacco, manufactured or unmanufactured, not specially provided for in this section, 55 cents per pound; scrap tobacco, 35 cents per pound.

184. Snuff and snuff flour, manufactured of tobacco, ground dry, or damp, and pickled, scented, or otherwise, of all descriptions, 55 cents per pound.

185. Cigars, cigarettes, cheroots of all kinds, \$4.50 per pound and 25 per centum ad valorem, and paper cigars and cigarettes, including wrappers, shall be subject to the same duties as are herein imposed upon cigars.

#### SCHEDULE G—AGRICULTURAL PRODUCTS AND PROVISIONS.

186. Horses and mules, 10 per centum ad valorem.

187. All live animals not specially provided for in this section, 10 per centum ad valorem.

188. Barley, 15 cents per bushel of forty-eight pounds.

189. Barley malt, 25 cents per bushel of thirty-four pounds.

190. Barley, pearled, patent, or hulled, 1 cent per pound.

191. Macaroni, vermicelli, and all similar preparations, 1 cent per pound.

192. Oats, 6 cents per bushel of thirty-two pounds; oatmeal and rolled oats, 30 cents per one hundred pounds; oat hulls, 8 cents per one hundred pounds.

193. Rice, cleaned, 1 cent per pound; uncleaned rice, or rice free of the outer hull and still having the inner cuticle on,  $\frac{3}{8}$  of 1 cent per pound; rice flour, and rice meal, and rice broken which will pass through a number twelve sieve of a kind prescribed by the Secretary of the Treasury,  $\frac{1}{4}$  cent per pound; paddy, or rice having the outer hull on,  $\frac{3}{8}$  of 1 cent per pound.

194. Biscuits, bread, wafers, cakes, and other baked articles, and puddings, by whatever name known, containing chocolate, nuts, fruit, or confectionery of any kind, and without regard to the component material of chief value, 25 per centum ad valorem.

195. Butter and butter substitutes,  $2\frac{1}{2}$  cents per pound.

196. Cheese and substitutes therefor, 20 per centum ad valorem.

197. Beans, and lentils, not specially provided for, 25 cents per bushel of sixty pounds.

198. Beets of all kinds, 5 per centum ad valorem.

199. Beans, peas, prepared or preserved, or contained in tins, jars, bottles, or similar packages, including the weight of immediate coverings, 1 cent per

pound; mushrooms and truffles, including the weight of immediate coverings,  $2\frac{1}{2}$  cents per pound.

200. Vegetables, if cut, sliced or otherwise reduced in size, or if parched or roasted, or if pickled, or packed in salt, brine, oil, or prepared in any way; any of the foregoing not specially provided for in this section, and bean stick or bean cake, miso, and similar products, 25 per centum ad valorem.

201. Pickles, including pickled nuts, sauces of all kinds, not specially provided for in this section, and fish paste or sauce, 25 per centum ad valorem.

202. Cider, 2 cents per gallon.

203. Eggs frozen or otherwise prepared or preserved in tins or other packages, not specially provided for in this section, including the weight of the immediate coverings or containers, 2 cents per pound; frozen or liquid egg albumen, 1 cent per pound.

204. Eggs, dried, 10 cents per pound; eggs, yolk of, 10 per centum ad valorem.

205. Hay, \$2 per ton.

206. Honey, 10 cents per gallon.

207. Hops, 16 cents per pound; hop extract and lupulin, 50 per centum ad valorem.

208. Garlic, 1 cent per pound; onions, 20 cents per bushel of 57 pounds.

209. Peas, green or dried, in bulk or in barrels, sacks, or similar packages, 10 cents per bushel of sixty pounds; split peas, 20 cents per bushel of sixty pounds; peas in cartons, papers, or other similar packages, including the weight of the immediate covering,  $\frac{1}{3}$  cent per pound.

210. Orchids, palms, azalea indica, and cut flowers, preserved or fresh, 25 per centum ad valorem; lily of the valley pips, tulips, narcissus, begonia, and gloxinia bulbs, \$1 per thousand; hyacinth bulbs, astilbe, dielytra, and lily of the valley clumps, \$2.50 per thousand; lily bulbs and calla bulbs or corms, \$5 per thousand; herbaceous peony, Iris Kaempferri or Germanica, canna, dahlia, and amaryllis bulbs, \$10 per thousand; all other bulbs, roots, root stocks, corms, and tubers, which are cultivated for their flowers or foliage, 50 cents per thousand: *Provided*, That all mature mother flowering bulbs imported exclusively for propagating purposes shall be admitted free of duty.

211. Stocks, cuttings, or seedlings of Myrobalan plum, Mahaleb or Mazzard cherry, Manetti multiflora and briar rose, Rosa Rugosa, three years old or less, \$1 per thousand plants; stocks, cuttings, or seedlings of pear, apple, quince, and the Saint Julien plum, three years old or less, \$1 per thousand plants; rose plants, budded, grafted, or grown on their own roots, 4 cents each; stocks, cuttings, and seedlings, of all fruit and ornamental trees, deciduous and evergreen shrubs and vines, and all trees, shrubs, plants, and vines commonly known as nursery or greenhouse stock, not specially provided for in this section, 15 per centum ad valorem.

212. Seeds: Castor beans or seeds, 15 cents per bushel of fifty pounds; flaxseed or linseed and other oil seeds not specially provided for in this section, 20 cents per bushel of fifty-six pounds; poppy seed, 15 cents per bushel of forty-seven pounds; mushroom spawn, and spinach seed, 1 cent per pound; canary seed,  $\frac{1}{2}$  cent per pound; caraway seed, 1 cent per pound; anise seed, 2 cents per pound; beet (except sugar beet), carrot, corn salad, parsley, parsnip, radish, turnip, and rutabaga seed, 3 cents per pound; cabbage, collard, kale, and kohlrabi seed, 6 cents per pound; egg plant and pepper seed, 10 cents per pound; seeds of all kinds not specially provided for in this section, 5 cents

per pound: *Provided*, That no allowance shall be made for dirt or other impurities in seeds provided for in this paragraph.

213. Straw, 50 cents per ton.

214. Teazels, 15 per centum ad valorem.

215. Vegetables in their natural state, not specially provided for in this section, 15 per centum ad valorem.

216. Fish, except shellfish, by whatever name known, packed in oil or in oil and other substances, in bottles, jars, kegs, tin boxes, or cans, 25 per centum ad valorem; all other fish, except shell fish, in tin packages, not specially provided for in this section, 15 per centum ad valorem; caviar and other preserved roe of fish, 30 per centum ad valorem; fish, skinned or boned,  $\frac{3}{4}$  of 1 cent per pound.

217. Apples, peaches, quinces, cherries, plums, and pears, green or ripe, 10 cents per bushel of fifty pounds; berries, edible, in their natural condition,  $\frac{1}{2}$  cent per quart; cranberries, 10 per centum ad valorem; all edible fruits, including berries, when dried, desiccated, evaporated, or prepared in any manner, not specially provided for in this section, 1 cent per pound; comfits, sweetmeats, and fruits of all kinds preserved or packed in sugar, or having sugar added thereto or preserved or packed in molasses, spirits, or their own juices, if containing no alcohol, or containing not over 10 per centum of alcohol, 20 per centum ad valorem; if containing over 10 per centum of alcohol and not specially provided for in this section, 20 per centum ad valorem, and in addition \$2.50 per proof gallon on the alcohol contained therein in excess of 10 per centum; jellies of all kinds, 20 per centum ad valorem; pineapples preserved in their own juice, 20 per centum ad valorem.

218. Figs, 2 cents per pound; plums, prunes, and prunelles, 1 cent per pound; raisins and other dried grapes, 2 cents per pound; dates, 1 cent per pound; currants, Zante or other,  $1\frac{1}{2}$  cents per pound; olives, 15 cents per gallon.

219. Grapes in barrels or other packages, 25 cents per cubic foot of the capacity of the barrels or packages.

220. Lemons, limes, oranges, grapefruit, shaddocks, and pomelos in packages of a capacity of one and one-fourth cubic feet or less, 18 cents per package; in packages of capacity exceeding one and one-fourth cubic feet and not exceeding two and one-half cubic feet, 35 cents per package; in packages exceeding two and one-half and not exceeding five cubic feet, 70 cents per package; in packages exceeding five cubic feet or in bulk,  $\frac{1}{2}$  of 1 cent per pound.

221. Orange peel or lemon peel, preserved, candied, or dried, 1 cent per pound; coconut meat or copra desiccated, shredded, cut, or similarly prepared, and citron or citron peel, preserved, candied, or dried, 2 cents per pound.

222. Pineapples, in barrels or other packages, 6 cents per cubic foot of the capacity of the barrels or packages; in bulk, \$5 per thousand.

223. Almonds, not shelled, 3 cents per pound; almonds, shelled, 4 cents per pound; apricot and peach kernels, 3 cents per pound.

224. Filberts and walnuts of all kinds, not shelled, 2 cents per pound; shelled, 4 cents per pound.

225. Peanuts or ground beans, unshelled,  $\frac{3}{8}$  of 1 cent per pound; shelled,  $\frac{1}{4}$  of 1 cent per pound.

226. Nuts of all kinds, shelled or unshelled, not specially provided for in this section, 1 cent per pound; but no allowance shall be made for dirt or other impurities in nuts of any kind, shelled or unshelled.

227. Venison, and other game,  $1\frac{1}{2}$  cents per pound; game birds, dressed, 30 per centum ad valorem.

228. Extract of meat, not specially provided for in this section, 10 cents per pound; fluid extract of meat, 5 cents per pound, but the dutiable weight of the extract of meat and of the fluid extract of meat shall not include the weight of the packages in which the same is imported.

229. Poultry, live, 1 cent per pound; dead, or prepared in any manner, including the weight of the immediate coverings or containers, 2 cents per pound.

230. Chicory root, raw, dried, or undried, but unground, 1 cent per pound; chicory root, burnt or roasted, ground or granulated, or in rolls, or otherwise prepared, and not specially provided for in this section, 2 cents per pound.

231. Unsweetened chocolate and cocoa, prepared or manufactured, not specially provided for in this section, 8 per centum ad valorem. Sweetened chocolate and cocoa, prepared or manufactured, not specially provided for in this section, valued at 20 cents per pound or less, 2 cents per pound; valued at more than 20 cents per pound, 25 per centum ad valorem. The weight and the value of the immediate coverings, other than the outer packing case or other covering, shall be included in the dutiable weight and the value of the merchandise.

232. Cocoa butter or cocoa butterine, refined deodorized coconut oil, and all substitutes for cocoa butter,  $3\frac{1}{2}$  cents per pound.

233. Dandelion root, and acorns prepared, and articles used as coffee, or as substitutes for coffee not specially provided for in this section, 2 cents per pound.

234. Starch, made from potatoes, 1 cent per pound; all other starch, including all preparations, from whatever substance produced, fit for use as starch,  $\frac{1}{2}$  cent per pound.

235. Spices, unground: Cassia buds, cassia, and cassia vera; cinnamon and cinnamon chips; ginger root, unground and not preserved or candied; nutmegs; pepper, black or white; capsicum or red pepper, or cayenne pepper; and clove stems, 1 cent per pound; cloves, 2 cents per pound; pimento,  $\frac{3}{4}$  of 1 cent per pound; sage,  $\frac{1}{2}$  cent per pound; mace, 8 cents per pound; Bombay or wild mace, 18 cents per pound; ground spices, in each case, the specific duty per pound enumerated in the foregoing part of this paragraph for unground spices, and in addition thereto a duty of 20 per centum ad valorem; mustard, ground or prepared, in bottles or otherwise, 6 cents per pound; all other spices not specially provided for in this section, including all herbs or herb leaves in glass or other small packages for culinary use, 20 per centum ad valorem.

236. Vinegar, 4 cents per proof gallon. The standard proof for vinegar shall be taken to be that strength which requires thirty-five grains of bicarbonate of potash to neutralize one ounce troy of vinegar.

#### SCHEDULE H—SPIRITS, WINES, AND OTHER BEVERAGES.

237. Brandy and other spirits manufactured or distilled from grain or other materials, and not specially provided for in this section, \$2.60 per proof gallon.

238. Each and every gauge or wine gallon of measurement shall be counted as at least one proof gallon; and the standard for determining the proof of brandy and other spirits or liquors of any kind imported shall be the same as that which is defined in the laws relating to internal revenue: *Provided*, That it shall be lawful for the Secretary of the Treasury, in his discretion, to authorize the ascertainment of the proof of wines, cordials, or other liquors, by distillation or otherwise, in cases where it is impracticable to ascertain such proof by the means prescribed by existing law or regulations: *And provided further*,

That any brandy or other spirituous or distilled liquors imported in any sized cask, bottle, jug, or other packages, of or from any country, dependency, or province under whose laws similar sized casks, bottles, jugs, or other packages of distilled spirits, wine, or other beverage put up or filled in the United States are denied entrance into such country, dependency, or province, shall be forfeited to the United States; and any brandy or other spirituous or distilled liquor imported in a cask of less capacity than ten gallons from any country shall be forfeited to the United States.

239. On all compounds or preparations of which distilled spirits are a component part of chief value there shall be levied a duty not less than that imposed upon distilled spirits.

240. Cordials, liqueurs, arrack, absinthe, kirschwasser, ratafia, and other spirituous beverages or bitters of all kinds, containing spirits, and not specially provided for in this section, \$2.60 per proof gallon.

241. No lower rate or amount of duty shall be levied, collected, and paid on brandy, spirits, and other spirituous beverages than that fixed by law for greater strength than the strength of first proof, and all imitations of brandy the description of first proof; but it shall be increased in proportion for any or spirits or wines imported by any names whatever shall be subject to the highest rate of duty provided for the genuine articles respectively intended to be represented, and in no case less than \$1.75 per gallon.

242. Bay rum or bay water, whether distilled or compounded, of first proof, and in proportion for any greater strength than first proof, \$1.75 per gallon.

243. Champagne and all other sparkling wines, in bottles containing each not more than one quart and more than one pint, \$9.60 per dozen; containing not more than one pint each and more than one-half pint, \$4.80 per dozen; containing one-half pint each or less, \$2.40 per dozen; in bottles or other vessels containing more than one quart each, in addition to \$9.60 per dozen bottles, on the quantity in excess of one quart, at the rate of \$3 per gallon; but no separate or additional duty shall be levied on the bottles.

244. Still wines, including ginger wine or ginger cordial, vermouth, and rice wine or sake, and similar beverages not specially provided for in this section, in casks or packages other than bottles or jugs, if containing 14 per centum or less of absolute alcohol, 45 cents per gallon; if containing more than 14 per centum of absolute alcohol, 60 cents per gallon. In bottles or jugs, per case of one dozen bottles or jugs, containing each not more than one quart and more than one pint, or twenty-four bottles or jugs containing each not more than one pint, \$1.85 per case; and any excess beyond these quantities found in such bottles or jugs shall be subject to a duty of 6 cents per pint or fractional part thereof, but no separate or additional duty shall be assessed on the bottles or jugs: *Provided*, That any wines, ginger cordial, or vermouth imported containing more than 24 per centum of alcohol shall be classed as spirits and pay duty accordingly: *And provided further*, That there shall be no constructive or other allowance for breakage, leakage, or damage on wines, liquors, cordials, or distilled spirits, except that when it shall appear to the collector of customs from the gauger's return, verified by an affidavit by the importer to be filed within five days after the delivery of the merchandise, that a cask or package has been broken or otherwise injured in transit from a foreign port and as a result thereof a part of its contents amounting to 10 per centum or more of the total value of the contents of the said cask or package in its condition as exported, has been lost, allowance therefor may be made in the liquidation of the duties. Wines, cordials, brandy, and other spirituous liquors, including



bitters of all kinds, and bay rum or bay water, imported in bottles or jugs, shall be packed in packages containing not less than one dozen bottles or jugs in each package, or duty shall be paid as if such package contained at least one dozen bottles or jugs, and in addition thereto, duty shall be collected on the bottles or jugs at the rates which would be chargeable thereon if imported empty. The percentage of alcohol in wines and fruit juices shall be determined in such manner as the Secretary of the Treasury shall by regulation prescribe.

245. Ale, porter, stout, and beer, in bottles or jugs, 45 cents per gallon, but no separate or additional duty shall be assessed on the bottles or jugs; otherwise than in bottles or jugs, 23 cents per gallon.

246. Malt extract, fluid, in casks, 23 cents per gallon; in bottles or jugs, 45 cents per gallon; solid or condensed, 45 per centum ad valorem.

247. Cherry juice and prune juice, or prune wine, and other fruit juices, and fruit sirup, not specially provided for in this section, containing no alcohol or not more than 18 per centum of alcohol, 70 cents per gallon; if containing more than 18 per centum of alcohol, 70 cents per gallon and in addition thereto \$2.07 per proof gallon on the alcohol contained therein.

248. Ginger ale, ginger beer, lemonade, soda water, and other similar beverages containing no alcohol, in plain green or colored, molded or pressed, glass bottles, containing each not more than one-half pint, 12 cents per dozen; containing each more than one-half pint and not more than three-fourths of a pint, 18 cents per dozen; containing more than three-fourths of a pint each and not more than one and one-half pints, 28 cents per dozen; but no separate or additional duty shall be assessed on the bottles; if imported otherwise than in plain green or colored, molded or pressed, glass bottles, or in such bottles containing more than one and one-half pints each, 50 cents per gallon, and in addition thereto duty shall be collected on the bottles, or other coverings, at the rates which would be chargeable thereon if imported empty. Beverages not specially provided for containing not more than 2 per centum of alcohol shall be assessed for duty under this paragraph.

249. All mineral waters and all imitations of natural mineral waters, and all artificial mineral waters not specially provided for in this section, in bottles or jugs containing not more than one-half pint, 10 cents per dozen bottles; if containing more than one-half pint and not more than one pint, 15 cents per dozen bottles; if containing more than one pint and not more than one quart, 20 cents per dozen bottles; if imported in bottles or in jugs containing more than one quart, 18 cents per gallon; if imported otherwise than in bottles or jugs, 8 cents per gallon; and in addition thereto, on all of the foregoing, duty shall be collected upon the bottles or other containers at one-third of the rates that would be charged thereon if imported empty or separately.

#### SCHEDULE I—COTTON MANUFACTURES.

250. Cotton thread and carded yarn, warps, or warp yarn, whether on beams or in bundles, skeins, or cops, or in any other form, not combed, bleached, dyed, mercerized, or colored, except spool thread of cotton, crochet, darning and embroidery cottons, hereinafter provided for, shall be subject to the following rates of duty:

Numbers up to and including number nine, 5 per centum ad valorem; exceeding number nine and not exceeding number nineteen,  $7\frac{1}{2}$  per centum ad valorem; exceeding number nineteen and not exceeding number thirty-nine, 10 per centum ad valorem; exceeding number thirty-nine and not exceeding

number forty-nine, 15 per centum ad valorem; exceeding number forty-nine and not exceeding number fifty-nine,  $17\frac{1}{2}$  per centum ad valorem; exceeding number fifty-nine and not exceeding number seventy-nine, 20 per centum ad valorem; exceeding number seventy-nine and not exceeding number ninety-nine,  $22\frac{1}{2}$  per centum ad valorem; exceeding number ninety-nine, 25 per centum ad valorem. When combed, bleached, dyed, mercerized, or colored, they shall be subject to the following rates of duty: Numbers up to and including number nine,  $7\frac{1}{2}$  per centum ad valorem; exceeding number nine and not exceeding number nineteen, 10 per centum ad valorem; exceeding number nineteen and not exceeding number thirty-nine,  $12\frac{1}{2}$  per centum ad valorem; exceeding number thirty-nine and not exceeding number forty-nine,  $17\frac{1}{2}$  per centum ad valorem; exceeding number forty-nine and not exceeding number fifty-nine, 20 per centum ad valorem; exceeding number fifty-nine and not exceeding number seventy-nine,  $22\frac{1}{2}$  per centum ad valorem; exceeding number seventy-nine and not exceeding number ninety-nine, 25 per centum ad valorem; exceeding number ninety-nine,  $27\frac{1}{2}$  per centum ad valorem. Cotton waste and flocks, manufactured or otherwise advanced in value, cotton card laps, roping, sliver, or roving, 5 per centum ad valorem.

251. Spool thread of cotton, crochet, darning, and embroidery cottons, on spools, reels, or balls, or in skeins, cones, or tubes, or in any other form, 15 per centum ad valorem.

252. Cotton cloth, not bleached, dyed, colored, stained, painted, printed, woven figured, or mercerized, containing yarns the average number of which does not exceed number nine,  $7\frac{1}{2}$  per centum ad valorem; exceeding number nine and not exceeding number nineteen, 10 per centum ad valorem; exceeding number nineteen and not exceeding number thirty-nine,  $12\frac{1}{2}$  per centum ad valorem; exceeding number thirty-nine and not exceeding number forty-nine,  $17\frac{1}{2}$  per centum ad valorem; exceeding number forty-nine and not exceeding number fifty-nine, 20 per centum ad valorem; exceeding number fifty-nine and not exceeding number seventy-nine,  $22\frac{1}{2}$  per centum ad valorem; exceeding number seventy-nine and not exceeding number ninety-nine, 25 per centum ad valorem; exceeding number ninety-nine,  $27\frac{1}{2}$  per centum ad valorem. Cotton cloth when bleached, dyed, colored, stained, painted, printed, woven figured, or mercerized, containing yarn the average number of which does not exceed number nine, 10 per centum ad valorem; exceeding number nine and not exceeding number nineteen,  $12\frac{1}{2}$  per centum ad valorem; exceeding number nineteen and not exceeding number thirty-nine, 15 per centum ad valorem; exceeding number thirty-nine and not exceeding number forty-nine, 20 per centum ad valorem; exceeding number forty-nine and not exceeding number fifty-nine,  $22\frac{1}{2}$  per centum ad valorem; exceeding number fifty-nine and not exceeding number seventy-nine, 25 per centum ad valorem; exceeding number seventy-nine and not exceeding number ninety-nine,  $27\frac{1}{2}$  per centum ad valorem; exceeding number ninety-nine, 30 per centum ad valorem; plain gauze or leno woven cotton nets or nettings shall be classified for duty as cotton cloth.

253. The term cotton cloth, or cloth, wherever used in the paragraphs of this schedule, unless otherwise specially provided for, shall be held to include all woven fabrics of cotton, in the piece, whether figured, fancy, or plain, and shall not include any article, finished or unfinished, made from cotton cloth. In the ascertainment of the condition of the cloth or yarn upon which the duties imposed upon cotton cloth are made to depend, the entire fabric and all parts thereof shall be included. The average number of the yarn in cotton cloth herein provided for shall be obtained by taking the length of the thread or yarn to be

equal to the distance covered by it in the cloth in the condition as imported, except that all clipped threads shall be measured as if continuous; in counting the threads all ply yarns shall be separated into singles and the count taken of the total singles; the weight shall be taken after any excessive sizing is removed by boiling or other suitable process.

254. Cloth composed of cotton or other vegetable fiber and silk, whether known as silk-striped sleeve linings, silk stripes, or otherwise, of which cotton or other vegetable fiber is the component material of chief value, and tracing cloth, 30 per centum ad valorem; cotton cloth filled or coated, all oilcloths (except silk oilcloths and oilcloths for floors), and cotton window hollands, 25 per centum ad valorem; waterproof cloth composed of cotton or other vegetable fiber, or of which cotton or other vegetable fiber is the component material of chief value or of cotton or other vegetable fiber and india rubber, 25 per centum ad valorem.

255. Handkerchiefs or mufflers composed of cotton, not specially provided for in this section, whether finished or unfinished, not hemmed, 25 per centum ad valorem; hemmed, or hemstitched, 30 per centum ad valorem.

256. Clothing, ready-made, and articles of wearing apparel of every description, composed of cotton or other vegetable fiber, or of which cotton or other vegetable fiber is the component material of chief value, or of cotton or other vegetable fiber and india rubber, made up or manufactured, wholly or in part, by the tailor, seamstress, or manufacturer, and not otherwise specially provided for in this section, 30 per centum ad valorem; shirt collars and cuffs of cotton, not specially provided for in this section, 30 per centum ad valorem.

257. Plushes, velvets, plush or velvet ribbons, velveteens, corduroys, and all pile fabrics, cut or uncut, whether or not the pile covers the entire surface; any of the foregoing composed wholly or in chief value of cotton or other vegetable fiber, except flax, hemp, or ramie; and manufactures or articles in any form, including such as are commonly known as bias dress facings or skirt bindings, made or cut from plushes, velvets, velveteens, corduroys, or other pile fabrics composed of cotton or other vegetable fiber, except flax, hemp, or ramie, 40 per centum ad valorem.

258. Curtains, table covers, and all articles manufactured of cotton chenille, or of which cotton chenille is the component material of chief value, tapestries, and other Jacquard figured upholstery goods, composed wholly or in chief value of cotton or other vegetable fiber; any of the foregoing, in the piece or otherwise, 35 per centum ad valorem; all other Jacquard figured manufactures of cotton or of which cotton is the component material of chief value, 30 per centum ad valorem.

259. Stockings, hose and half hose, made on knitting machines or frames, composed of cotton or other vegetable fiber, and not otherwise specially provided for in this section, 20 per centum ad valorem.

260. Stockings, hose and half hose, selvedged, fashioned, narrowed, or shaped wholly or in part by knitting machines or frames, or knit by hand, including such as are commercially known as seamless stockings, hose and half hose, and clocked stockings, hose and half hose, all of the above composed of cotton or other vegetable fiber, finished or unfinished; if valued at not more than 70 cents per dozen pairs, 30 per centum ad valorem; if valued at more than 70 cents, and not more than \$1.20 per dozen pairs, 40 per centum ad valorem; if valued at more than \$1.20 per dozen pairs, 50 per centum ad valorem. Gloves by whatever process made, composed wholly or in chief value of cotton, 35 per centum ad valorem.

261. Shirts and drawers, pants, vests, union suits, combination suits, tights, sweaters, corset covers, and all underwear and wearing apparel of every description, not specially provided for in this section, made wholly or in part on knitting machines or frames, or knit by hand, finished or unfinished, not including such as are trimmed with lace, imitation lace or crochet or as are embroidered and not including stockings, hose and half hose, composed of cotton or other vegetable fiber, 30 per centum ad valorem.

262. Bandings, belts, beltings, bindings, bone casings, cords, tassels, cords and tassels, garters, tire fabric or fabric suitable for use in pneumatic tires, suspenders and braces, and fabrics with fast edges not exceeding twelve inches in width, all of the foregoing made of cotton or other vegetable fiber, or of which cotton or other vegetable fiber is the component material of chief value, or of cotton or other vegetable fiber and india rubber, and not embroidered by hand or machinery; spindle banding, woven, braided, or twisted lamp, stove, or candle wicking made of cotton or other vegetable fiber; loom harness, healds, or collets made of cotton or other vegetable fiber, or of which cotton or other vegetable fiber is the component material of chief value; boot, shoe, and corset lacings made of cotton or other vegetable fiber; and labels for garments or other articles, composed of cotton or other vegetable fiber, 25 per centum ad valorem; belting for machinery made of cotton or other vegetable fiber and india rubber, or of which cotton or other vegetable fiber is the component material of chief value, 15 per centum ad valorem.

263. Cotton table damask, and manufactures of cotton table damask, or of which cotton table damask is the component material of chief value, not specially provided for in this section, 25 per centum ad valorem.

264. Towels, bath mats, quilts, blankets, polishing cloths, mop cloths, wash rags or cloths, sheets, pillowcases, and batting, any of the foregoing made of cotton, or of which cotton is the component material of chief value, not embroidered nor in part of lace and not otherwise provided for, 25 per centum ad valorem.

265. Lace window curtains, pillow shams, and bed sets, finished or unfinished, made on the Nottingham lace-curtain machine, and composed of cotton or other vegetable fiber, when counting not more than six points or spaces between the warp threads to the inch, 35 per centum ad valorem; when counting more than six and not more than eight points or spaces to the inch, 40 per centum ad valorem; when counting nine or more points or spaces to the inch, 45 per centum ad valorem.

266. All articles made from cotton cloth, whether finished or unfinished, and all manufactures of cotton or of which cotton is the component material of chief value, not specially provided for in this section, 30 per centum ad valorem.

#### SCHEDULE J—FLAX, HEMP, AND JUTE, AND MANUFACTURES OF.

267. Single yarns made of jute, not finer than five lea or number, 15 per centum ad valorem; if finer than five lea or number and yarns made of jute not otherwise specially provided for in this section, 20 per centum ad valorem.

268. Cables and cordage, composed of istle, Tampico fiber, manila, sisal grass or sunn, or a mixture of these or any of them,  $\frac{1}{2}$  cent per pound; cables and cordage made of hemp, tarred or untarred, 1 cent per pound.

269. Threads, twines, or cords, made from yarn not finer than five lea or number, composed of flax, hemp, or ramie, or of which these substances or any

of them is the component material of chief value, 20 per centum ad valorem; if made from yarn finer than five lea or number, 25 per centum ad valorem.

270. Single yarns, made of flax, hemp, or ramie, or a mixture of any of them, not finer than eight lea or number, 12 per centum ad valorem; finer than eight lea or number and not finer than eighty lea or number, 20 per centum ad valorem; finer than eighty lea or number, 10 per centum ad valorem; ramie sliver or roving, 15 per centum ad valorem.

271. Gill nettings, nets, webs, and seines made of flax, hemp, or ramie, or a mixture of any of them, or of which any of them is the component material of chief value, 25 per centum ad valorem.

272. Floor mattings, plain, fancy, or figured, including mats and rugs, manufactured from straw, round or split, or other vegetable substances, not otherwise provided for in this section, and having a warp of cotton, hemp, or other vegetable substances, including what are commonly known as China, Japan, and Indian straw matting,  $2\frac{1}{2}$  cents per square yard.

273. Carpets, carpeting, mats and rugs made of flax, hemp, jute, or other vegetable fiber (except cotton), 30 per centum ad valorem.

274. Hydraulic or flume hose, made in whole or in part of cotton, flax, hemp, ramie, or jute, 7 cents per pound.

275. Tapes composed wholly or in part of flax, woven with or without metal threads, on reels, spools, or otherwise, and designed expressly for use in the manufacture of measuring tapes, 20 per centum ad valorem.

276. Linoleum, plain, stamped, painted, or printed, including corticine and cork carpet, figured or plain, also linoleum known as granite and oak plank, 30 per centum ad valorem; inlaid linoleum, 35 per centum ad valorem; oilcloth for floors, plain, stamped, painted, or printed, 20 per centum ad valorem; mats or rugs made of oilcloth, linoleum, corticine, or cork carpet shall be subject to the same rate of duty as herein provided for oilcloth, linoleum, corticine, or cork carpet.

277. Shirt collars and cuffs, composed in whole or in part of linen, 30 per centum ad valorem.

278. Bands, handings, belts, beltings, bindings, cords, ribbons, tapes, webs and webbings, all the foregoing composed wholly of flax, hemp, or ramie, or of flax, hemp, or ramie and india rubber, and not otherwise specially provided for in this section, 30 per centum ad valorem; wearing apparel composed wholly of flax, hemp, or ramie, or of flax, hemp, or ramie and india rubber, 40 per centum ad valorem.

279. Plain woven fabrics of single jute yarns, by whatever name known, bleached, dyed, colored, stained, painted, printed, or rendered noninflammable by any process, 10 per centum ad valorem.

280. All pile fabrics, whether or not the pile covers the entire surface, composed of flax, hemp, or ramie, or of which flax, hemp, or ramie is the component material of chief value, and all articles and manufactures made from such fabrics, not specially provided for in this section, 40 per centum ad valorem.

281. Bags or sacks made from plain woven fabrics, of single jute yarns, not dyed, colored, stained, painted, printed, or bleached, 10 per centum ad valorem.

282. Handkerchiefs composed of flax, hemp, or ramie, or of which these substances, or any of them, is the component material of chief value, whether in the piece or otherwise, and whether finished or unfinished, not hemmed or hemmed only, 35 per centum ad valorem; if hemstitched, or imitation hemstitched, or revered, or with drawn threads, but not embroidered, initialed, or in part of lace, 40 per centum ad valorem.

283. Plain woven fabrics, not including articles, finished or unfinished, of flax, hemp, or ramie, or of which these substances or any of them is the component material of chief value, including such as is known as shirting cloth, 30 per centum ad valorem.

284. All woven articles, finished or unfinished, and all manufactures of flax, hemp, ramie, or other vegetable fiber, or of which these substances, or any of them, is the component material of chief value, not specially provided for in this section, 35 per centum ad valorem.

285. Istle or tampico, when dressed, dyed, or combed, 20 per centum ad valorem.

#### SCHEDULE K—WOOL AND MANUFACTURES OF.

286. Combed wool or tops and roving or roping made wholly or in part of wool or camel's hair, and on other wool and hair which have been advanced in any manner or by any process of manufacture beyond the washed or scoured condition, not specially provided for in this section, 8 per centum ad valorem.

287. Yarns made wholly or in chief value of wool, 18 per centum ad valorem.

288. Cloths, knit fabrics, felts not woven, and all manufactures of every description made, by any process, wholly or in chief value of wool, not specially provided for in this section, 35 per centum ad valorem; cloths if made in chief value of cattle hair or horse hair, not specially provided for in this section, 25 per centum ad valorem; plushes, velvets, and all other pile fabrics, cut or uncut, woven or knit, whether or not the pile covers the entire surface, made wholly or in chief value of wool, and articles made wholly or in chief value of such plushes, velvets, or pile fabrics, 40 per centum ad valorem; stockings, hose and half hose, made on knitting machines or frames, composed wholly or in chief value of wool, not specially provided for in this section, 20 per centum ad valorem; stockings, hose and half hose, selvedged, fashioned, narrowed, or shaped wholly or in part by knitting machines or frames, or knit by hand, including such as are commercially known as seamless stockings, hose and half hose, and clocked stockings, hose and half hose, gloves and mittens, all of the above, composed wholly or in chief value of wool, if valued at not more than \$1.20 per dozen pairs, 30 per centum ad valorem; if valued at more than \$1.20 per dozen pairs, 40 per centum ad valorem; press cloth composed of camel's hair, not specially provided for in this section, 10 per centum ad valorem.

289. Blankets and flannels, composed wholly or in chief value of wool, 25 per centum ad valorem; flannels composed wholly or in chief value of wool, valued at above 50 cents per pound, 30 per centum ad valorem.

290. Women's and children's dress goods, coat linings, Italian cloths, bunting, and goods of similar description and character, composed wholly or in chief value of wool, and not specially provided for in this section, 35 per centum ad valorem.

291. Clothing, ready-made, and articles of wearing apparel of every description, including shawls whether knitted or woven, and knitted articles of every description made up or manufactured wholly or in part, and not specially provided for in this section, composed wholly or in chief value of wool, 35 per centum ad valorem.

292. Webbing, suspenders, braces, bandings, belts, beltings, bindings, cords, cords and tassels, and ribbons; any of the foregoing made of wool or of which wool or wool and india rubber are the component materials of chief value, and not specially provided for in this section, 35 per centum ad valorem.

293. Aubusson, Axminster, moquette, and chenille carpets, figured or plain, and all carpets or carpeting of like character or description, 35 per centum ad valorem.

294. Saxony, Wilton, and Tournay velvet carpets, figured or plain, and all carpets or carpeting of like character or description, 30 per centum ad valorem.

295. Brussels carpets, figured or plain, and all carpets or carpeting of like character or description, 25 per centum ad valorem.

296. Velvet and tapestry velvet carpets, figured or plain, printed on the warp or otherwise, and all carpets or carpeting of like character or description, 30 per centum ad valorem.

297. Tapestry Brussels carpets, figured or plain, and all carpets or carpeting of like character or description, printed on the warp or otherwise, 20 per centum ad valorem.

298. Treble ingrain, three-ply, and all-chain Venetian carpets, 20 per centum ad valorem.

299. Wool Dutch and two-ply ingrain carpets, 20 per centum ad valorem.

300. Carpets of every description, woven whole for rooms, and Oriental, Berlin, Aubusson, Axminster, and similar rugs, 50 per centum ad valorem.

301. Druggets and bockings, printed, colored, or otherwise, 20 per centum ad valorem.

302. Carpets and carpeting of wool or cotton, or composed in part of either of them, not specially provided for in this section, and on mats, matting, and rugs of cotton, 20 per centum ad valorem.

303. Mats, rugs for floors, screens, covers, hassocks, bed sides, art squares, and other portions of carpets or carpeting, composed wholly or in part of wool, and not specially provided for in this section, shall be subjected to the rate of duty herein imposed on carpets or carpeting of like character or description.

304. Whenever in this section the word "wool" is used in connection with a manufactured article of which it is a component material, it shall be held to include wool or hair of the sheep, camel, or other like animals, whether manufactured by the woollen, worsted, felt, or any other process.

305. Hair of the Angora goat, alpaca, and other like animals, and all hair on the skin of such animals, 15 per centum ad valorem.

306. Tops made from the hair of the Angora goat, alpaca, and other like animals, 20 per centum ad valorem.

307. Yarns made of the hair of the Angora goat, alpaca, and other like animals, 25 per centum ad valorem.

308. Cloth and all manufactures of every description made by any process, wholly or in chief value of the hair of the Angora goat, alpaca, and other like animals, not specially provided for in this section, 40 per centum ad valorem.

309. Plushes, velvets, and all other pile fabrics, cut or uncut, woven or knit, whether or not the pile covers the entire surface, made wholly or partly of the hair of the Angora goat, alpaca, or other like animals, and articles made wholly or in chief value of such plushes, velvets, or pile fabrics, 45 per centum ad valorem.

310. The provisions of this schedule (K) shall be effective on and after the first day of January, nineteen hundred and fourteen, until which date the rates of duty now provided by Schedule K of the existing law shall remain in full force and effect.

## SCHEDULE L—SILKS AND SILK GOODS.

311. Silk partially manufactured from cocoons or from waste silk and not further advanced or manufactured than carded or combed silk, and silk noils exceeding two inches in length, 20 cents per pound.

312. Spun silk or schappe silk yarn, 35 per centum ad valorem.

313. Thrown silk not more advanced than single, tram, or organzine, sewing silk, twist, floss, and silk threads or yarns of every description made from raw silk, 15 per centum ad valorem.

314. Velvets, plushes, chenilles, velvet or plush ribbons, or other pile fabrics, composed of silk or of which silk is the component material of chief value, 50 per centum ad valorem.

315. Handkerchiefs or mufflers composed wholly or in chief value of silk, finished or unfinished; if cut, not hemmed or hemmed only, 40 per centum ad valorem; if hemstitched or imitation hemstitched, or revered, or having drawn threads, but not embroidered in any manner with an initial letter, monogram, or otherwise, 50 per centum ad valorem.

316. Ribbons, bandings, including hatbands, belts, beltings, bindings, all of the foregoing not exceeding twelve inches in width and if with fast edges, bone casings, braces, cords, cords and tassels, garters, suspenders, tubings, and webs and webbings; all the foregoing made of silk or of which silk or silk and india rubber are the component materials of chief value, if not embroidered in any manner, and not specially provided for in this section, 45 per centum ad valorem.

317. Clothing, ready-made, and articles of wearing apparel of every description, including knit goods, made up or manufactured in whole or in part by the tailor, seamstress, or manufacturer; all the foregoing composed of silk or of which silk or silk and india rubber are the component materials of chief value, not specially provided for in this section, 50 per centum ad valorem.

318. Woven fabrics, in the piece or otherwise, of which silk is the component material of chief value, and all manufactures of silk, or of which silk or silk and india rubber are the component materials of chief value, not specially provided for in this section, 45 per centum ad valorem.

319. Yarns, threads, filaments of artificial or imitation silk, or of artificial or imitation horsehair, by whatever name known, and by whatever process made, 35 per centum ad valorem; beltings, cords, tassels, ribbons, or other articles or fabrics composed wholly or in chief value of yarns, threads, filaments, or fibers of artificial or imitation silk or of artificial or imitation horsehair, or of yarns, threads, filaments or fibers of artificial or imitation silk, or of artificial or imitation horsehair and india rubber, by whatever name known, and by whatever process made, 60 per centum ad valorem.

## SCHEDULE M—PAPERS AND BOOKS.

320. Sheathing paper, pulpboard in rolls, not laminated, roofing felt, common paper-box board, not coated, lined, embossed, printed or decorated in any manner, nor cut into shapes for boxes or other articles, 5 per centum ad valorem.

321. Filter masse or filter stock, composed wholly or in part of wood pulp, wood flour, cotton or other vegetable fiber, 20 per centum ad valorem.

322. Printing paper (other than paper commercially known as handmade or machine handmade paper, japan paper, and imitation japan paper by whatever name known), unsized, sized, or glued, suitable for the printing of books and



newspapers, but not for covers or bindings, not specially provided for in this section, valued above  $2\frac{1}{2}$  cents per pound, 12 per centum ad valorem: *Provided, however,* That if any country, dependency, province, or other subdivision of government shall impose any export duty, export license fee, or other charge of any kind whatsoever (whether in the form of additional charge or license fee or otherwise) upon printing paper, wood pulp, or wood for use in the manufacture of wood pulp, there shall be imposed upon printing paper, valued above  $2\frac{1}{2}$  cents per pound, when imported either directly or indirectly from such country, dependency, province, or other subdivision of government, an additional duty equal to the amount of the highest export duty or other export charge imposed by such country, dependency, province, or other subdivision of government, upon either printing paper, or upon an amount of wood pulp, or wood for use in the manufacture of wood pulp necessary to manufacture such printing paper.

323. Papers commonly known as copying paper, stereotype paper, bibulous paper, tissue paper, pottery paper, letter-copying books, wholly or partly manufactured, crêpe paper and filtering paper, and articles manufactured from any of the foregoing papers or of which such paper is the component material of chief value, 30 per centum ad valorem.

324. Papers wholly or partly covered with metal leaf or with gelatin or flock, papers with white coated surface or surfaces, calender plate finished, hand dipped marbled paper, parchment paper, and lithographic transfer paper not printed, 25 per centum ad valorem; papers with coated surface or surfaces suitable for covering boxes, not specially provided for, whether or not embossed or printed except by lithographic process, 40 per centum ad valorem; all other paper with coated surface or surfaces not specially provided for in this section; uncoated papers, gummed, or with the surface or surfaces wholly or partly decorated or covered with a design, fancy effect, pattern, or character, whether produced in the pulp or otherwise except by lithographic process, cloth-lined or reinforced papers, and grease-proof and imitation parchment papers which have been supercalendered and rendered transparent or partially so, by whatever name known, all other grease-proof and imitation parchment papers, not specially provided for in this section, by whatever name known, bags, envelopes, and all other articles composed wholly or in chief value of any of the foregoing papers, not specially provided for in this section, and all boxes of paper or papier mâché or wood covered with any of the foregoing papers or covered or lined with cotton or other vegetable fiber, 35 per centum ad valorem; albuminized or sensitized paper or paper otherwise surface-coated for photographic purposes, 25 per centum ad valorem; plain basic papers for albuminizing, sensitizing, baryta coating, or for photographic or solar printing processes, 15 per centum ad valorem.

325. Pictures, calendars, cards, booklets, labels, flaps, cigar bands, placards, and other articles composed wholly or in chief value of paper lithographically printed in whole or in part from stone, gelatin, metal, or other material (except boxes, views of American scenery or objects, and music, and illustrations when forming a part of a periodical or newspaper or of bound or unbound books, accompanying the same, not specially provided for in this section) shall pay duty at the following rates: Labels and flaps printed in less than eight colors (bronze printing to be counted as two colors), but not printed in whole or in part of metal leaf, 15 cents per pound; cigar bands of the same number of colors and printings, 20 cents per pound; labels and flaps printed in eight or more colors (bronze printing to be counted as two colors), but not printed in whole

or in part of metal leaf, 20 cents per pound; cigar bands of the same number of colors and printings, 25 cents per pound; labels and flaps printed in whole or in part of metal leaf, 35 cents per pound; cigar bands printed in whole or in part of metal leaf, 40 cents per pound; booklets, 7 cents per pound; all other articles not exceeding eight one-thousandths of an inch in thickness, 15 cents per pound; exceeding eight one-thousandths of an inch and not exceeding twenty one-thousandths of an inch in thickness and less than thirty-five square inches cutting size in dimension, 5 cents per pound; exceeding eight and not exceeding twenty one-thousandths of an inch in thickness and thirty-five square inches and over cutting size in dimension, 7 cents per pound; exceeding twenty one-thousandths of an inch in thickness, 5 cents per pound, providing that in the case of articles hereinbefore specified the thickness which shall determine the rate of duty to be imposed shall be that of the thinnest lithographed material found in the article, but for the purpose of this paragraph the thickness of lithographs mounted or pasted upon paper, cardboard, or other material shall be the combined thickness of the lithograph and the foundation upon which it is mounted or pasted; books of paper or other material for children's use, lithographically printed in whole or in part, not exceeding in weight twenty-four ounces each, 4 cents per pound; fashion magazines or periodicals printed in whole or in part by lithographic process or decorated by hand, 6 cents per pound; booklets, wholly or in chief value of paper, decorated in whole or in part by hand or by spraying, whether or not lithographed, 10 cents per pound; decalcomanias in ceramic colors, weighing not over one hundred pounds per thousand sheets, on a basis of twenty by thirty inches in dimensions, 60 cents per pound; all other decalcomanias, except toy decalcomanias, 15 cents per pound.

326. Writing, letter, note, drawing, handmade paper and paper commercially known as handmade paper and machine handmade paper, japan paper and imitation japan paper by whatever name known, and ledger, bond, record, tablet, typewriter, and onionskin and imitation onionskin papers calendered or uncalendered, whether or not any such paper is ruled, bordered, embossed, printed, lined, or decorated in any manner, 25 per centum ad valorem.

327. Paper envelopes, folded or flat, not specially provided for in this section, 15 per centum ad valorem.

328. Jacquard designs on ruled paper, or cut on Jacquard cards, and parts of such designs, cardboard and bristol board, press boards or press paper, paper hangings with paper back or composed wholly or in chief value of paper, and wrapping paper not specially provided for in this section, 25 per centum ad valorem.

329. Books of all kinds, bound or unbound, including blank books, slate books and pamphlets, engravings, photographs, etchings, maps, charts, music in books or sheets, and printed matter, all the foregoing, and not specially provided for in this section, 15 per centum ad valorem. Views of any landscape, scene, building, place or locality in the United States, on cardboard or paper, not thinner than eight one-thousandths of one inch, by whatever process printed or produced, including those wholly or in part produced by either lithographic or photogelatin process (except show cards), bound or unbound, or in any other form, 20 cents per pound; thinner than eight one-thousandths of one inch, \$2 per thousand.

330. Photograph, autograph, scrap, post-card, and postage-stamp albums, wholly or partly manufactured, 25 per centum ad valorem.

331. Playing cards, 60 per centum ad valorem.

332. Papers or cardboard, cut, die cut, or stamped into designs or shapes,

such as initials, monograms, lace, borders, or other forms, and all post cards, not including American views, plain, decorated, embossed, or printed, except by lithographic process, and all papers and manufactures of paper or of which paper is the component material of chief value, not specially provided for in this section, 25 per centum ad valorem.

#### SCHEDULE N—SUNDRIES.

333. Beads and spangles of all kinds, including imitation pearl beads, not threaded or strung, or strung loosely on thread for facility in transportation only, 35 per centum ad valorem; curtains, and other articles not embroidered nor appliquéd and not specially provided for in this section, composed wholly or in chief value of beads or spangles made of glass or paste, gelatin, metal, or other material, 50 per centum ad valorem.

334. Ramie hat braids, 40 per centum ad valorem; manufactures of ramie hat braids, 50 per centum ad valorem.

335. Braids, plaits, laces, and willow sheets or squares, composed wholly or in chief value of straw, chip, grass, palm leaf, willow, osier, rattan, real horsehair, cuba bark, or manila hemp, suitable for making or ornamenting hats, bonnets, or hoods, not bleached, dyed, colored, or stained, 15 per centum ad valorem; if bleached, dyed, colored, or stained, 20 per centum ad valorem; hats, bonnets, and hoods composed wholly or in chief value of straw, chip, grass, palm leaf, willow, osier, rattan, cuba bark, or manila hemp, whether wholly or partly manufactured, but not blocked or trimmed, 25 per centum ad valorem; if blocked or trimmed, and in chief value of such materials, 40 per centum ad valorem. But the terms "grass" and "straw" shall be understood to mean these substances in their natural form and structure, and not the separated fiber thereof.

336. Brooms, made of broom corn, straw, wooden fibre, or twigs, 15 per centum ad valorem; brushes and feather dusters of all kinds, and hair pencils in quills or otherwise, 35 per centum ad valorem.

337. Bristles, sorted, bunched, or prepared, 7 cents per pound.

338. Button forms of lastings, mohair or silk cloth, or other manufactures of cloth, woven or made in patterns of such size, shape, or form as to be fit for buttons exclusively, and not exceeding eight inches in any one dimension, 10 per centum ad valorem.

339. Buttons of vegetable ivory in sizes thirty-six lines and larger, 35 per centum ad valorem; below thirty-six lines, 45 per centum ad valorem; buttons of shell and pearl in sizes twenty-six lines and larger, 25 per centum ad valorem; below twenty-six lines, 45 per centum ad valorem; agate buttons and shoe buttons, 15 per centum ad valorem; parts of buttons and button molds or blanks, finished or unfinished, and all collar and cuff buttons and studs composed wholly of bone, mother-of-pearl, ivory, or agate, all the foregoing and buttons not specially provided for in this section, 40 per centum ad valorem.

340. Cork bark, cut into squares, cubes, or quarters, 4 cents per pound; manufactured cork stoppers, over three-fourths of an inch in diameter, measured at the larger end, and manufactured cork disks, wafers, or washers, over three-sixteenths of an inch in thickness, 12 cents per pound; manufactured cork stoppers, three-fourths of an inch or less in diameter, measured at the larger end, and manufactured cork disks, wafers, or washers, three-sixteenths of an inch or less in thickness, 15 cents per pound; cork, artificial, or cork substitutes

manufactured from cork waste, or granulated corks, and not otherwise provided for in this section, 3 cents per pound; cork insulation, wholly or in chief value of granulated cork, in slabs, boards, planks, or molded forms,  $\frac{1}{4}$  cent per pound; cork paper, 35 per centum ad valorem; manufactures wholly or in chief value of cork or of cork bark, or of artificial cork or bark substitutes, granulated or ground cork, not specially provided for in this section, 30 per centum ad valorem.

341. Dice, dominoes, draughts, chessmen, chess balls, and billiard, pool, bagatelle balls, and poker chips, of ivory, bone, or other materials, 50 per centum ad valorem.

342. Dolls, and parts of dolls, doll heads, toy marbles of whatever materials composed, and all other toys, and parts of toys, not composed of china, porcelain, parian, bisque, earthen or stone ware, and not specially provided for in this section, 35 per centum ad valorem.

343. Emery grains and emery, manufactured, ground, pulverized, or refined, 1 cent per pound; emery wheels, emery files, emery paper, and manufactures of which emery or corundum is the component material of chief value, 20 per centum ad valorem.

344. Firecrackers of all kinds, 6 cents per pound; bombs, rockets, Roman candles, and fireworks of all descriptions, not specially provided for in this section, 10 cents per pound; the weight on all the foregoing to include all coverings, wrappings, and packing material.

345. Matches, friction or lucifer, of all descriptions, per gross of one hundred and forty-four boxes, containing not more than one hundred matches per box, 3 cents per gross; when imported otherwise than in boxes containing not more than one hundred matches each,  $\frac{3}{4}$  of 1 cent per one thousand matches; wax matches, fusees, wind matches, and all matches in books or folders or having a stained, dyed, or colored stick or stem, and tapers consisting of a wick coated with an inflammable substance, and night lights, 25 per centum ad valorem: *Provided*, That in accordance with section ten of "An Act to provide for a tax upon white phosphorus matches, and for other purposes," approved April ninth, nineteen hundred and twelve, white phosphorus matches manufactured wholly or in part in any foreign country shall not be entitled to enter at any of the ports of the United States, and the importation thereof is hereby prohibited: *Provided further*, That nothing in this Act contained shall be held to repeal or modify said Act to provide for a tax upon white phosphorus matches, and for other purposes, approved April ninth, nineteen hundred and twelve.

346. Percussion caps, cartridges, and cartridge shells empty, 15 per centum ad valorem; blasting caps, \$1 per thousand; mining, blasting, or safety fuses of all kinds, 15 per centum ad valorem.

347. Feathers and downs, on the skin or otherwise, crude or not dressed, colored, or otherwise advanced or manufactured in any manner, not specially provided for in this section, 20 per centum ad valorem; when dressed, colored, or otherwise advanced or manufactured in any manner, and not suitable for use as millinery ornaments, including quilts of down and manufactures of down, 40 per centum ad valorem; artificial or ornamental feathers suitable for use as millinery ornaments, artificial and ornamental fruits, grains, leaves, flowers, and stems or parts thereof, of whatever material composed, not specially provided for in this section, 60 per centum ad valorem; boas, boutonnières, wreaths, and all articles not specially provided for in this section, composed wholly or in chief value of any of the feathers, flowers, leaves, or other ma-

terial herein mentioned, 60 per centum ad valorem: *Provided*, That the importation of aigrettes, egret plumes or so-called osprey plumes, and the feathers, quills, heads, wings, tails, skins, or parts of skins, of wild birds, either raw or manufactured, and not for scientific or educational purposes, is hereby prohibited; but this provision shall not apply to the feathers or plumes of ostriches, or to the feathers or plumes of domestic fowls of any kind.

348. Furs dressed on the skin, not advanced further than dyeing, 30 per centum ad valorem; plates and mats of dog and goat skins, 10 per centum ad valorem; manufactures of furs, further advanced than dressing and dyeing, when prepared for use as material, joined or sewed together, including plates, linings, and crosses, except plates and mats of dog and goat skins, and articles manufactured from fur not specially provided for in this section, 40 per centum ad valorem; articles of wearing apparel of every description partly or wholly manufactured, composed of or of which hides or skins of cattle of the bovine species, or of the dog or goat are the component material of chief value, 15 per centum ad valorem; articles of wearing apparel of every description partly or wholly manufactured, composed of or of which fur is the component material of chief value, not specially provided for in this section, 50 per centum ad valorem; furs not on the skin, prepared for hatters' use, including fur skins carroted, 15 per centum ad valorem.

349. Fans of all kinds, except common palm-leaf fans, 50 per centum ad valorem.

350. Gun wads of all descriptions, 10 per centum ad valorem.

351. Human hair, raw, 10 per centum ad valorem; if cleaned or commercially known as drawn, but not manufactured, 20 per centum ad valorem; manufactures of human hair, including nets and nettings, or of which human hair is the component material of chief value, not specially provided for in this section, 35 per centum ad valorem.

352. Hair, curled, suitable for beds or mattresses, 10 per centum ad valorem.

353. Haircloth, known as "crinoline" cloth, 6 cents per square yard; haircloth, known as "hair seating," and hair press cloth, 15 cents per square yard.

354. Hats, bonnets, or hoods, for men's, women's, boys', or children's wear, trimmed or untrimmed, including bodies, hoods, plateaux, forms or shapes, for hats or bonnets, composed wholly or in chief value of fur of the rabbit, beaver, or other animals, 45 per centum ad valorem.

355. Indurated fiber ware and manufactures of pulp, not specially provided for in this section, 25 per centum ad valorem.

356. Jewelry, commonly or commercially so known, valued above 20 cents per dozen pieces, 60 per centum ad valorem; rope, curb, cable, and fancy patterns of chain not exceeding one-half inch in diameter, width, or thickness, valued above 30 cents per yard; and articles valued above 20 cents per dozen pieces designed to be worn on apparel or carried on or about or attached to the person, such as and including buckles, card cases, chains, cigar cases, cigar cutters, cigar holders, cigarette cases, cigarette holders, coin holders, collar, cuff, and dress buttons, combs, match boxes, mesh bags and purses, millinery, military, and hair ornaments, pins, powder cases, stamp cases, vanity cases, and like articles; all the foregoing and parts thereof, finished or partly finished, composed of metal, whether or not enameled, washed, covered, or plated, including rolled gold plate, and whether or not set with precious or semiprecious stones, pearls, cameos, coral, or amber, or with imitation precious stones or imitation pearls, 60 per centum ad valorem. Stampings, galleries, mesh and other materials of metal, whether or not set with glass or paste, finished or

partly finished, separate or in strips or sheets, suitable for use in the manufacture of any of the foregoing articles in this paragraph, 50 per centum ad valorem.

357. Diamonds and other precious stones, rough or uncut, and not advanced in condition or value from their natural state by cleaving, splitting, cutting, or other process, whether in their natural form or broken, and bort; any of the foregoing not set, and diamond dust, 10 per centum ad valorem; pearls and parts thereof, drilled or undrilled, but not set or strung; diamonds, coral, rubies, cameos, and other precious stones and semiprecious stones, cut but not set, and suitable for use in the manufacture of jewelry, 20 per centum ad valorem; imitation precious stones, including pearls and parts thereof, for use in the manufacture of jewelry, doublets, artificial, or so-called synthetic or reconstructed pearls and parts thereof, rubies, or other precious stones, 20 per centum ad valorem.

358. Laces, lace window curtains not specially provided for in this section, coach, carriage, and automobile laces, and all lace articles of whatever yarns, threads, or filaments composed; handkerchiefs, napkins, wearing apparel, and all other articles or fabrics made wholly or in part of lace or of imitation lace of any kind; embroideries, wearing apparel, handkerchiefs, and all articles or fabrics embroidered in any manner by hand or machinery, whether with a plain or fancy initial, monogram, or otherwise, or tamboured, appliqué, or scalloped by hand or machinery, any of the foregoing by whatever name known; edgings, insertings, galloons, nets, nettings, veils, veilings, neck ruffings, ruchings, tuckings, flouncings, flutings, quillings, ornaments; braids, loom woven and ornamented in the process of weaving, or made by hand, or on any braid machine, knitting machine, or lace machine, and not specially provided for; trimmings not specially provided for; woven fabrics or articles from which threads have been omitted, drawn, punched, or cut, and with threads introduced after weaving, forming figures or designs, not including straight hemstitching; and articles made in whole or in part of any of the foregoing fabrics or articles; all of the foregoing of whatever yarns, threads, or filaments composed, 60 per centum ad valorem.

359. Chamois skins, 15 per centum ad valorem; pianoforte, pianoforte action, enameled upholstery leather, and glove leathers, 10 per centum ad valorem.

360. Bags, baskets, belts, satchels, card cases, pocketbooks, jewel boxes, portfolios, and other boxes and cases, made wholly of or in chief value of leather or parchment, not jewelry, and manufactures of leather or parchment, or of which leather or parchment is the component material of chief value, not specially provided for in this section, 30 per centum ad valorem; any of the foregoing permanently fitted and furnished with traveling, bottle, drinking, dining, luncheon and similar sets, 35 per centum ad valorem.

361. Gloves, not specially provided for in this section, made wholly or in chief value of leather, whether wholly or partly manufactured, shall pay duty at the following rates, the lengths stated in each case being the extreme length when stretched to their full extent, namely:

362. Men's, women's, or children's "glacé" finish, Schmaschen (of sheep origin), not over fourteen inches in length, \$1 per dozen pairs; over fourteen inches in length, 25 cents additional per dozen pairs for each inch in excess of fourteen inches.

363. All other women's or children's gloves wholly or in chief value of leather, not over fourteen inches in length, \$2 per dozen pairs; over fourteen

inches in length, 25 cents additional per dozen pairs for each inch in excess of fourteen inches; all men's leather gloves not specially provided for in this section, \$2.50 per dozen pairs.

364. In addition to the foregoing rates there shall be paid the following cumulative duties: On all leather gloves when lined with cotton or other vegetable fiber, 25 cents per dozen pairs; when lined with a knitted glove or when lined with silk, leather, or wool, 50 cents per dozen pairs; when lined with fur, \$2 per dozen pairs; on all piqué and pique-seam gloves, 25 cents per dozen pairs.

365. Glove trunks, with or without the usual accompanying pieces, shall pay 75 per centum of the duty provided for the gloves in the fabrication of which they are suitable.

366. Manufactures of catgut, or whip gut, or worm gut, including strings for musical instruments; any of the foregoing or of which these substances or any of them is the component material of chief value, not specially provided for in this section, 20 per centum ad valorem.

367. Manufactures of amber, asbestos, bladders, or wax, or of which these substances or any of them is the component material of chief value, not specially provided for in this section, 10 per centum ad valorem; yarn and woven fabrics composed wholly or in chief value of asbestos, 20 per centum ad valorem.

368. Manufactures of bone, chip, grass, horn, india rubber or gutta-percha, palm leaf, quills, straw, weeds, or whalebone, or of which any of them is the component material of chief value not otherwise specially provided for in this section, shall be subject to the following rates: Manufactures of india rubber or gutta-percha, commonly known as druggists' sundries, 15 per centum ad valorem; manufactures of india rubber or gutta-percha, not specially provided for in this section, 10 per centum ad valorem; palm leaf, 15 per centum ad valorem; bone, chip, horn, quills, and whalebone, 20 per centum ad valorem; grass, straw, and weeds, 25 per centum ad valorem; combs composed wholly of horn or of horn and metal, 25 per centum ad valorem. The terms "grass" and "straw" shall be understood to mean these substances in their natural state, and not the separated fibers thereof.

369. Ivory tusks in their natural state, or cut vertically across the grain only, with the bark left intact, 20 per centum ad valorem; manufactures of ivory or vegetable ivory, or of which either of these substances is the component material of chief value, not specially provided for in this section, 35 per centum ad valorem; manufactures of mother-of-pearl and shell, plaster of Paris, papier-mâché, and vulcanized india rubber known as "hard rubber," or of which these substances or any of them is the component material of chief value, not specially provided for in this section, 25 per centum ad valorem; shells engraved, cut, ornamented, or otherwise manufactured, 25 per centum ad valorem.

370. Masks, of whatever material composed, 25 per centum ad valorem.

371. Matting made of cocoa fiber or rattan, 5 cents per square yard; mats made of cocoa fiber or rattan, 3 cents per square foot.

372. Moss and sea grass, eelgrass, and seaweeds, if manufactured or dyed, 10 per centum ad valorem.

373. Musical instruments or parts thereof, pianoforte actions and parts thereof, cases for musical instruments, pitch pipes, tuning forks, tuning hammers, and metronomes; strings for musical instruments, composed wholly or in part of steel or other metal, all the foregoing, 35 per centum ad valorem.

374. Phonographs, gramophones, graphophones, and similar articles, or parts thereof, 25 per centum ad valorem.

375. Violin rosin, in boxes or cases or otherwise, 10 per centum ad valorem.

376. Works of art, including paintings in oil or water-colors, pastels, pen and ink drawings, or copies, replicas or reproductions of any of the same, statuary, sculptures, or copies, replicas or reproductions thereof, and etchings and engravings, not specially provided for in this section, 15 per centum ad valorem.

377. Peat moss, 50 cents per ton.

378. Pencils of paper or wood, or other material not metal, filled with lead or other material, pencils of lead, 36 cents per gross, but in no case shall any of the foregoing pay less than 25 per centum ad valorem; slate pencils, 25 per centum ad valorem.

379. Pencil leads not in wood or other material, 10 per centum ad valorem.

380. Photographic cameras, and parts thereof, not specially provided for in this section, photographic dry plates, not specially provided for in this section, 15 per centum ad valorem; photographic-film negatives, imported in any form, for use in any way in connection with moving-picture exhibits, or for making or reproducing pictures for such exhibits, exposed but not developed, 2 cents per linear or running foot; if exposed and developed, 3 cents per linear or running foot; photographic-film positives, imported in any form, for use in any way in connection with moving-picture exhibits, including herein all moving, motion, motophotography or cinematography film pictures, prints, positives or duplicates of every kind and nature, and of whatever substance made, 1 cent per linear or running foot: *Provided, however,* That all photographic-films imported under this section shall be subject to such censorship as may be imposed by the Secretary of the Treasury.

381. Pipes and smokers' articles: Common tobacco pipes and pipe bowls made wholly of clay, 25 per centum ad valorem; other pipes and pipe bowls of whatever material composed, and all smokers' articles whatsoever, not specially provided for in this section, including cigarette books, cigarette-book covers, pouches for smoking or chewing tobacco, and cigarette paper in all forms, except cork paper, 50 per centum ad valorem; meerschaum, crude or unmanufactured, 20 per centum ad valorem.

382. Plush, black, known commercially as hatters' plush, composed of silk, or of silk and cotton, such as is used for making men's hats, 10 per centum ad valorem.

383. Umbrellas, parasols, and sunshades covered with material other than paper or lace, not embroidered or appliquéd, 35 per centum ad valorem. Sticks for umbrellas, parasols, or sunshades, and walking canes, finished or unfinished, 30 per centum ad valorem.

384. Waste, not specially provided for in this section, 10 per centum ad valorem.

385. That there shall be levied, collected, and paid on the importation of all raw or unmanufactured articles not enumerated or provided for in this section, a duty of 10 per centum ad valorem, and on all articles manufactured, in whole or in part, not provided for in this section, a duty of 15 per centum ad valorem.

386. That each and every imported article, not enumerated in this section, which is similar, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this section as chargeable with duty, shall pay the same rate of duty which is levied on the enumerated article which it most resembles in any of the particulars before mentioned; and if any non-enumerated article equally resembles two or more enumerated articles on which



different rates of duty are chargeable, there shall be levied on such nonenumerated article the same rate of duty as is chargeable on the article which it resembles paying the highest rate of duty; and on articles not enumerated, manufactured of two or more materials, the duty shall be assessed at the highest rate at which the same would be chargeable if composed wholly of the component material thereof of chief value; and the words "component material of chief value," wherever used in this section, shall be held to mean that component material which shall exceed in value any other single component material of the article; and the value of each component material shall be determined by the ascertained value of such material in its condition as found in the article. If two or more rates of duty shall be applicable to any imported article, it shall pay duty at the highest of such rates.

### FREE LIST.

That on and after the day following the passage of this Act, except as otherwise specially provided for in this Act, the articles mentioned in the following paragraphs shall, when imported into the United States or into any of its possessions (except the Philippine Islands and the islands of Guam and Tutuila), be exempt from duty:

387. Acids: Acetic or pyroligneous, arsenic or arsenious, carbolic, chromic, fluoric, hydrofluoric, hydrochloric or muriatic, nitric, phosphoric, phthalic, prussic, silicic, sulphuric or oil of vitriol, and valerianic.

388. Aconite.

389. Acorns, raw, dried or undried, but unground.

390. Agates, unmanufactured.

391. Agricultural implements: Plows, tooth and disk harrows, headers, harvesters, reapers, agricultural drills and planters, mowers, horserakes, cultivators, thrashing machines, cotton gins, machinery for use in the manufacture of sugar, wagons and carts, and all other agricultural implements of any kind and description, whether specifically mentioned herein or not, whether in whole or in parts, including repair parts.

392. Albumen, not specially provided for in this section.

393. Alcohol, methyl or wood.

394. Alizarin, natural or synthetic, and dyes obtained from alizarin, anthracene, and carbazol.

395. Ammonia, sulphate of, perchlorate of, and nitrate of.

396. Antimony ore and stibnite containing antimony, but only as to the antimony content.

397. Any animal imported by a citizen of the United States, specially for breeding purposes, shall be admitted free, whether intended to be used by the importer himself or for sale for such purposes: *Provided*, That no such animal shall be admitted free unless pure bred of a recognized breed, and duly registered in a book of record recognized by the Secretary of Agriculture for that breed: *And provided further*, That the certificate of such record and pedigree of such animal shall be produced and submitted to the Department of Agriculture, duly authenticated by the proper custodian of such book of record, together with an affidavit of the owner, agent, or importer that the animal imported is the identical animal described in said certificate of record and pedigree. The Secretary of Agriculture may prescribe such regulations as may be required for determining the purity of breeding and the identity of such ani-

mal: *And provided further*, That the collectors of customs shall require a certificate from the Department of Agriculture stating that such animal is pure bred of a recognized breed and duly registered in a book of record recognized by the Secretary of Agriculture for that breed.

The Secretary of the Treasury may prescribe such additional regulations as may be required for the strict enforcement of this provision.

Horses, mules, and asses straying across the boundary line into any foreign country, or driven across such boundary line by the owner for temporary pasturage purposes only, together with their offspring, shall be dutiable unless brought back to the United States within six months, in which case they shall be free of duty, under regulations to be prescribed by the Secretary of the Treasury: *And provided further*, That the provisions of this Act shall apply to all such animals as have been imported and are in quarantine or otherwise in the custody of customs or other officers of the United States at the date of the taking effect of this Act.

398. Animals brought into the United States temporarily for a period not exceeding six months, for the purpose of breeding, exhibition or competition for prizes offered by any agricultural, polo, or racing association; but a bond shall be given in accordance with regulations prescribed by the Secretary of the Treasury; also teams of animals, including their harness and tackle, and the wagons or other vehicles actually owned by persons emigrating from foreign countries to the United States with their families, and in actual use for the purpose of such emigration under such regulations as the Secretary of the Treasury may prescribe; and wild animals intended for exhibition in zoological collections for scientific and educational purposes, and not for sale or profit.

399. Annatto, roucou, rocoa, or orleans, and all extracts of.

400. Antitoxins, vaccine virus, and all other serums derived from animals and used for therapeutic purposes.

401. Apatite.

402. Arrowroot in its natural state and not manufactured.

403. Arsenic and sulphide of arsenic, or orpiment.

404. Articles the growth, produce, or manufacture of the United States, when returned after having been exported, without having been advanced in value or improved in condition by any process of manufacture or other means; steel boxes, casks, barrels, carboys, bags, and other containers or coverings of American manufacture exported filled with American products, or exported empty and returned filled with foreign products, including shooks and staves when returned as barrels or boxes; also quicksilver flasks or bottles, iron or steel drums of either domestic or foreign manufacture, used for the shipment of acids, or other chemicals, which shall have been actually exported from the United States; but proof of the identity of such articles shall be made, under general regulations to be prescribed by the Secretary of the Treasury, but the exemption of bags from duty shall apply only to such domestic bags as may be imported by the exporter thereof, and if any such articles are subject to internal-revenue tax at the time of exportation, such tax shall be proved to have been paid before exportation and not refunded; photographic dry plates or films of American manufacture (except moving-picture films), exposed abroad, whether developed or not, and films from moving-picture machines, light struck or otherwise damaged, or worn out, so as to be unsuitable for any other purpose than the recovery of the constituent materials, provided the basic films are of American manufacture, but proof of the identity of such articles shall be made under general regulations to be prescribed by the Secretary of the Treasury;

articles exported from the United States for repairs may be returned upon payment of a duty upon the value of the repairs at the rate at which the article itself would be subject if imported under conditions and regulations to be prescribed by the Secretary of the Treasury: *Provided*, That this paragraph shall not apply to any article upon which an allowance of drawback has been made, the reimportation of which is hereby prohibited except upon payment of duties equal to the drawbacks allowed; or to any article manufactured in bonded warehouse and exported under any provision of law: *And provided further*, That when manufactured tobacco which has been exported without payment of internal-revenue tax shall be reimported it shall be retained in the custody of the collector of customs until internal-revenue stamps in payment of the legal duties shall be placed thereon: *And provided further*, That the provisions of this paragraph shall not apply to animals made dutiable under the provisions of paragraph 397.

405. Asafetida.

406. Asbestos, unmanufactured.

407. Ashes, wood and lye of, and beet-root ashes.

408. Bagging for cotton, gunny cloth, and similar fabrics, suitable for covering cotton, composed of single yarns made of jute, jute butts, seg, Russian seg, New Zealand tow, Norwegian tow, aloe, mill waste, cotton tares, or other material not bleached, dyed, colored, stained, painted, or printed, not exceeding sixteen threads to the square inch, counting the warp and filling, and weighing not less than fifteen ounces per square yard; plain woven fabrics of single jute yarns by whatever name known, not bleached, dyed, colored, stained, printed, or rendered noninflammable by any process; and waste of any of the above articles suitable for the manufacture of paper.

409. Balm of Gilead.

410. Barks, cinchona or other, from which quinine may be extracted.

411. Bauxite or beauxite, crude, not refined or otherwise advanced in condition from its natural state.

412. Beeswax.

413. Bells, broken, and bell metal, broken and fit only to be remanufactured.

414. Bibles, comprising the books of the Old or New Testament, or both, bound or unbound.

415. All binding twine manufactured from New Zealand hemp, manila, istle or Tampico fiber, sisal grass, or sunn, or a mixture of any two or more of them, of single ply and measuring not exceeding seven hundred and fifty feet to the pound.

416. Birds and land and water fowls, not specially provided for in this section.

417. Biscuits, bread, and wafers, not specially provided for in this section.

418. Bismuth.

419. Bladders, and all integuments, tendons and intestines of animals and fish sounds, crude, dried or salted for preservation only, and unmanufactured, not specially provided for in this section.

420. Blood, dried, not specially provided for in this section.

421. Blue vitriol, or sulphate of copper; acetate and subacetate of copper, or verdigris.

422. Bolting cloths composed of silk, imported expressly for milling purposes, and so permanently marked as not to be available for any other use. Press cloths composed of camel's hair, imported expressly for oil milling purposes, and marked so as to indicate that it is for such purposes, and cut into

lengths not to exceed seventy-two inches and woven in widths not under ten inches nor to exceed fifteen inches and weighing not less than one-half pound per square foot.

423. Bones, crude, burned, calcined, ground, steamed, but not otherwise manufactured, and bone dust or animal carbon, bone meal, and bone ash.

424. Books, engravings, photographs, etchings, bound or unbound, maps and charts imported by authority or for the use of the United States or for the use of the Library of Congress.

425. Books, maps, music, engravings, photographs, etchings, lithographic prints, bound or unbound, and charts, which shall have been printed more than twenty years at the date of importation, and all hydrographic charts, and publications issued for their subscribers or exchanges by scientific and literary associations or academies, or publications of individuals for gratuitous private circulation, not advertising matter, and public documents issued by foreign governments.

426. Books and pamphlets printed wholly or chiefly in languages other than English; also books and music, in raised print, used exclusively by the blind, and all textbooks used in schools and other educational institutions; Braille tablets, cubarithmes, special apparatus and objects serving to teach the blind, including printing apparatus, machines, presses, and types for the use and benefit of the blind exclusively.

427. Books, maps, music, engravings, photographs, etchings, lithographic prints, and charts, specially imported, not more than two copies in any one invoice, in good faith, for the use and by order of any society or institution incorporated or established solely for religious, philosophical, educational, scientific, or literary purposes, or for the encouragement of the fine arts, or for the use and by order of any college, academy, school, or seminary of learning in the United States, or any State or public library, and not for sale, subject to such regulations as the Secretary of the Treasury shall prescribe.

428. Books, libraries, usual and reasonable furniture, and similar household effects of persons or families from foreign countries, all the foregoing if actually used abroad by them not less than one year, and not intended for any other person or persons, nor for sale.

429. Borax, crude and unmanufactured, and borate of lime, soda, and other borate material, crude and unmanufactured, not otherwise provided for in this section.

430. Brass, old brass, clippings from brass or Dutch metal, all the foregoing, fit only for remanufacture.

431. Brazilian pebble, unwrought or unmanufactured.

432. Bristles, crude, not sorted, bunched, or prepared.

433. Bromin.

434. Broom corn.

435. Buckwheat and buckwheat flour.

436. Bullion, gold or silver.

437. Burgundy pitch.

438. Burrstones, manufactured or bound up into millstones.

439. Cadmium.

440. Calcium, acetate of, brown and gray, and chloride of, crude; calcium carbide and calcium nitrate.

441. Cash registers, linotype and all typesetting machines, sewing machines, typewriters, shoe machinery, cream separators valued at not exceeding \$75, sand-blast machines, sludge machines, and tar and oil spreading machines used

in the construction and maintenance of roads and in improving them by the use of road preservatives, all the foregoing whether imported in whole or in parts, including repair parts.

- 442. Castor or castoreum.
- 443. Catgut, whip gut, or worm gut, unmanufactured.
- 444. Cement, Roman, Portland, and other hydraulic.
- 445. Cerium, cerite, or cerium ore.
- 446. Chalk, crude, not ground, bolted, precipitated, or otherwise manufactured.
- 447. Charcoal, blood char, bone char, or bone black, not suitable for use as a pigment.
- 448. Chromate of iron or chromic ore.
- 449. Chromium, hydroxide of, crude.
- 450. Common blue clay and Gross-Almerode glass-pot clay, in cases or casks, suitable for the manufacture of crucibles and glass melting pots or tank blocks.
- 451. Coal, anthracite, bituminous, culm, slack, and shale; coke; compositions used for fuel in which coal or coal dust is the component material of chief value, whether in briquets or other form.
- 452. Coal tar, crude, pitch of coal tar, wood or other tar, dead or creosote oil, and products of coal tar known as anthracene and anthracene oil, naphthalin, phenol, and cresol.
- 453. Cobalt and cobalt ore.
- 454. *Cocculus indicus*.
- 455. Cochineal.
- 456. Cocoa, or cacao, crude, and fiber, leaves, and shells of.
- 457. Coffee.
- 458. Coins of gold, silver, copper, or other metal.
- 459. Coir, and coir yarn.
- 460. Composition metal of which copper is the component material of chief value, not specially provided for in this section.
- 461. Copper ore; regulus of, and black or coarse copper, and copper cement; old copper, fit only for remanufacture, copper scale, clippings from new copper, and copper in plates, bars, ingots, or pigs, not manufactured or specially provided for in this section.
- 462. Copperas, or sulphate of iron.
- 463. Coral, marine, uncut, and unmanufactured.
- 464. Cork wood, or cork bark, unmanufactured, and cork waste, shavings, and cork refuse of all kinds.
- 465. Corn or maize.
- 466. Corn meal.
- 467. Cotton, and cotton waste or flocks.
- 468. Cryolite, or kryolith.
- 469. Cudbear.
- 470. Curling stones, or quoits, and curling-stone handles.
- 471. Curry, and curry powder.
- 472. Cuttlefish bone.
- 473. Dandelion roots, raw, dried or undried, but unground.
- 474. Glaziers' and engravers' diamonds, unset, miners' diamonds.
- 475. Divi-divi.
- 476. Dragon's blood.
- 477. Drugs, such as barks, beans, berries, buds, bulbs, bulbous roots, excrescences, fruits, flowers, dried fibers, dried insects, grains, gums, gum resin,

herbs, leaves, lichens, mosses, logs, roots, stems, vegetables, seeds (aromatic, not garden seeds), seeds of morbid growth, weeds; any of the foregoing which are natural and uncompounded drugs and not edible and not specially provided for in this section, and are in a crude state, not advanced in value or condition by shredding, grinding, chipping, crushing, or any other process or treatment whatever beyond that essential to the proper packing of the drugs and the prevention of decay or deterioration pending manufacture: *Provided*, That no article containing alcohol shall be admitted free of duty under this paragraph.

478. Eggs of poultry, birds, fish, and insects (except fish roe preserved for food purposes): *Provided, however*, That the importation of eggs of game birds or eggs of birds not used for food, except specimens for scientific collections, is prohibited: *Provided further*, That the importation of eggs of game birds for purposes of propagation is hereby authorized, under rules and regulations to be prescribed by the Secretary of the Treasury.

479. Emery ore and corundum, and crude artificial abrasives, not specially provided for.

480. Fans, common palm-leaf, plain and not ornamented or decorated in any manner, and palm leaf in its natural state, not colored, dyed, or otherwise advanced or manufactured.

481. Felt, adhesive, for sheathing vessels.

482. Fibrin, in all forms.

483. Fresh-water fish, and all other fish not otherwise specially provided for in this section.

484. Fish skins.

485. Flax straw, flax, not hackled or dressed; flax hackled, known as "dressed line," tow of flax and flax noils; hemp, and tow of hemp; hemp hackled, known as "line of hemp."

486. Flint, flints, and flint stones, unground.

487. Fossils.

488. Fruits or berries, green, ripe, or dried, and fruits in brine, not specially provided for in this section.

489. Fruit plants, tropical and semitropical, for the purpose of propagation or cultivation.

490. Fulminates, fulminating powder, and other like articles not specially provided for in this section.

491. Furs and fur skins, undressed.

492. Gambier.

493. Glass enamel, white, for watch and clock dials.

494. Glass plates or disks, rough-cut or unwrought, for use in the manufacture of optical instruments, spectacles, and eyeglasses, and suitable only for such use: *Provided, however*, That such disks exceeding eight inches in diameter may be polished sufficiently to enable the character of the glass to be determined.

495. Gloves, made wholly or in chief value of leather made from horse-hides, pigskins, and cattle hides of cattle of the bovine species, excepting calfskins, whether wholly or partly manufactured.

496. Goldbeaters' molds and goldbeaters' skins.

497. Grasses and fibers: Istle or Tampico fiber, jute, jute butts, manila, sisal grass, sunn, and all other textile grasses or fibrous vegetable substances, not dressed or manufactured in any manner, and not specially provided for in this section.

498. Grease, fats, vegetable tallow, and oils (excepting fish oils), not chemi-

cally compounded, such as are commonly used in soap making or in wire drawing, or for stuffing or dressing leather, not specially provided for in this section.

499. Guano, manures, and all substances used only for manure, including basic slag, ground or unground, and calcium cyanamid or lime nitrogen.

500. Gum: Amber in chips valued at not more than 50 cents per pound, copal, damar, and kauri.

501. Gunpowder, and all explosive substances, not specially provided for in this section, used for mining, blasting, and artillery purposes.

502. Gutta-percha, crude.

503. Hair of horse, cattle, and other animals, cleaned or uncleaned, drawn or undrawn, but unmanufactured, not specially provided for in this section.

504. Hide cuttings, raw, with or without hair, and all other glue stock.

505. Hide rope.

506. Hides of cattle, raw or uncured, or dry, salted, or pickled.

507. Hones and whetstones.

508. Hoofs, unmanufactured.

509. Hoop or band iron, or hoop or band steel, cut to lengths, or wholly or partly manufactured into hoops or ties, coated or not coated with paint or any other preparation, with or without buckles or fastenings, for baling cotton or any other commodity.

510. Hop roots for cultivation.

511. Horns and parts of, including horn strips and tips, unmanufactured.

512. Ice.

513. India rubber, crude, and milk of, and scrap or refuse india rubber, fit only for remanufacture.

514. Indigo, natural or synthetic, dry or suspended in water, and dyes obtained from indigo.

515. Iodine, crude, or resublimed.

516. Ipecac.

517. Iridium, osmium, palladium, rhodium, and ruthenium and native combinations thereof with one another or with platinum.

518. Iron ore, including manganiferous iron ore, and the dross or residuum from burnt pyrites; iron in pigs, iron kentledge, spiegeleisen, wrought iron and scrap and scrap steel; but nothing shall be deemed scrap iron or scrap steel except second-hand or waste or refuse iron or steel fit only to be remanufactured; ferromanganese; iron in slabs, blooms, loops or other forms less finished than iron bars, and more advanced than pig iron, except castings, not specially provided for in this section.

519. Jalap.

520. Jet, unmanufactured.

521. Joss stick or joss light.

522. Junk, old.

523. Kelp.

524. Kieserite.

525. Kyanite, or cyanite, and kainite.

526. Lac dye, crude, seed, button, stick, and shell.

527. Lactarene or casein.

528. Lard, lard compounds, and lard substitutes.

529. Lava, unmanufactured.

530. All leather not specially provided for in this section and leather board or compressed leather; leather cut into shoe uppers or vamps or other forms

suitable for conversion into boots or shoes; boots and shoes made wholly or in chief value of leather; leather shoe laces, finished or unfinished; harness, saddles, and saddlery, in sets or in parts, finished or unfinished.

531. Leeches.

532. Lemon juice, lime juice, and sour orange juice, all the foregoing containing not more than 2 per centum of alcohol.

533. Lifeboats and life-saving apparatus specially imported by societies and institutions incorporated or established to encourage the saving of human life.

534. Limestone-rock asphalt; asphaltum, and bitumen.

535. Lithographic stones, not engraved.

536. Litmus, prepared or not prepared.

537. Loadstones.

538. Madder and munjeet, or Indian madder, ground or prepared, and all extracts of.

539. Magnesite, crude or calcined, not purified.

540. Manganese, oxide and ore of.

541. Manna.

542. Manuscripts.

543. Marrow, crude.

544. Marshmallow or althea root, leaves or flowers, natural or unmanufactured.

545. Meats: Fresh beef, veal, mutton, lamb, and pork; bacon and hams; meats of all kinds, prepared or preserved, not specially provided for in this section: *Provided, however,* That none of the foregoing meats shall be admitted into the United States unless the same is healthful, wholesome and fit for human food and contains no dye, chemical, preservative, or ingredient which renders the same unhealthful, unwholesome or unfit for human food, and unless the same also complies with the rules and regulations made by the Secretary of Agriculture, and that, after entry into the United States in compliance with said rules and regulations, said imported meats shall be deemed and treated as domestic meats within the meaning of and shall be subject to the provisions of the Act of June thirtieth, nineteen hundred and six (Thirty-fourth Statutes at Large, page six hundred and seventy-four), commonly called the Meat Inspection Amendment, and the Act of June thirtieth, nineteen hundred and six, (Thirty-fourth Statutes at Large, page seven hundred and sixty-eight), commonly called the Food and Drugs Act, and that the Secretary of Agriculture be and hereby is authorized to make rules and regulations to carry out the purposes of this paragraph, and that in such rules and regulations the Secretary of Agriculture may prescribe the terms and conditions for the destruction for food purposes of all such meats offered for entry and refused admission into the United States unless the same be exported by the consignee within the time fixed therefor in such rules and regulations.

546. Medals of gold, silver, or copper, and other articles actually bestowed as trophies or prizes, and received and accepted as honorary distinctions.

547. Milk and cream, including milk or cream preserved or condensed, or sterilized by heating or other processes, and sugar of milk.

548. Mineral salts obtained by evaporation from mineral waters, when accompanied by a duly authenticated certificate and satisfactory proof showing that they are in no way artificially prepared and are only the product of a designated mineral spring.

549. Minerals, crude, or not advanced in value or condition by refining or



grinding, or by other process of manufacture, not specially provided for in this section.

550. Miners' rescue appliances, designed for emergency use in mines where artificial breathing is necessary in the presence of poisonous gases, to aid in the saving of human life, and miners' safety lamps, and parts, accessories, and appliances for cleaning, repairing, and operating all the foregoing.

551. Models of inventions and of other improvements in the arts, to be used exclusively as models and incapable of any other use.

552. Moss, seaweeds, and vegetable substances, crude or unmanufactured, not otherwise specially provided for in this section.

553. Myrobolans fruit.

554. Cut nails and cut spikes of iron or steel, horseshoe nails, horseshoe nail rods, hobnails, and all other wrought-iron or steel nails not specially provided for in this section; wire staples, wire nails made of wrought iron or steel, spikes, and horse, mule, or ox shoes, of iron or steel, and cut tacks, brads, or sprigs.

555. Needles, hand sewing and darning, and needles for shoe machines.

556. Newspapers and periodicals; but the term "periodicals" as herein used shall be understood to embrace only unbound or paper-covered publications issued within six months of the time of entry, devoted to current literature of the day, or containing current literature as a predominant feature, and issued regularly at stated periods, as weekly, monthly, or quarterly, and bearing the date of issue.

557. Nuts: Marrons, crude; coconuts in the shell and broken coconut meat or copra, not shredded, desiccated, or prepared in any manner; palm nuts and palm-nut kernels.

558. *Nux vomica*.

559. Oakum.

560. Oil cake.

561. Oils: Birch tar, cajeput, coconut, cod, cod liver, cottonseed, croton, ichthyol, juglandium, palm, palm-kernel, perilla, soya-bean, and olive oil rendered unfit for use as food or for any but mechanical or manufacturing purposes, by such means as shall be satisfactory to the Secretary of the Treasury and under regulations to be prescribed by him; Chinese nut oil, nut oil or oil of nuts not specially provided for in this section; petroleum, crude or refined, and all products obtained from petroleum, including kerosene, benzine, naphtha, gasoline, paraffin, and paraffin oil; and also spermaceti, whale, and other fish oils of American fisheries, and all fish and other products of such fisheries.

562. Oleo stearin.

563. Orange and lemon peel, not preserved, candied, or dried.

564. Orchil, or orchil liquid.

565. Ores of gold, silver, or nickel, and nickel matte; ores of the platinum metals; sweepings of gold and silver.

566. Paper stock, crude, of every description, including all grasses, fibers, rags, waste, including jute, hemp and flax waste, shavings, clippings, old paper, rope ends, waste rope, and waste bagging, and all other waste not specially provided for in this section, including old gunny cloth and old gunny bags, used chiefly for paper making.

567. Printing paper (other than paper commercially known as handmade or machine handmade paper, japan paper, and imitation japan paper by whatever name known), unsized, sized, or glued, suitable for the printing of books and newspapers, but not for covers or bindings, not specially provided for in

this section, valued at not above  $2\frac{1}{2}$  cents per pound, decalcomania paper not printed.

568. Parchment and vellum.

569. Paris green and London purple.

570. Pearl, mother of, and shells, not sawed, cut, flaked, polished, or otherwise manufactured, or advanced in value from the natural state.

571. Personal effects, not merchandise, of citizens of the United States dying in foreign countries.

572. Pewter and britannia metal, old, and fit only to be remanufactured.

573. Philosophical and scientific apparatus, utensils, instruments, and preparations, including bottles and boxes containing the same, specially imported in good faith for the use and by order of any society or institution incorporated or established solely for religious, philosophical, educational, scientific, or literary purposes, or for the encouragement of the fine arts, or for the use and by order of any college, academy, school, or seminary of learning in the United States, or any State or public library, and not for sale, and articles solely for experimental purposes, when imported by any society or institution of the character herein described, subject to such regulations as the Secretary of the Treasury shall prescribe.

574. Phosphates, crude.

575. Phosphorus.

576. Photographic and moving-picture films, sensitized but not exposed or developed.

577. Plants, trees, shrubs, roots, seed cane, and seeds, imported by the Department of Agriculture or the United States Botanic Garden.

578. Platinum, unmanufactured or in ingots, bars, plates, sheets, wire, sponge, or scrap, and vases, retorts, and other apparatus, vessels, and parts thereof, composed of platinum, for chemical uses.

579. Plumbago.

580. Potash: Crude, or "black salts"; carbonate of; cyanide of; sulphate of; hydrate of, when not containing more than 15 per centum of caustic soda; nitrate of, or saltpeter, crude; and muriate of.

581. Potatoes, and potatoes dried, desiccated, or otherwise prepared, not specially provided for in this section: *Provided*, That any of the foregoing specified articles shall be subject to a duty of 10 per centum ad valorem when imported directly or indirectly from a country, dependency, or other subdivision of government which imposes a duty on such articles imported from the United States.

582. Professional books, implements, instruments, and tools of trade, occupation, or employment in the actual possession of persons emigrating to the United States owned and used by them abroad; but this exemption shall not be construed to include machinery or other articles imported for use in any manufacturing establishment, or for any other person or persons, or for sale, nor shall it be construed to include theatrical scenery, properties, and apparel; but such articles brought by proprietors or managers of theatrical exhibitions arriving from abroad, for temporary use by them in such exhibitions, and not for any other person, and not for sale, and which have been used by them abroad, shall be admitted free of duty under such regulations as the Secretary of the Treasury may prescribe; but bonds shall be given for the payment to the United States of such duties as may be imposed by law upon any and all such articles as shall not be exported within six months after such importation: *Provided*, That the Secretary of the Treasury may, in his discretion, extend

such period for a further term of six months in case application shall be made therefor.

583. Pelu.
584. Quinia, sulphate of, and all alkaloids or salts of cinchona bark.
585. Radium and salts of, radioactive substitutes, selenium and salts of.
586. Rags, not otherwise specially provided for in this section.
587. Railway bars, made of iron or steel, and railway bars made in part of steel, rails, and punched iron or steel flat rails.
588. Rennets, raw or prepared.
589. Rye and rye flour.
590. Sago, crude, and sago flour.
591. Salicin.
592. Salep, or salop.
593. Salt.
594. Santonin, and its combinations with acids not subject to duty under this section.
595. Seeds: Cardamom, cauliflower, celery, coriander, cotton, cummin, fennel, fenugreek, hemp, hoarhound, mangelwurzel, mustard, rape, Saint John's bread or bean, sorghum, sugar beet, and sugar cane for seed; bulbs and bulbous roots, not edible and not otherwise provided for in this section; all flower and grass seeds; coniferous evergreen seedlings; all the foregoing not specially provided for in this section.
596. Sheep dip.
597. Shotgun barrels, in single tubes, forged, rough bored.
598. Shrimps, lobsters, and other shellfish.
599. Silk cocoons and silk waste.
600. Silk, raw, in skeins reeled from the cocoon, or rereeled, but not wound, doubled, twisted, or advanced in manufacture in any way.
601. Silkworm eggs.
602. Skeletons and other preparations of anatomy.
603. Skins of hares, rabbits, dogs, goats, and sheep, undressed.
604. Skins of all kinds, raw, and hides not specially provided for in this section.
605. Soda, arseniate of, cyanide of, sulphate of, crude, or salt cake and niter cake, soda ash, silicate of, nitrate of, or cubic nitrate.
606. Soya beans.
607. Specimens of natural history, botany, and mineralogy, when imported for scientific public collections, and not for sale.
608. Spunk.
609. Spurs and stilts used in the manufacture of earthen, porcelain, and stone ware.
610. Stamps: Foreign postage or revenue stamps, canceled or uncanceled, and foreign government stamped post cards bearing no other printing than the official imprint thereon.
611. Statuary and casts of sculpture for use as models or for art educational purposes only; regalia and gems, where specially imported in good faith for the use and by order of any society incorporated or established solely for religious, philosophical, educational, scientific, or literary purposes, or for the encouragement of the fine arts, or for the use and by order of any college, academy, school, seminary of learning, orphan asylum, or public hospital in the United States, or any State or public library, and not for sale, subject to such regulations as the Secretary of the Treasury shall prescribe; but the term

“regalia” as herein used shall be held to embrace only such insignia of rank or office or emblems as may be worn upon the person or borne in the hand during public exercises of the society or institution, and shall not include articles of furniture or fixtures, or of regular wearing apparel, nor personal property of individuals.

612. Steel engraved forms for bonds, debentures, stock certificates, negotiable receipts, notes and other securities; and engraved steel plates, dies and rolls, suitable for use in engraving or printing bonds, stock certificates or other securities.

613. Steel ingots, cogged ingots, blooms and slabs, die blocks or blanks, and billets, if made by the Bessemer, Siemens-Martin, open-hearth or similar processes, not containing alloy, such as nickel, cobalt, vanadium, chromium, tungsten, or wolfram, molybdenum, titanium, iridium, uranium, tantalum, boron, and similar alloys.

614. Stone and sand: Burrstone in blocks, rough or unmanufactured; rotten stone, tripoli, and sand, crude or manufactured; cliff stone, freestone, granite, sandstone, and limestone, unmanufactured, and not suitable for use as monumental or building stone; all of the foregoing not specially provided for in this section.

615. Strontia, oxide of, protoxide of strontian, and strontianite or mineral carbonate of strontia.

616. Strychnia or strychnine, and its combinations with acids not subject to duty under this section.

617. Sulphur in any form, brimstone, and sulphur ore as pyrites, or sulphuret of iron in its natural state, containing in excess of 25 per centum of sulphur.

618. Sumac, ground or unground.

619. Swine, cattle, sheep, and all other domestic live animals suitable for human food not otherwise provided for in this section.

620. Tagua nuts.

621. Talcum, steatite, and French chalk, crude and unground.

622. Tallow.

623. Tamarinds.

624. Tanning material: Extracts of quebracho, and of hemlock bark; extracts of oak and chestnut and other barks and woods other than dyewoods such as are commonly used for tanning not specially provided for in this section; nuts and nutgalls and woods used expressly for dyeing or tanning, whether or not advanced in value or condition by shredding, grinding, chipping, crushing, or any other process; and articles in a crude state used in dyeing or tanning; all the foregoing not containing alcohol and not specially provided for in this section.

625. Tapioca, tapioca flour, cassava or cassady.

626. Tar and pitch of wood.

627. Tea not specially provided for in this section, and tea plants: *Provided*, That the cans, boxes, or other containers of tea packed in packages of less than five pounds each shall be dutiable at the rate chargeable thereon if imported empty: *Provided further*, That nothing herein contained shall be construed to repeal or impair the provisions of an Act entitled “An Act to prevent the importation of impure and unwholesome tea,” approved March second, eighteen hundred and ninety-seven, and any Act amendatory thereof.

628. Teeth, natural, or unmanufactured.

629. Terra alba, not made from gypsum or plaster rock.

630. Terra japonica.

631. Tin ore, cassiterite or black oxide of tin, tin in bars, blocks, pigs, or grain or granulated, and scrap tin: *Provided*, That there shall be imposed and paid upon cassiterite, or black oxide of tin, and upon bar, block, pig tin and grain or granulated, a duty of 4 cents per pound when it is made to appear to the satisfaction of the President of the United States that the mines of the United States are producing one thousand five hundred tons of cassiterite and bar, block, and pig tin per year. The President shall make known this fact by proclamation, and thereafter said duties shall go into effect.

632. Tobacco stems.

633. Tungsten-bearing ores of all kinds.

634. Turmeric.

635. Turpentine, Venice, and spirits of.

636. Turtles.

637. Type, stereotype metal, electrotype metal, linotype composition, all of the foregoing, old and fit only to be remanufactured.

638. Uranium, oxide and salts of.

639. Valonia.

640. Wafers, unleavened or not edible.

641. Wax, vegetable or mineral.

642. Wearing apparel, articles of personal adornment, toilet articles, and similar personal effects of persons arriving in the United States; but this exemption shall include only such articles as were actually owned by them and in their possession abroad at the time of or prior to their departure from a foreign country, and as are necessary and appropriate for the wear and use of such persons and are intended for such wear and use, and shall not be held to apply to merchandise or articles intended for other persons or for sale: *Provided*, That in case of residents of the United States returning from abroad all wearing apparel, personal and household effects taken by them out of the United States to foreign countries shall be admitted free of duty, without regard to their value, upon their identity being established under appropriate rules and regulations to be prescribed by the Secretary of the Treasury: *Provided further*, That up to but not exceeding \$100 in value of articles acquired abroad by such residents of the United States for personal or household use or as souvenirs or curios, but not bought on commission or intended for sale, shall be admitted free of duty.

643. Whalebone, unmanufactured.

644. Wheat, wheat flour, semolina, and other wheat products, not specially provided for in this section: *Provided*, That wheat shall be subject to a duty of 10 cents per bushel, that wheat flour shall be subject to a duty of 45 cents per barrel of 196 pounds, and semolina and other products of wheat, not specially provided for in this section, 10 per centum ad valorem, when imported directly or indirectly from a country, dependency, or other subdivision of government which imposes a duty on wheat or wheat flour or semolina imported from the United States.

645. All barbed wire, galvanized wire not larger than twenty one-hundredths of one inch in diameter and not smaller than eight one-hundredths of one inch in diameter of the kind commonly used for fencing purposes, galvanized wire fencing composed of wires not larger than twenty one-hundredths of one inch in diameter nor smaller than eight one-hundredths of one inch in diameter, and wire commonly used for baling hay or other commodities.

646. Witherite.

647. Wood: Logs, timber, round, unmanufactured, hewn or sawed, sided or squared; pulp woods, kindling wood, firewood, hop poles, hoop poles, fence posts, handle bolts, shingle bolts, gun blocks for gunstocks rough hewn or sawed, or planed on one side; hubs for wheels, posts, heading bolts, stave bolts, last blocks, wagon blocks, oar blocks, heading blocks, and all like blocks or sticks, rough hewn, sawed, or bored; sawed boards, planks, deals, and other lumber, not further manufactured than sawed, planed, and tongued and grooved; clapboards, laths, pickets, palings, staves, shingles, ship timber, ship planking, broom handles, sawdust, and wood flour; all the foregoing not specially provided for in this section.

648. Woods: Cedar, including Spanish cedar, *lignum-vitæ*, lancewood, ebony, box, granadilla, mahogany, rosewood, satinwood, and all forms of cabinet woods, in the log, rough, or hewn only, and red cedar (*Juniperus virginiana*) timber, hewn, sided, squared, or round; sticks of partridge, hair wood, pimento, orange, myrtle, bamboo, rattan, reeds unmanufactured, india malacca joints, and other woods not specially provided for in this section, in the rough, or not further advanced than cut into lengths suitable for sticks for umbrellas, parasols, sunshades, whips, fishing rods, or walking canes.

649. Mechanically ground wood pulp, chemical wood pulp, unbleached or bleached, and rag pulp.

650. Wool of the sheep, hair of the camel, and other like animals, and all wools and hair on the skin of such animals, and paper twine for binding any of the foregoing. This paragraph shall be effective on and after the first day of December, nineteen hundred and thirteen, until which time the rates of duty now provided by schedule K of the existing law shall remain in full force and effect.

651. Wool wastes: All noils, top waste, card waste, slubbing waste, roving waste, ring waste, yarn waste, bur waste, thread waste, garnetted waste, shoddies, mungo, flocks, wool extract, carbonized wool, carbonized noils, and all other wastes not specially provided for in this section. This paragraph shall be effective on and after the first day of December, nineteen hundred and thirteen, until which time the rates of duty now provided by schedule K of the existing law shall remain in full force and effect.

652. Original paintings in oil, mineral, water, or other colors, pastels, original drawings and sketches in pen and ink or pencil and water colors, artists' proof etchings unbound, and engravings and woodcuts unbound, original sculptures or statuary, including not more than two replicas or reproductions of the same; but the terms "sculpture" and "statuary" as used in this paragraph shall be understood to include professional productions of sculptors only, whether in round or in relief, in bronze, marble, stone, terra cotta, ivory, wood, or metal, or whether cut, carved, or otherwise wrought by hand from the solid block or mass of marble, stone, or alabaster, or from metal, or cast in bronze or other metal or substance, or from wax or plaster, made as the professional productions of sculptors only; and the words "painting" and "sculpture" and "statuary" as used in this paragraph shall not be understood to include any articles of utility, nor such as are made wholly or in part by stenciling or any other mechanical process; and the words "etchings," "engravings," and "wood-cuts" as used in this paragraph shall be understood to include only such as are printed by hand from plates or blocks etched or engraved with hand tools and not such as are printed from plates or blocks etched or engraved by photochemical or other mechanical processes.

653. Works of art, drawings, engravings, photographic pictures, and philosophical and scientific apparatus brought by professional artists, lecturers, or scientists arriving from abroad for use by them temporarily for exhibition and in illustration, promotion, and encouragement of art, science, or industry in the United States, and not for sale, shall be admitted free of duty, under such regulations as the Secretary of the Treasury shall prescribe; but bonds shall be given for the payment to the United States of such duties as may be imposed by law upon any and all such articles as shall not be exported within six months after such importation: *Provided*, That the Secretary of the Treasury may, in his discretion, extend such period for a further term of six months in cases where application therefor shall be made.

654. Works of art, collections in illustration of the progress of the arts, sciences, agriculture, or manufactures, photographs, works in terra cotta, parian, pottery, or porcelain, antiquities and artistic copies thereof in metal or other material, imported in good faith for exhibition at a fixed place by any State or by any society or institution established for the encouragement of the arts, science, agriculture, or education, or for a municipal corporation, and all like articles imported in good faith by any society or association, or for a municipal corporation, for the purpose of erecting a public monument, and not intended for sale nor for any other purpose than herein expressed; but bond shall be given under such rules and regulations as the Secretary of the Treasury may prescribe, for the payment of lawful duties which may accrue should any of the articles aforesaid be sold, transferred, or used contrary to this provision, and such articles shall be subject, at any time, to examination and inspection by the proper officers of the customs: *Provided*, That the privileges of this and the preceding paragraph shall not be allowed to associations or corporations engaged in or connected with business of a private or commercial character.

655. Works of art, productions of American artists residing temporarily abroad, or other works of art, including pictorial paintings on glass, imported expressly for presentation to a national institution or to any State or municipal corporation or incorporated religious society, college, or other public institution, including stained or painted window glass or stained or painted glass windows imported to be used in houses of worship, and excluding any article, in whole or in part, molded, cast, or mechanically wrought from metal within twenty years prior to importation; but such exemption shall be subject to such regulations as the Secretary of the Treasury may prescribe.

656. Works of art (except rugs and carpets), collections in illustration of the progress of the arts, works in bronze, marble, terra cotta, parian, pottery, or porcelain, artistic antiquities, and objects of art of ornamental character or educational value which shall have been produced more than one hundred years prior to the date of importation, but the free importation of such objects shall be subject to such regulations as to proof of antiquity as the Secretary of the Treasury may prescribe.

657. Zaffer. [38 Stat. L. 114-166.]

## SECTION II. [INCOME TAX.]

[See INTERNAL REVENUE.]

**SECTION III. [CUSTOMS ADMINISTRATION.]**

A. That the Act entitled "An Act to simplify the laws in relation to the collection of the revenues," approved June tenth, eighteen hundred and ninety, as amended, be further amended to read as follows:

"B. That all merchandise imported into the United States shall, for the purpose of this Act, be deemed and held to be the property of the person to whom the same is consigned; and the holder of a bill of lading duly indorsed by the consignee therein named, or, if consigned to order, by the consignor, shall be deemed the consignee thereof; and in case of the abandonment of any merchandise to the underwriters the latter may be recognized as the consignee.

"C. That all invoices of imported merchandise shall be made out in the currency of the place or country from whence the importations shall be made, or, if purchased, or agreed to be purchased, in the currency actually paid, agreed upon, or to be paid therefor, shall contain a correct, complete, and detailed description of such merchandise and of the packages, wrappings, or other coverings containing it, and shall be made in triplicate or in quadruplicate in case of merchandise intended for immediate transportation without appraisement, and signed by the person owning or shipping the same, if the merchandise has been actually purchased, or price agreed upon, fixed, or determined, or by the manufacturer or owner thereof, if the same has been procured otherwise than by purchase, or agreement of purchase, or by the duly authorized agent of such purchaser, seller, manufacturer, or owner.

"D. That all such invoices shall, at or before the shipment of the merchandise, be produced to the consular officer of the United States of the consular district in which the merchandise was manufactured, or purchased, or contracted to be delivered from, or when purchases or agreements for purchase are made in several places, in the consular district where the merchandise is assembled for shipment, as the case may be, for export to the United States, and shall have indorsed thereon, when so produced, a declaration signed by the purchaser, seller, manufacturer, owner, or agent, setting forth that the invoice is in all respects correct and true and was made at the place from which the merchandise is to be exported to the United States; that it contains, if the merchandise was obtained by purchase, or agreement for purchase, a true and full statement of the time when, the place where, the person from whom the same was purchased, or agreed to be purchased, and the actual cost thereof, or price agreed upon, fixed, or determined, and of all charges thereon, as provided by this Act; and that no discounts, rebates, or commissions are contained in the invoice but such as have been actually allowed thereon, and that all drawbacks or bounties received or to be received are shown therein; and when obtained in any other manner than by purchase, or agreement of purchase, the actual market value or wholesale price thereof, at the time of exportation to the United States, in the principal markets of the country from whence exported; that such actual market value is the price at which the merchandise described in the invoice is freely offered for sale to all purchasers in said markets, and that it is the price which the manufacturer or owner making the declaration would have received, and was willing to receive, for such merchandise sold in the ordinary course of trade in the usual wholesale quantities, and that it includes



all charges thereon as provided by this Act, and the actual quantity thereof; and that no different invoice of the merchandise mentioned in the invoice so produced has been or will be furnished to anyone. If the merchandise was actually purchased, or agreed to be purchased, the declaration shall also contain a statement that the currency in which such invoice is made out is that which was actually paid for the merchandise by the purchaser, or agreed to be paid, fixed, or determined.

"E. That, except in case of personal effects accompanying the passenger, no importation of any merchandise exceeding \$100 in value shall be admitted to entry without the production of a duly certified invoice thereof as required by law, or of an affidavit made by the owner, importer, or consignee, before the collector or his deputy, showing why it is impracticable to produce such invoice; and no entry shall be made in the absence of a certified invoice, upon affidavit as aforesaid, unless such affidavit be accompanied by a statement in the form of an invoice, or otherwise, showing the actual cost of such merchandise, if purchased, or if obtained otherwise than by purchase, the actual market value or wholesale price thereof at the time of exportation to the United States in the principal markets of the country from which the same has been imported, which statement shall be verified by the oath of the owner, importer, consignee, or agent desiring to make entry of the merchandise, to be administered by the collector or his deputy, and it shall be lawful for the collector or his deputy to examine the deponent under oath, touching the sources of his knowledge, information, or belief in the premises, and to require him to produce any letter, paper, or statement of account in his possession, or under his control, which may assist the officers of customs in ascertaining the actual value of the importation or any part thereof, and in default of such production, when so requested, such owner, importer, consignee, or agent shall be thereafter debarred from producing any such letter, paper, or statement for the purpose of avoiding any additional duty, penalty, or forfeiture incurred under this Act, unless he shall show to the satisfaction of the court or the officers of the customs, as the case may be, that it was not in his power to produce the same when so demanded; and no merchandise shall be admitted to entry under the provisions of this section unless the collector shall be satisfied that the failure to produce a duly certified invoice is due to causes beyond the control of the owner, consignee, or agent thereof: *Provided*, That the Secretary of the Treasury may make regulations by which books, magazines, and other periodicals published and imported in successive parts, numbers, or volumes, and entitled to be imported free of duty, shall require but one declaration for the entire series. And when entry of merchandise exceeding \$100 in value is made by a statement in the form of an invoice, the collector shall require a bond for the production of a duly certified invoice.

"F. That whenever merchandise imported into the United States is entered by invoice, a declaration upon a form to be prescribed by the Secretary of the Treasury, according to the nature of the case, shall be filed with the collector of the port at the time of entry by the owner, importer, consignee, or agent, which declaration so filed shall be duly signed by the owner, importer, consignee, or agent before the collector, or before a notary public or other officer duly authorized by law to administer oaths and take acknowledgments, under regulations to be prescribed by the Secretary of the Treasury: *Provided*, That if any of the invoices or bills of lading of any merchandise imported in any one vessel which should otherwise be embraced in said entry have not been received at the date of the entry the declaration may state the fact, and thereupon such

merchandise, of which the invoices or bills of lading are not produced, shall not be included in such entry, but may be entered subsequently. That the Secretary of the Treasury and the Secretary of Commerce are hereby authorized and directed to establish from time to time for statistical purposes a list or enumeration of articles in such detail as in their judgment may be necessary comprehending all goods, wares, and merchandise imported into the United States, and that as a part of the declaration herein provided there shall be either attached thereto or included therein an accurate statement specifying, in the terms of the said detailed list or enumeration, the kinds and quantities of all merchandise imported, and the value of the total quantity of each kind of article, and it shall be the duty of the consular officer, to whom the invoice shall be produced, to require such information to be given.

"G. That if any consignor, seller, owner, importer, consignee, agent, or other person or persons, shall enter or introduce, or attempt to enter or introduce, into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, or shall make any false statement in the declarations provided for in paragraph F without reasonable cause to believe the truth of such statement, or shall aid or procure the making of any such false statement as to any matter material thereto without reasonable cause to believe the truth of such statement, or shall be guilty of any willful act or omission by means whereof the United States shall or may be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, declaration, affidavit, letter, paper, or statement, or affected by such act or omission, such person or persons shall upon conviction be fined for each offense a sum not exceeding \$5,000, or be imprisoned for a time not exceeding two years, or both, in the discretion of the court: *Provided*, That nothing in this section shall be construed to relieve imported merchandise from forfeiture by reason of such false statement or for any cause elsewhere provided by law.

"H. That if any consignor, seller, owner, importer, consignee, agent, or other person or persons shall enter or introduce, or attempt to enter or introduce, into the commerce of the United States any imported merchandise by means of any fraudulent or false invoice, declaration, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, or shall make any false statement in the declarations provided for in paragraph F without reasonable cause to believe the truth of such statement, or shall aid or procure the making of any such false statement as to any matter material thereto without reasonable cause to believe the truth of such statement, or shall be guilty of any willful act or omission by means whereof the United States shall or may be deprived of the lawful duties or any portion thereof, accruing upon the merchandise or any portion thereof, embraced or referred to in such invoice, declaration, affidavit, letter, paper, or statement, or affected by such act or omission, such merchandise, or the value thereof, to be recovered from such person or persons, shall be forfeited, which forfeiture shall only apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles of merchandise to which such fraud or false paper or statement relates. That the arrival within the territorial limits of the United States of any merchandise consigned for sale and remaining the property of the shipper or consignor, and the acceptance of a false or fraudulent invoice thereof by the

consignee or the agent of the consignor, or the existence of any other facts constituting an attempted fraud, shall be deemed, for the purposes of this paragraph, to be an attempt to enter such merchandise notwithstanding no actual entry has been made or offered.

"I. That the owner, consignee, or agent of any imported merchandise may, at the time when he shall make entry of such merchandise, but not after either the invoice or the merchandise has come under the observation of the appraiser, make such addition in the entry to or such deduction from the cost or value given in the invoice or pro forma invoice or statement in form of an invoice, which he shall produce with his entry, as in his opinion may raise or lower the same to the actual market value or wholesale price of such merchandise at the time of exportation to the United States, in the principal markets of the country from which the same has been imported; and the collector within whose district any merchandise may be imported or entered, whether the same has been actually purchased or procured otherwise than by purchase, shall cause the actual market value or wholesale price of such merchandise to be appraised; and if the appraised value of any article of imported merchandise subject to an ad valorem duty or to a duty based upon or regulated in any manner by the value thereof shall exceed the value declared in the entry, there shall be levied, collected, and paid, in addition to the duties imposed by law on such merchandise, an additional duty of 1 per centum of the total appraised value thereof for each 1 per centum that such appraised value exceeds the value declared in the entry: *Provided*, That the additional duties shall only apply to the particular article or articles in each invoice that are so undervalued and shall not be imposed upon any article upon which the amount of duty imposed by law on account of the appraised value does not exceed the amount of duty that would be imposed if the appraised value did not exceed the entered value, and shall be limited to 75 per centum of the appraised value of such article or articles. Such additional duties shall not be construed to be penal, and shall not be remitted nor payment thereof in any way avoided except in cases arising from a manifest clerical error, nor shall they be refunded in case of exportation of the merchandise, or on any other account, nor shall they be subject to the benefit of drawback: *Provided*, That if the appraised value of any merchandise shall exceed the value declared in the entry by more than 75 per centum, except when arising from a manifest clerical error, such entry shall be held to be presumptively fraudulent, and the collector of customs shall seize such merchandise and proceed as in case of forfeiture for violation of the customs laws, and in any legal proceeding other than a criminal prosecution that may result from such seizure, the undervaluation as shown by the appraisal shall be presumptive evidence of fraud, and the burden of proof shall be on the claimant to rebut the same, and forfeiture shall be adjudged unless he shall rebut such presumption of fraudulent intent by sufficient evidence. The forfeiture provided for in this section shall apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles in each invoice which are undervalued: *Provided further*, That all additional duties, penalties, or forfeitures applicable to merchandise entered by a duly certified invoice shall be alike applicable to merchandise entered by a pro forma invoice or statement in the form of an invoice, and no forfeiture or disability of any kind incurred under the provisions of this section shall be remitted or mitigated by the Secretary of the Treasury. The duty shall not, however, be assessed in any case upon an amount less than the entered value, unless by direction of the Secretary of the Treasury in cases in which the importer certifies at the time of entry that the entered

value is higher than the foreign market value and that the goods are so entered in order to meet advances by the appraiser in similar cases then pending on appeal for reappraisal, and the importer's contention shall subsequently be sustained by a final decision on reappraisal, and it shall appear that the action of the importer on entry was taken in good faith, after due diligence and inquiry on his part, and the Secretary of the Treasury shall accompany his directions with a statement of his conclusions and his reasons therefor.

"J. That when merchandise entered for customs duty has been consigned for sale by or on account of the manufacturer thereof, to a person, agent, partner, or consignee in the United States, such person, agent, partner, or consignee shall, at the time of the entry of such merchandise, present to the collector of customs at the port where such entry is made, as a part of such entry, and in addition to the certified invoice or statement in the form of an invoice required by law, a statement signed by such manufacturer, declaring the cost of production of such merchandise, such cost to include all the elements of cost as stated in paragraph I. of this Act. When merchandise entered for customs duty has been consigned for sale by or on account of a person other than the manufacturer of such merchandise, to a person, agent, partner, or consignee in the United States, such person, agent, partner, or consignee shall at the time of the entry of such merchandise present to the collector of customs at the port where such entry is made, as a part of such entry, a statement signed by the consignor thereof, declaring that the merchandise was actually purchased by him or for his account, and showing the time when, the place where, and from whom he purchased the merchandise, and in detail the price he paid for the same: *Provided*, That the statements required by this section shall be made in triplicate, and shall bear the attestation of the consular officer of the United States resident within the consular district wherein the merchandise was manufactured, if consigned by the manufacturer or for his account, or from whence it was imported when consigned by a person other than the manufacturer, one copy thereof to be delivered to the person making the statement, one copy to be transmitted with the triplicate invoice of the merchandise to the collector of the port in the United States to which the merchandise is consigned, and the remaining copy to be filed in the consulate.

"K. That it shall be the duty of the appraisers of the United States, and every of them, and every person who shall act as such appraiser, or of the collector, as the case may be, by all reasonable ways and means in his or their power to ascertain, estimate, and appraise (any invoice or affidavit thereto or statement of cost, or of cost of production to the contrary notwithstanding) the actual market value and wholesale price of the merchandise at the time of exportation to the United States, in the principal markets of the country whence the same has been imported, and the number of yards, parcels, or quantities, and actual market value or wholesale price of every of them, as the case may require.

"L. That when the actual market value, as defined by law, of any article of imported merchandise, wholly or partly manufactured and subject to an ad valorem duty, or to a duty based in whole or in part on value, can not be ascertained to the satisfaction of the appraising officer, such officer shall use all available means in his power to ascertain the cost of production of such merchandise at the time of exportation to the United States, and at the place of manufacture, such cost of production to include the cost of materials and of fabrication, and all general expenses to be estimated at not less than 10 per centum, covering each and every outlay of whatsoever nature incident to such

production, together with the expense of preparing and putting up such merchandise ready for shipment, and an addition of not less than 8 nor more than 50 per centum upon the total cost as thus ascertained; and in no case shall such merchandise be appraised upon original appraisal or reappraisal at less than the total cost of production as thus ascertained. The actual market value or wholesale price, as defined by law, of any imported merchandise which is consigned for sale in the United States, or which is sold for exportation to the United States, and which is not actually sold or freely offered for sale in usual wholesale quantities in the open market of the country of exportation to all purchasers, shall not in any case be appraised at less than the wholesale price at which such or similar imported merchandise is actually sold or freely offered for sale in usual wholesale quantities in the United States in the open market, due allowance by deduction being made for estimated duties thereon, cost of transportation, insurance and other necessary expenses from the place of shipment to the place of delivery, and a commission not exceeding 6 per centum, if any has been paid or contracted to be paid on consigned goods, or profits not to exceed 8 per centum and a reasonable allowance for general expenses (not to exceed 8 per centum) on purchased goods.

"M. That the appraiser shall revise and correct the reports of the assistant appraisers as he may judge proper, and the appraiser, or, at ports where there is no appraiser, the person acting as such, shall report to the collector his decision as to the value of the merchandise appraised. At ports where there is no appraiser the certificate of the customs officer to whom is committed the estimating and collection of duties, of the dutiable value of any merchandise required to be appraised, shall be deemed and taken to be the appraisement of such merchandise. If the collector shall deem the appraisement of any imported merchandise too low, he may, within sixty days thereafter, appeal to reappraisal, which shall be made by one of the general appraisers, or if the importer, owner, agent, or consignee of such merchandise shall deem the appraisement thereof too high, and shall have complied with the requirements of law with respect to the entry and appraisement of merchandise, he may within ten days thereafter appeal for reappraisal by giving notice thereof to the collector in writing. Such appeal shall be deemed to be finally abandoned and waived unless within two days from the date of filing thereof the person who filed such notice shall deposit with the collector of customs a fee of \$1 for each entry. Such fee shall be deposited and accounted for as miscellaneous receipts, and in case the appeal in connection with which such fee was deposited shall be finally sustained, in whole or in part, such fee shall be refunded to the importer, with the duties found to be collected in excess, from the appropriation for the refund to importers of excess of deposits. The decision of the general appraiser in cases of reappraisal shall be final and conclusive as to the dutiable value of such merchandise against all parties interested therein, unless the importer, owner, consignee, or agent of the merchandise shall deem the reappraisal of the merchandise too high, and shall, within five days thereafter, give notice to the collector, in writing, of an appeal, or unless the collector shall deem the reappraisal of the merchandise too low, and shall within ten days thereafter appeal for re-appraisal; in either case the collector shall transmit the invoice and all the papers appertaining thereto to the board of nine general appraisers, to be by rule thereof duly assigned for determination. In such cases the general appraiser and boards of general appraisers shall proceed by all reasonable ways and means in their power to ascertain, estimate, and determine the dutiable value of the imported merchandise, and

in so doing may exercise both judicial and inquisitorial functions. In such cases the general appraisers and the Boards of General Appraisers shall give reasonable notice to the importer and the proper representative of the Government of the time and place of each and every hearing at which the parties or their attorneys shall have opportunity to introduce evidence and to hear and cross-examine the witnesses for the other party, and to inspect all samples and all documentary evidence or other papers offered. Affidavits of persons whose attendance can not be procured may be admitted in the discretion of the general appraiser or Board of General Appraisers. The decision of the appraiser, or the person acting as such (in case where no objection is made thereto, either by the collector or by the importer, owner, consignee, or agent), or the single general appraiser in case of no appeal, or of the board of three general appraisers, in all reappraisement cases, shall be final and conclusive against all parties and shall not be subject to review in any manner for any cause in any tribunal or court, and the collector or the person acting as such shall ascertain, fix, and liquidate the rate and amount of the duties to be paid on such merchandise, and the dutiable costs and charges thereon, according to law; and no reappraisement or re-reappraisement shall be considered invalid because of the absence of the merchandise or samples thereof before the officer or officers making the same, where no party in interest had demanded the inspection of such merchandise or samples, and where the merchandise or samples were reasonably accessible for inspection.

"N. That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, or upon merchandise on which duty shall have been assessed, including all dutiable costs and charges, and as to all fees and exactions of whatever character (except duties on tonnage), shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee, or agent of such merchandise, or the person paying such fees, charges, and exactions other than duties, shall, within thirty days after but not before such ascertainment and liquidation of duties, as well in cases of merchandise entered in bond as for consumption, or within fifteen days after the payment of such fees, charges, and exactions, if dissatisfied with such decision imposing a higher rate of duty, or a greater charge, fee, or exaction, than he shall claim to be legally payable, file a protest or protests in writing with the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon. Such protest shall be deemed to be finally abandoned and waived unless within thirty days from the date of filing thereof the person who filed such notice or protest shall have deposited with the collector of customs a fee of \$1 with respect to each protest. Such fee shall be deposited and accounted for as miscellaneous receipts, and in case the protest in connection with which such fee was deposited shall be finally sustained in whole or in part, such fee shall be refunded to the importer, with the duties found to be collected in excess, from the appropriation for the refund to importers of excess of deposits. No agreement for a contingent fee in respect to recovery or refund under protest shall be lawful. Compliance with this provision shall be a condition precedent to the validity of the protest and to any refund thereunder, and a violation of this provision shall be punishable by a fine not exceeding \$500, or imprisonment for not more than one year, or both.

"Upon such payment of duties, protest, and deposit of protest fee, the

collector shall transmit the invoice and all the papers and exhibits connected therewith to the board of nine general appraisers, for due assignment and determination as provided by law; such determination shall be final and conclusive upon all persons interested therein, and the record shall be transmitted to the proper collector or person acting as such, who shall liquidate the entry accordingly, except in cases where an appeal shall be filed in the United States Court of Customs Appeals within the time and in the manner provided for by law.

"O. That the general appraisers, or any of them, are hereby authorized to administer oaths, and said general appraisers, the boards of general appraisers, the local appraisers, or the collectors, as the case may be, may cite to appear before them, and examine upon oath any owner, importer, agent, consignee, or other person touching any matter or thing which they, or either of them, may deem material respecting any imported merchandise then under consideration or previously imported within one year, in ascertaining the classification or dutiable value thereof or the rate or amount of duty; and they, or either of them, may require the production of any letters, accounts, contracts, or invoices relating to said merchandise, and may require such testimony to be reduced to writing, and when so taken it shall be filed and preserved for use or reference until the final decision of the collector, appraiser, or said board of appraisers shall be made respecting the valuation or classification of said merchandise, as the case may be; and such evidence shall be given consideration in all subsequent proceedings relating to such merchandise.

"P. That if any person so cited to appear shall neglect or refuse to attend, or shall decline to answer, or shall refuse to answer in writing any interrogatories, and subscribe his name to his deposition, or to produce such papers when so required by a general appraiser, or a board of general appraisers, or a local appraiser, or a collector, he shall be liable to a penalty of not less than \$20 nor more than \$500; and if such person be the owner, importer, or consignee, the appraisement which the Board of General Appraisers or local appraiser, or collector where there is no appraiser, may make of the merchandise shall be final and conclusive; and any person who shall willfully and corruptly swear falsely on an examination before any general appraiser, or Board of General Appraisers, or local appraiser or collector, shall be deemed guilty of perjury; and if he is the owner, importer, or consignee, the merchandise shall be forfeited, or the value thereof may be recovered from him.

"Q. That all decisions of the general appraisers and of the boards of general appraisers, respecting values and rates of duty, shall be preserved and filed, and shall be open to inspection under proper regulations to be prescribed by the Secretary of the Treasury. All decisions of the general appraisers shall be reported forthwith to the Secretary of the Treasury and to the Board of General Appraisers on duty at the port of New York, and the report to the board shall be accompanied, whenever practicable, by samples of the merchandise in question, and it shall be the duty of the said board, under the direction of the Secretary of the Treasury, to cause an abstract to be made and published of such decisions of the appraisers as they or he may deem important, to be published either in full, or if full publication shall not be requested by the Secretary or by the board, then by an abstract containing a general description of the merchandise in question, a statement of the facts upon which the decision is based, and of the value and rate of duty fixed in each case, with reference, whenever practicable, by number or other designation, to samples deposited in the place of samples at New York, and such abstracts shall be

issued from time to time, at least once in each week, for the information of customs officers and the public.

"R. That whenever imported merchandise is subject to an ad valorem rate of duty, or to a duty based upon or regulated in any manner by the value thereof, the duty shall be assessed upon the actual market value or wholesale price thereof, at the time of exportation to the United States, in the principal markets of the country from whence exported; that such actual market value shall be held to be the price at which such merchandise is freely offered for sale to all purchasers in said markets, in the usual wholesale quantities, and the price which the seller, shipper, or owner would have received, and was willing to receive, for such merchandise when sold in the ordinary course of trade in the usual wholesale quantities, including the value of all cartons, cases, crates, boxes, sacks, casks, barrels, hogsheads, bottles, jars, demi-johns, carboys, and other containers or coverings, whether holding liquids or solids, and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, and if there be used for covering or holding imported merchandise, whether dutiable or free, any unusual article or form designed for use otherwise than in the bona fide transportation of such merchandise to the United States, additional duty shall be levied and collected upon such material or article at the rate to which the same would be subjected if separately imported. That the words "value," or "actual market value," or "wholesale price," whenever used in this Act, or in any law relating to the appraisement of imported merchandise, shall be construed to be the actual market value or wholesale price of such, or similar merchandise comparable in value therewith, as defined in this Act.

"S. Any merchandise deposited in any public or private bonded warehouse may be withdrawn for consumption within three years from the date of original importation, on payment of the duties and charges to which it may be subject by law at the time of such withdrawal: *Provided*, That nothing herein shall affect or impair existing provisions of law in regard to the disposal of perishable or explosive articles.

"T. That in all suits or informations brought, where any seizure has been made pursuant to any Act providing for or regulating the collection of duties on imports or tonnage, if the property is claimed by any person, the burden of proof shall lie upon such claimant, and in all actions or proceedings for the recovery of the value of merchandise imported contrary to any Act providing for or regulating the collection of duties on imports or tonnage, the burden of proof shall be upon the defendant: *Provided*, That probable cause is shown for such prosecution, to be judged of by the court.

"U. That if any person, persons, corporations, or other bodies, selling, shipping, consigning, or manufacturing merchandise exported to the United States, shall fail or refuse to submit to the inspection of a duly accredited investigating officer of the United States, when so requested to do, any or all of his books, records, or accounts pertaining to the value or classification of such merchandise, then the Secretary of the Treasury, in his discretion, is authorized while such failure or refusal continues to levy an additional duty of 15 per centum ad valorem on all such merchandise when imported into the United States: *Provided, however*, That such additional duties shall not be imposed in case the laws of the country of exportation provide for the administration, by its duly authorized officers, of oaths to invoices, or statements of cost, before certification by consuls, and for punishment for false swearing under said oaths, whenever consuls are directed by the Secretary of State, under section twenty-eight



hundred and sixty-two of the Revised Statutes, to require such oaths before certification of the invoices.

"V. That if any person, persons, corporations, or other bodies, engaged in the importation of merchandise into the United States or engaged in dealing with such imported merchandise, shall fail or refuse to submit to the inspection of a duly accredited investigating officer of the United States, upon request so to do from the chief officer of customs at the port where such merchandise is entered, any or all of his books, records, or accounts pertaining to the value or classification of any such imported merchandise, then the Secretary of the Treasury, in his discretion, is authorized while such failure or refusal continues, to assess additional duty of 15 per centum on all merchandise consigned to or imported by, or shipped, or intended for delivery, to such person, persons, corporations, or other bodies so failing or refusing.

"W. That where merchandise purchased or manufactured in different consular districts in the same country is assembled for shipment and embraced in a single invoice and consulated at the shipping point, such invoice shall have attached thereto the original bills or invoices or statements in the nature of such, showing the prices actually paid, contracted to be paid, fixed, or determined, and in connection with each such purchase or consignment the invoice shall state all charges and expenses as provided in paragraph R of this section.

"X. No allowance shall be made in the estimation and liquidation of duties for shortage or nonimportation caused by decay, destruction, or injury to fruit or other perishable articles imported into the United States whereby their commercial value has been destroyed, unless under regulations prescribed by the Secretary of the Treasury. Proof to ascertain such destruction or nonimportation shall be lodged with the collector of customs of the port where such merchandise has been landed, or the person acting as such, within ten days after the landing of such merchandise. The provisions hereof shall apply whether or not the merchandise has been entered, and whether or not the duties have been paid or secured to be paid, and whether or not a permit of delivery has been granted to the owner or consignee. Nor shall any allowance be made for damage, but the importers may within ten days after entry abandon to the United States all or any portion of goods, wares, or merchandise of every description included in any invoice and be relieved from the payment of duties on the portion so abandoned: *Provided*, That the portion so abandoned shall amount to 10 per centum or more of the total value or quantity of the invoice. The right of abandonment herein provided for may be exercised whether the goods, wares, or merchandise have been damaged or not, or whether or not the same have any commercial value: *Provided further*, That section twenty-eight hundred and ninety-nine of the Revised Statutes, relating to the return of packages unopened for appraisement, shall in no wise prohibit the right of importers to make all needful examinations to determine whether the right to abandon accrues, or whether by reason of total destruction there is a nonimportation in whole or in part. All merchandise abandoned to the Government by the importers shall be delivered by the importers thereof at such place within the port of arrival as the chief officer of customs may direct, and on the failure of the importers to comply with the direction of the collector or the chief officer of customs, as the case may be, the abandoned merchandise shall be disposed of by the customs authorities under such regulations as the Secretary of the Treasury may prescribe, at the expense of such importers. Where imported fruit or perishable goods have been condemned at the port of original entry within ten days after landing, by health officers or other legally

constituted authorities, the importers or their agents shall, within twenty-four hours after such condemnation, lodge with the collector, or the person acting as collector, of said port, notice thereof in writing, together with an invoice description and the quantity of the articles condemned, their location, and the name of the vessel in which imported. Upon receipt of said notice the collector, or person acting as collector, shall at once cause an investigation and a report to be made in writing by at least two customs officers touching the identity and quantity of fruit or perishable goods condemned, and unless proof to ascertain the shortage or nonimportation of fruit or perishable goods shall have been lodged as herein required, or if the importer or his agent fails to notify the collector of such condemnation proceedings as herein provided, proof of such shortage or nonimportation shall not be deemed established and no allowance shall be made in the liquidation of duties chargeable thereon.

"Y. That whenever it shall be shown to the satisfaction of the Secretary of the Treasury that, in any case of unascertained or estimated duties, or payments made upon appeal, more money has been paid to or deposited with a collector of customs than, as has been ascertained by final liquidation thereof, the law required to be paid or deposited, the Secretary of the Treasury shall direct the Treasurer to refund and pay the same out of any money in the Treasury not otherwise appropriated. The necessary moneys therefor are hereby appropriated, and this appropriation shall be deemed a permanent indefinite appropriation; and the Secretary of the Treasury is hereby authorized to correct manifest clerical errors in any entry or liquidation for or against the United States, at any time within one year of the date of such entry, but not afterwards: *Provided*, That the Secretary of the Treasury shall, in his annual report to Congress, give a detailed statement of the various sums of money refunded under the provisions of this Act or of any other Act of Congress relating to the revenue, together with copies of the rulings under which repayments were made.

"Z. That from and after the taking effect of this Act, no collector or other officer of the customs shall be in any way liable to any owner, importer, consignee, or agent of any merchandise, or any other person, for or on account of any rulings or decisions as to the classification of said merchandise or the duties charged thereon, or the collection of any dues, charges, or duties on or on account of said merchandise, or any other matter or thing as to which said owner, importer, consignee, or agent of such merchandise might, under this Act, be entitled to appeal from the decision of said collector or other officer, or from any board of appraisers.

"AA. That any person who shall give, or offer to give, or promise to give, any money or thing of value, directly or indirectly, to any officer or employee of the United States in consideration of or for any act or omission contrary to law in connection with or pertaining to the importation, appraisement, entry, examination, or inspection of goods, wares, or merchandise, including herein any baggage or of the liquidation of the entry thereof, or shall by threats or demands or promises of any character attempt to improperly influence or control any such officer or employee of the United States as to the performance of his official duties shall, on conviction thereof, be fined not exceeding \$2,000, or be imprisoned at hard labor not more than one year, or both, in the discretion of the court; and evidence of such giving, or offering, or promising to give, satisfactory to the court in which such trial is had, shall be regarded as prima facie evidence that such giving or offering or promising was contrary to law,

and shall put upon the accused the burden of proving that such act was innocent and not done with an unlawful intention.

"BB. That any officer or employee of the United States who shall, excepting for lawful duties or fees, solicit, demand, exact, or receive from any person, directly or indirectly, any money or thing of value in connection with or pertaining to the importation, appraisement, entry, examination, or inspection of goods, wares, or merchandise, including herein any baggage or liquidation of the entry thereof, on conviction thereof shall be fined not exceeding \$5,000, or be imprisoned at hard labor not more than two years, or both, in the discretion of the court; and evidence of such soliciting, demanding, exacting, or receiving, satisfactory to the court in which such trial is had, shall be regarded as prima facie evidence that such soliciting, demanding, exacting, or receiving was contrary to law, and shall put upon the accused the burden of proving that such act was innocent and not with an unlawful intention.

"CC. That any baggage or personal effects arriving in the United States in transit to any foreign country may be delivered by the parties having it in charge to the collector of the proper district, to be by him retained, without the payment or exaction of any import duty, or to be forwarded by such collector to the collector of the port of departure and to be delivered to such parties on their departure for their foreign destination, under such rules and regulations as the Secretary of the Treasury may prescribe." [38 Stat. L. 181.]

For the Act of June 10, 1890, as originally enacted and as heretofore amended, see 2 Fed. Stat. Annot. 611; 1909 Supp. Fed. Stat. Annot. 109.

#### SECTION IV.

A. [*Negotiation of trade agreements authorized.*] That for the purpose of readjusting the present duties on importations into the United States and at the same time to encourage the export trade of this country, the President of the United States is authorized and empowered to negotiate trade agreements with foreign nations wherein mutual concessions are made looking toward freer trade relations and further reciprocal expansion of trade and commerce: *Provided, however,* That said trade agreements before becoming operative shall be submitted to the Congress of the United States for ratification or rejection.

B. [*Cuban reciprocity.*] That nothing in this Act contained shall be so construed as to abrogate or in any manner impair or affect the provisions of the treaty of commercial reciprocity concluded between the United States and the Republic of Cuba on the eleventh day of December, nineteen hundred and two, or the provisions of the Act of Congress heretofore passed for the execution of the same except as to the proviso of article eight of said treaty, which proviso is hereby abrogated and repealed.

C. [*Philippine Islands.*] That there shall be levied, collected, and paid upon all articles coming into the United States from the Philippine Islands the rates of duty which are required to be levied, collected, and paid upon like articles imported from foreign countries: *Provided,* That all articles, the growth or product of or manufactured in the Philippine Islands from materials the growth or product of the Philippine Islands or of the United States, or of both, or which do not contain foreign materials to the value of more than 20 per centum of their total value, upon which no drawback of customs duties has been allowed

therein, coming into the United States from the Philippine Islands shall hereafter be admitted free of duty: *Provided, however*, That in consideration of the exemptions aforesaid, all articles, the growth, product, or manufacture of the United States, upon which no drawback of customs duties has been allowed therein, shall be admitted to the Philippine Islands from the United States free of duty: *And provided further*, That the free admission, herein provided, of such articles, the growth, product, or manufacture of the United States, into the Philippine Islands, or of the growth, product, or manufacture, as hereinbefore defined, of the Philippine Islands into the United States, shall be conditioned upon the direct shipment thereof, under a through bill of lading, from the country of origin to the country of destination: *Provided*, That direct shipment shall include shipments in bond through foreign territory contiguous to the United States: *Provided, however*, That if such articles become unpacked while en route by accident, wreck, or other casualty, or so damaged as to necessitate their repacking, the same shall be admitted free of duty upon satisfactory proof that the unpacking occurred through accident or necessity and that the merchandise involved is the identical merchandise originally shipped from the United States or the Philippine Islands, as the case may be, and that its condition has not been changed except for such damage as may have been sustained: *And provided*, That there shall be levied, collected, and paid, in the United States, upon articles, goods, wares, or merchandise coming into the United States from the Philippine Islands, a tax equal to the internal-revenue tax imposed in the United States upon the like articles, goods, wares, or merchandise of domestic manufacture; such tax to be paid by internal-revenue stamp or stamps, to be provided by the Commissioner of Internal Revenue, and to be affixed in such manner and under such regulations as he, with the approval of the Secretary of the Treasury, shall prescribe; and such articles, goods, wares, or merchandise, shipped from said islands to the United States, shall be exempt from the payment of any tax imposed by the internal-revenue laws of the Philippine Islands: *And provided further*, That there shall be levied, collected, and paid in the Philippine Islands, upon articles, goods, wares, or merchandise going into the Philippine Islands from the United States, a tax equal to the internal-revenue tax imposed in the Philippine Islands upon the like articles, goods, wares, or merchandise of Philippine Islands manufacture; such tax to be paid by internal-revenue stamps or otherwise, as provided by the laws of the Philippine Islands; and such articles, goods, wares, or merchandise going into the Philippine Islands from the United States shall be exempt from the payment of any tax imposed by the internal-revenue laws of the United States: *And provided further*, That in addition to the customs taxes imposed in the Philippine Islands, there shall be levied, collected, and paid therein upon articles, goods, wares, or merchandise imported into the Philippine Islands from countries other than the United States, the internal-revenue tax imposed by the Philippine Government on like articles manufactured and consumed in the Philippine Islands or shipped thereto for consumption therein, from the United States: *And provided further*, That from and after the passage of this Act all internal revenues collected in or for account of the Philippine Islands shall accrue intact to the general government thereof and be paid into the insular treasury: *And provided further*, That section thirteen of "An Act to raise revenue for the Philippine Islands, and for other purposes," approved August fifth, nineteen hundred and nine, is hereby repealed.

D. [*Porto Rico*.] That articles, goods, wares, or merchandise going into

Porto Rico from the United States shall be exempted from the payment of any tax imposed by the internal-revenue laws of the United States.

E. [*Countervailing duty on imports receiving export bounty.*] That whenever any country, dependency, colony, province, or other political subdivision of government shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise from such country, dependency, colony, province, or other political subdivision of government, and such article or merchandise is dutiable under the provisions of this Act, then upon the importation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this Act, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The net amount of all such bounties or grants shall be from time to time ascertained, determined, and declared by the Secretary of the Treasury, who shall make all needful regulations for the identification of such articles and merchandise and for the assessment and collection of such additional duties.

F. Subsection 1. [*Country of origin to be marked on articles.*] That all articles of foreign manufacture or production, which are capable of being marked, stamped, branded, or labeled, without injury, shall be marked, stamped, branded, or labeled in legible English words, in a conspicuous place that shall not be covered or obscured by any subsequent attachments or arrangements, so as to indicate the country of origin. Said marking, stamping, branding, or labeling shall be as nearly indelible and permanent as the nature of the article will permit.

All packages containing imported articles shall be marked, stamped, branded, or labeled so as to indicate legibly and plainly, in English words, the country of origin and the quantity of their contents, and until marked in accordance with the directions prescribed in this section no articles or packages shall be delivered to the importer.

Should any article or package of imported merchandise be marked, stamped, branded, or labeled so as not accurately to indicate the quantity, number, or measurement actually contained in such article or package, no delivery of the same shall be made to the importer until the mark, stamp, brand, or label, as the case may be, shall be changed so as to conform to the facts of the case.

The Secretary of the Treasury shall prescribe the necessary rules and regulations to carry out the foregoing provision.

F. Subsection 2. [*Punishment for false marking, etc.*] If any person shall fraudulently violate any of the provisions of this Act relating to the marking, stamping, branding, or labeling of any imported articles or packages; or shall fraudulently deface, destroy, remove, alter, or obliterate any such marks, stamps, brands, or labels with intent to conceal the information given by or contained in such marks, stamps, brands, or labels, he shall upon conviction be fined in any sum not exceeding \$5,000, or be imprisoned for any time not exceeding one year, or both.

G. Subsection 1. [*Importations prohibited.*] That all persons are prohibited from importing into the United States from any foreign country any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material,

or any cast, instrument, or other article of an immoral nature, or any drug or medicine, or any article whatever for the prevention of conception or for causing unlawful abortion, or any lottery ticket, or any advertisement of any lottery. No such articles, whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles shall be proceeded against, seized, and forfeited by due course of law. All such prohibited articles and the package in which they are contained in the course of importation shall be detained by the officer of customs, and proceedings taken against the same as hereinafter prescribed, unless it appears to the satisfaction of the collector of customs that the obscene articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee: *Provided*, That the drugs hereinbefore mentioned, when imported in bulk and not put up for any of the purposes hereinbefore specified, are excepted from the operation of this subsection.

G. Subsection 2. [*Punishment for officials aiding violations.*] That whoever, being an officer, agent, or employee of the Government of the United States, shall knowingly aid or abet any person engaged in any violation of any of the provisions of law prohibiting importing, advertising, dealing in, exhibiting, or sending or receiving by mail obscene or indecent publications or representations, or means for preventing conception or procuring abortion, or other articles of indecent or immoral use or tendency, shall be deemed guilty of a misdemeanor, and shall for every offense be punishable by a fine of not more than \$5,000, or by imprisonment at hard labor for not more than ten years, or both.

G. Subsection 3. [*Proceedings for seizure, etc.*] That any circuit or district judge of the United States, within the proper district, before whom complaint in writing of any violation of the two preceding sections is made, to the satisfaction of such judge, and founded on knowledge or belief, and if upon belief, setting forth the grounds of such belief, and supported by oath or affirmation of the complainant, may issue, conformably to the Constitution, a warrant directed to the marshal or any deputy marshal in the proper district, directing him to search for, seize, and take possession of any such article or thing mentioned in the two preceding sections, and to make due and immediate return thereof, to the end that the same may be condemned and destroyed by proceedings, which shall be conducted in the same manner as other proceedings in the case of municipal seizure, and with the same right of appeal or writ of error.

H. Subsection 1. [*Neat cattle and hides.*] That the importation of neat cattle and the hides of neat cattle from any foreign country into the United States is prohibited: *Provided*, That the operation of this section shall be suspended as to any foreign country or countries, or any parts of such country or countries, whenever the Secretary of the Treasury shall officially determine, and give public notice thereof, that such importation will not tend to the introduction or spread of contagious or infectious diseases among the cattle of the United States; and the Secretary of the Treasury is hereby authorized and empowered, and it shall be his duty, to make all necessary orders and regulations to carry this section into effect, or to suspend the same as herein provided, and to send copies thereof to the proper officers in the United States and to such officers or agents of the United States in foreign countries as he shall judge necessary.

H. Subsection 2. [*Punishment for violations.*] That any person convicted of a willful violation of any of the provisions of the preceding subsection

shall be fined not exceeding \$500, or imprisoned not exceeding one year, or both, in the discretion of the court.

I. [*Convict labor manufactures.*] That all goods, wares, articles, and merchandise manufactured wholly or in part in any foreign country by convict labor shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited, and the Secretary of the Treasury is authorized and directed to prescribe such regulations as may be necessary for the enforcement of this provision.

J. Subsection 1. [*Discriminating duty on imports in foreign vessels, etc.*] That a discriminating duty of 10 per centum ad valorem, in addition to the duties imposed by law, shall be levied, collected, and paid on all goods, wares, or merchandise which shall be imported in vessels not of the United States, or which being the production or manufacture of any foreign country not contiguous to the United States, shall come into the United States from such contiguous country; but this discriminating duty shall not apply to goods, wares, or merchandise which shall be imported in vessels not of the United States entitled at the time of such importation by treaty or convention or Act of Congress to be entered in the ports of the United States on payment of the same duties as shall then be payable on goods, wares, and merchandise imported in vessels of the United States, nor to such foreign products or manufactures as shall be imported from such contiguous countries in the usual course of strictly retail trade.

J. Subsection 2. [*Imports restricted to American vessels, or of country of origin.*] That no goods, wares, or merchandise, unless in cases provided for by treaty, shall be imported into the United States from any foreign port or place, except in vessels of the United States, or in such foreign vessels as truly and wholly belong to the citizens or subjects of that country of which the goods are the growth, production, or manufacture, or from which such goods, wares, or merchandise can only be, or most usually are, first shipped for transportation. All goods, wares, or merchandise imported contrary to this section, and the vessel wherein the same shall be imported, together with her cargo, tackle, apparel, and furniture, shall be forfeited to the United States; and such goods, wares, or merchandise, ship, or vessel, and cargo shall be liable to be seized, prosecuted, and condemned in like manner, and under the same regulations, restrictions, and provisions as have been heretofore established for the recovery, collection, distribution, and remission of forfeitures to the United States by the several revenue laws.

J. Subsection 3. [*Not applicable if no similar restriction exists.*] That the preceding subsection shall not apply to vessels or goods, wares, or merchandise imported in vessels of a foreign nation which does not maintain a similar regulation against vessels of the United States.

J. Subsection 4. [*Miscellaneous articles admitted free.*] That machinery or other articles to be altered or repaired, molders' patterns for use in the manufacture of castings intended to be and actually exported within six months from the date of importation thereof, models of women's wearing apparel imported by manufacturers for use as models in their own establishments, and not for sale, samples solely for use in taking orders for merchandise, articles intended solely for experimental purposes, and automobiles, motor cycles, bicycles, aeroplanes, airships, balloons, motor boats, racing shells, teams, and saddle horses, and similar vehicles and craft brought temporarily into the United States by nonresidents for touring purposes or for the purpose of taking part in races or other specific contests, may be admitted without the payment of duty

under bond for their exportation within six months from the date of importation and under such regulations and subject to such conditions as the Secretary of the Treasury may prescribe: *Provided*, That no article shall be entitled to entry under this section that is intended for sale or which is imported for sale on approval.

J. Subsection 5. [*Shipbuilding materials, etc.*] That all materials of foreign production which may be necessary for the construction of naval vessels or other vessels of the United States, vessels built in the United States for foreign account and ownership, or for the purpose of being employed in the foreign or domestic trade, and all such materials necessary for the building of their machinery, and all articles necessary for their outfit and equipment, may be imported in bond under such regulations as the Secretary of the Treasury may prescribe; and upon proof that such materials have been used for such purposes no duties shall be paid thereon.

J. Subsection 6. [*Articles from bonded warehouses to repair vessels exempted.*] That all articles of foreign production needed for the repair of naval vessels of, or other vessels owned or used by, the United States and vessels now or hereafter registered under the laws of the United States may be withdrawn from bonded warehouses free of duty, under such regulations as the Secretary of the Treasury may prescribe.

J. Subsection 7. [*Discount on imports in American registered vessels.*] That a discount of 5 per centum on all duties imposed by this Act shall be allowed on such goods, wares, and merchandise as shall be imported in vessels admitted to registration under the laws of the United States: *Provided*, That nothing in this subsection shall be so construed as to abrogate or in any manner impair or affect the provisions of any treaty concluded between the United States and any foreign nation.

K. [*Supplies to foreign war vessels.*] The privilege of purchasing supplies from public warehouses, free of duty, and from bonded manufacturing warehouses, free of duty or of internal-revenue tax, as the case may be, shall be extended, under such regulations as the Secretary of the Treasury shall prescribe, to the vessels of war of any nation in ports of the United States which may reciprocate such privileges toward the vessels of war of the United States in its ports.

L. [*Abandoned goods from vessels sunken in American waters.*] That whenever any vessel laden with merchandise, in whole or in part subject to duty, has been sunk in any river, harbor, bay, or waters subject to the jurisdiction of the United States, and within its limits, for the period of two years, and is abandoned by the owner thereof, any person who may raise such vessel shall be permitted to bring any merchandise recovered therefrom into the port nearest to the place where such vessel was so raised free from the payment of any duty thereupon, but under such regulations as the Secretary of the Treasury may prescribe.

M. [*Bonded manufacturing warehouses.*] That all articles manufactured in whole or in part of imported materials, or of materials subject to internal-revenue tax, and intended for exportation without being charged with duty, and without having an internal-revenue stamp affixed thereto, shall, under such regulations as the Secretary of the Treasury may prescribe, in order to be so manufactured and exported, be made and manufactured in bonded warehouses similar to those known and designated in Treasury Regulations as bonded warehouses, class six: *Provided*, That the manufacturer of such articles shall first give satisfactory bonds for the faithful observance of all the provisions of



law and of such regulations as shall be prescribed by the Secretary of the Treasury: *Provided further*, That the manufacture of distilled spirits from grain, starch, molasses, or sugar, including all dilutions or mixtures of them or either of them, shall not be permitted in such manufacturing warehouses.

Whenever goods manufactured in any bonded warehouse established under the provisions of the preceding paragraph shall be exported directly therefrom or shall be duly laden for transportation and immediate exportation under the supervision of the proper officer who shall be duly designated for that purpose, such goods shall be exempt from duty and from the requirements relating to revenue stamps.

Any materials used in the manufacture of such goods, and any packages, coverings, vessels, brands, and labels used in putting up the same may, under the regulations of the Secretary of the Treasury, be conveyed without the payment of revenue tax or duty into any bonded manufacturing warehouse, and imported goods may, under the aforesaid regulations, be transferred without the exaction of duty from any bonded warehouse into any bonded manufacturing warehouse; but this privilege shall not be held to apply to implements, machinery, or apparatus to be used in the construction or repair of any bonded manufacturing warehouse or for the prosecution of the business carried on therein.

No articles or materials received into such bonded manufacturing warehouse shall be withdrawn or removed therefrom except for direct shipment and exportation or for transportation and immediate exportation in bond to foreign countries or to the Philippine Islands under the supervision of the officer duly designated therefor by the collector of the port, who shall certify to such shipment and exportation, or lading for transportation, as the case may be, describing the articles by their mark or otherwise, the quantity, the date of exportation, and the name of the vessel: *Provided*, That the waste material or by-products incident to the processes of manufacture, including waste derived from cleaning rice in bonded warehouses under Act of March twenty-fourth, eighteen hundred and seventy-four, in said bonded warehouses may be withdrawn for domestic consumption on the payment of duty equal to the duty which would be assessed and collected, by law, if such waste or by-products were imported from a foreign country. All labor performed and services rendered under these provisions shall be under the supervision of a duly designated officer of the customs and at the expense of the manufacturer.

A careful account shall be kept by the collector of all merchandise delivered by him to any bonded manufacturing warehouse, and a sworn monthly return, verified by the customs officers in charge, shall be made by the manufacturers containing a detailed statement of all imported merchandise used by him in the manufacture of exported articles.

Before commencing business the proprietor of any manufacturing warehouse shall file with the Secretary of the Treasury a list of all the articles intended to be manufactured in such warehouse, and state the formula of manufacture and the names and quantities of the ingredients to be used therein.

Articles manufactured under these provisions may be withdrawn under such regulations as the Secretary of the Treasury may prescribe for transportation and delivery into any bonded warehouse at an exterior port for the sole purpose of immediate export therefrom: *Provided*, That cigars manufactured in whole of tobacco imported from any one country, made and manufactured in such bonded manufacturing warehouses, may be withdrawn for home consumption upon the payment of the duties on such tobacco in its condition as imported

under such regulations as the Secretary of the Treasury may prescribe, and the payment of the internal-revenue tax accruing on such cigars in their condition as withdrawn, and the boxes or packages containing such cigars shall be stamped to indicate their character, origin of tobacco from which made, and place of manufacture.

The provisions of Revised Statutes thirty-four hundred and thirty-three shall, so far as may be practicable, apply to any bonded manufacturing warehouse established under this Act and to the merchandise conveyed therein.

N. SUBSECTION 1. [*Bonded smelting warehouses.*] That the works of manufacturers engaged in smelting or refining, or both, of ores and crude metals, may upon the giving of satisfactory bonds be designated as bonded smelting warehouses. Ores or crude metals may be removed from the vessel or other vehicle in which imported, or from a bonded warehouse, into a bonded smelting warehouse without the payment of duties thereon and there smelted or refined, or both, together with ores or crude metals of home or foreign production: *Provided*, That the bonds shall be charged with the amount of duties payable upon such ores and crude metals at the time of their importation, and the several charges against such bonds may be canceled upon the exportation or delivery to a bonded manufacturing warehouse established under paragraph M of this section of an amount of the same kind of metal equal to the actual amount of dutiable metal producible from the smelting or refining, or both, of such ores or crude metals as determined from time to time by the Secretary of the Treasury: *And provided further*, That the said metals so producible, or any portion thereof, may be withdrawn for domestic consumption, or transferred to a bonded customs warehouse, and withdrawn therefrom, and the several charges against the bonds canceled upon the payment of the duties chargeable against an equivalent amount of ores or crude metals from which said metal would be producible in their condition as imported: *And provided further*, That on the arrival of the ores and crude metals at such establishments they shall be sampled and assayed according to commercial methods under the supervision of Government officers, to be appointed by the Secretary of the Treasury and at the expense of the manufacturer: *Provided further*, That antimonial lead produced in said establishments may be withdrawn for consumption upon the payment of the duties chargeable against it as type metal under existing law and the charges against the bonds canceled in a similar sum: *Provided further*, That all labor performed and services rendered pursuant to this section shall be under the supervision of an officer of the customs, to be appointed by the Secretary of the Treasury, and at the expense of the manufacturer: *Provided further*, That all regulations for the carrying out of this section shall be prescribed by the Secretary of the Treasury.

SUBSECTION 2. [*Alcohol for denaturization.* See INTERNAL REVENUE, *post*, p. 185.]

O. [*Drawbacks.*] That upon the exportation of articles manufactured or produced in the United States by the use of imported merchandise or materials upon which customs duties have been paid, the full amount of such duties paid upon the quantity of materials used in the manufacture or production of the exported product shall be refunded as drawback, less 1 per centum of such duties: *Provided*, That where a principal product and a by-product result from the manipulation of imported material and only the by-product is exported, the proportion of the drawback distributed to such by-product shall not exceed the duty assessable under this Act on a similar by-product of foreign origin if imported into the United States. Where no duty is assessable upon the impor-

tation of a corresponding by-product, no drawback shall be payable on such by-product produced from the imported material; if, however, the principal product is exported, then on the exportation thereof there shall be refunded as drawback the whole of the duty paid on the imported material used in the production of both the principal and the by-product, less 1 per cent, as hereinbefore provided: *Provided further*, That when the articles exported are manufactured in part from domestic materials, the imported materials or the parts of the articles manufactured from such materials, shall so appear in the completed articles that the quantity or measure thereof may be ascertained: *And provided further*, That the drawback on any article allowed under existing law shall be continued at the rate herein provided. That the imported materials used in the manufacture or production of articles entitled to drawback of customs duties when exported shall, in all cases where drawback of duties paid on such materials is claimed, be identified, the quantity of such materials used and the amount of duties paid thereon shall be ascertained, the facts of the manufacture or production of such articles in the United States and their exportation therefrom shall be determined, and the drawback due thereon shall be paid to the manufacturer, producer, or exporter, to the agent of either or to the person to whom such manufacturer, producer, exporter, or agent shall in writing order such drawback paid, under such regulations as the Secretary of the Treasury shall prescribe.

That on the exportation of flavoring extracts, medicinal or toilet preparations (including perfumery) hereafter manufactured or produced in the United States in part from domestic alcohol on which an internal-revenue tax has been paid, there shall be allowed a drawback equal in amount to the tax found to have been paid on the alcohol so used: *Provided*, That no other than domestic tax-paid alcohol shall have been used in the manufacture or production of such preparations. Such drawback shall be determined and paid under such rules and regulations, and upon the filing of such notices, bonds, bills of lading, and other evidence of payment of tax and exportation, as the Secretary of the Treasury shall prescribe.

That the provisions of this section shall apply to materials used in the construction and equipment of vessels built for foreign account and ownership, or for the government of any foreign country, notwithstanding that such vessels may not within the strict meaning of the term be articles exported.

P. [*Reimported domestic articles.*] That upon the reimportation of articles once exported, of the growth, product, or manufacture of the United States, upon which no internal tax has been assessed or paid, or upon which such tax has been paid and refunded by allowance or drawback, there shall be levied, collected, and paid a duty equal to the tax imposed by the internal-revenue laws upon such articles, except articles manufactured in bonded warehouses and exported pursuant to law, which shall be subject to the same rate of duty as if originally imported, but proof of the identity of such articles shall be made under general regulations to be prescribed by the Secretary of the Treasury.

Q. [*Operation of duties imposed herein.*] That on and after the day when this Act shall go into effect all goods, wares, and merchandise previously imported, for which no entry has been made, and all goods, wares, and merchandise previously entered without payment of duty and under bond for warehousing, transportation, or any other purpose, for which no permit of delivery to the importer or his agent has been issued, shall be subjected to the duties imposed by this Act and to no other duty, upon the entry or the withdrawal thereof: *Provided*, That when duties are based upon the weight of merchandise deposited

in any public or private bonded warehouse, said duties shall be levied and collected upon the weight of such merchandise at the time of its entry.

R. [*Estimate of domestic production and consumption of articles herein enumerated.*] That the President shall cause to be ascertained each year, the amount of imports and exports of the articles enumerated in the various paragraphs in section one of this Act and cause an estimate to be made of the amount of the domestic production and consumption of said articles, and where it is ascertained that the imports under any paragraph amount to less than 5 per centum of the domestic consumption of the articles enumerated he shall advise the Congress as to the facts and his conclusions by special message, if deemed important in the public interest.

S. [*Tariff of 1909 repealed in part — sections not affected.*] That, except as hereinafter provided, sections one to forty-two both inclusive, of an Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August fifth, nineteen hundred and nine, and all Acts and parts of Acts inconsistent with the provisions of this Act, are hereby repealed: *Provided*, That nothing in this Act shall be construed to permit any oaths to be demanded or fees to be charged except as provided in this Act or in section twenty-eight hundred and sixty-two of the Revised Statutes of the United States, nor to repeal or in any manner affect the following numbered sections of the aforesaid Act approved August fifth, nineteen hundred and nine, viz: Subsection twenty-nine of section twenty-eight and subsequent laws and amendments relating to the establishment and continuance of a Customs Court, subsection thirty of section twenty-eight, providing for additional attorneys, subsection twelve of section twenty-eight and subsequent provisions establishing a Board of General Appraisers of merchandise, sections thirty, thirty-one, thirty-two, thirty-three, and thirty-five, imposing an internal revenue tax upon tobacco, section thirty-six, providing for a tonnage duty, section thirty-nine, authorizing the Secretary of the Treasury to borrow on the credit of the United States to defray expenditures on account of the Panama Canal, section forty, authorizing the Secretary of the Treasury to borrow to meet public expenditures:

[*Corporation excise tax to be assessed for 1912 — continued to February 28, 1913 — computation — collection — returns for 1913 — repeal — pending proceedings, etc., not affected — rights and liabilities to be enforced — prior offenses, etc. — limitations not affected.*] *Provided further*, That all excise taxes upon corporations imposed by section thirty-eight, that have accrued or have been imposed for the year ending December thirty-first, nineteen hundred and twelve, shall be returned, assessed, and collected in the same manner, and under the same provisions, liens, and penalties as if section thirty-eight continued in full force and effect: *And provided further*, That a special excise tax with respect to the carrying on or doing of business, equivalent to 1 per centum upon their entire net income, shall be levied, assessed, and collected upon corporations, joint stock companies or associations, and insurance companies, of the character described in section thirty-eight of the Act of August fifth, nineteen hundred and nine, for the period from January first to February twenty-eighth, nineteen hundred and thirteen, both dates inclusive, which said tax shall be computed upon one-sixth of the entire net income of said corporations, joint stock companies or associations, and insurance companies, for said year, said net income to be ascertained in accordance with the provisions of subsec-

tion G of section two of this Act: *Provided further*, That the provisions of said section thirty-eight of the Act of August fifth, nineteen hundred and nine, relative to the collection of the tax therein imposed shall remain in force for the collection of the excise tax herein provided, but for the year nineteen hundred and thirteen it shall not be necessary to make more than one return and assessment for all the taxes imposed herein upon said corporations, joint stock companies or associations, and insurance companies, either by way of income or excise, which return and assessment shall be made at the times and in the manner provided in this Act; but the repeal of existing laws or modifications thereof embraced in this Act shall not affect any act done, or any right accruing or accrued, or any suit or proceeding had or commenced in any civil case before the said repeal or modification; but all rights and liabilities under said laws shall continue and may be enforced in the same manner as if said repeal or modifications had not been made. Any offenses committed and all penalties or forfeitures or liabilities incurred prior to the passage of this Act under any statute embraced in or changed, modified, or repealed by this Act may be prosecuted or punished in the same manner and with the same effect as if this Act had not been passed. No Acts of limitation now in force, whether applicable to civil causes and proceedings or to the prosecution of offenses or for the recovery of penalties or forfeitures embraced in or modified, changed, or repealed by this Act shall be affected thereby so far as they affect any suits, proceedings, or prosecutions, whether civil or criminal, for causes arising or acts done or committed prior to the passage of this Act, which may be commenced and prosecuted within the same time and with the same effect as if this Act had not been passed.

For the Tariff Act of Aug. 5, 1909, see 1909 Supp. Fed. Stat. Annot. 726. For the provisions concerning excise tax on corporations (sec. 38), see 1909 Supp. Fed. Stat. Annot. 829 et seq.

T. [*Invalidity of one clause, etc., not to affect remainder of Act.*] If any clause, sentence, paragraph, or part of this Act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of said Act, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

U. [*In effect day after passage.*] That unless otherwise herein specially provided, this Act shall take effect on the day following its passage. [*38 Stat. L. 192.*]

An Act Extending to the port of Perth Amboy, New Jersey, the privileges of section seven of the Act approved June tenth, eighteen hundred and eighty, governing the immediate transportation of dutiable merchandise without appraisement.

[*Act of October 3, 1913, ch. 20.*]

[*Perth Amboy, N. J., granted immediate transportation privileges.*] That the privileges of section seven of the Act approved June tenth, eighteen hundred and eighty, governing the immediate transportation of dutiable merchandise without appraisement, be, and the same are hereby, extended to the port of Perth Amboy, New Jersey. [*38 Stat. L. 204.*]

For sec. 7 of the Act of June 10, 1880, see 2 Fed. Stat. Annot. 715.

## DENATURED ALCOHOL.

See *INTERNAL REVENUE*.

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## DEPOSITIONS.

See *EVIDENCE*.

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## DESERT LAND ENTRIES.

See *PUBLIC LANDS*.

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## DIPLOMATIC AND CONSULAR OFFICERS.

Act of December 6, 1913, Ch. —, 136.

*Sec. 1. Minister to Paraguay, 136.*

*2. Minister to Uruguay, 136.*

Act of September 4, 1913, Ch. 10, 136.

*Ambassador to Spain, 136.*

An Act Authorizing the appointment of envoys extraordinary and ministers plenipotentiary to each Paraguay and Uruguay.

[*Act of Dec. 6, 1913, ch. —.*]

[*Sec. 1. [Minister to Paraguay.]* That the President is hereby authorized to appoint, as the representative of the United States, an envoy extraordinary and minister plenipotentiary to Paraguay, who shall receive as his compensation the sum of \$10,000 per annum. [*— Stat. L. —.*]

*Sec. 2. [Minister to Uruguay.]* That the President is hereby further authorized to appoint, as the representative of the United States, an envoy extraordinary and minister plenipotentiary to Uruguay, who shall receive as his compensation the sum of \$10,000 per annum. [*— Stat. L. —.*]

An Act Authorizing the appointment of an ambassador to Spain.

[*Act of September 4, 1913, ch. 10.*]

[*Ambassador to Spain.*] That the President is hereby authorized to appoint, as the representative of the United States, an ambassador to Spain, who shall receive as his compensation the sum of \$17,500 per annum. [*33 Stat. L. 110.*]

## **DISTRICT ATTORNEYS.**

See *JUDICIAL OFFICERS.*

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## **DISTRICT COURTS.**

See *JUDICIARY.*

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## **DOCUMENTS.**

See *PUBLIC DOCUMENTS.*

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## **DRAWBACKS.**

See *CUSTOMS DUTIES.*

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## **DRUGS.**

See *FOOD AND DRUGS.*

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## **DUTIES.**

See *CUSTOMS DUTIES.*

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## **EIGHT HOUR DAY.**

See *LABOR.*

## ELECTIONS.

Act of August 23, 1912, Ch. 349, 138.

*Publicity of Political Contributions — Verification of Statements — Requirements Modified, 138.*

An Act Amending paragraph ten of section eight of an Act entitled "An Act providing for publicity of contributions made for the purpose of influencing elections at which Representatives in Congress are elected," approved June twenty-fifth, nineteen hundred and ten, as amended by section two of an Act entitled "An Act to amend an Act entitled 'An Act providing for publicity of contributions made for the purpose of influencing elections at which Representatives in Congress are elected' and extending the same to candidates for nomination and election to the offices of Representative and Senator in the Congress of the United States and limiting the amount of campaign expenses," approved August nineteenth, nineteen hundred and eleven.

[Act of August 23, 1912, ch. 349.]

[*Publicity of political contributions — verification of statements — requirements modified.*] That paragraph ten of section eight of an Act entitled "An Act providing for publicity of contributions made for the purpose of influencing elections at which Representatives in Congress are elected," approved June twenty-fifth, nineteen hundred and ten, as amended by section two of an Act entitled "An Act to amend an Act entitled 'An Act providing for publicity of contributions made for the purpose of influencing elections at which Representatives in Congress are elected' and extending the same to candidates for nomination and election to the offices of Representative and Senator in the Congress of the United States and limiting the amount of campaign expenses," approved August nineteenth, nineteen hundred and eleven, be, and the same is hereby, amended so as to read as follows:

"Every statement herein required shall be verified by the oath or affirmation of the candidate, taken before an officer authorized to administer oaths; and the depositing of any such statement in a regular post office, directed to the Clerk of the House of Representatives, or to the Secretary of the Senate, as the case may be, duly stamped and registered, within the time required herein, shall be deemed a sufficient filing of any such statement under any of the provisions of this Act." [37 Stat. L. 360.]

For the Act of Aug. 19, 1911, see 1912 Supp. Fed. Stat. Annot. 71. The Act of June 25, 1910, is given in 1912 Supp. Fed. Stat. Annot. 69.

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## EMPLOYEES.

See *LABOR*.



## ESTIMATES, APPROPRIATIONS AND REPORTS.

Act of August 24, 1912, Ch. 355, 139.

*Sec. 6. Estimates for Lump Sum Appropriations — Statements Required — Statement of Expenditures Contemplated — Expenditures of Preceding Year, 139.*

*7. Regular Appropriations Restricted to Fiscal Year — Exceptions, 139.*

Act of August 26, 1912, Ch. 408, 140.

*Sec. 7. Lump Sum Appropriations — Restriction on Salaries Paid from, 140.*

Act of May 1, 1913, Ch. 1, 140.

*Sec. 3. Rented Buildings, District of Columbia — Statement to Include Details of Floor Space, etc., 140.*

Act of June 23, 1913, Ch. 3, 141.

*Sec. 3. Estimates of Appropriations — Official to be Designated to Supervise and Prepare, for Each Department, etc., 141.*

### CROSS-REFERENCES.

*Cotton Reports, see AGRICULTURE.*

*Employees in Agricultural Department, see AGRICULTURE.*

*Lump Sum for Agricultural Department, see AGRICULTURE.*

*Form of Regular Annual Estimates, see EXECUTIVE DEPARTMENTS.*

*Labor Department, see LABOR.*

*Permanent Appropriation for Collecting Customs Revenue, see CUSTOMS DUTIES.*

*Printing Records, see PUBLIC PRINTING.*

And see generally *EXECUTIVE DEPARTMENTS.*

SEC. 6. [*Estimates for lump sum appropriations — statements required — statement of expenditures contemplated — expenditures of preceding year.*] Hereafter there shall be submitted, in the annual Book of Estimates, following every estimate for a general or lump sum appropriation which exceeds \$250,000 in amount, a statement showing in parallel columns:

First, the number of persons, if any, intended to be employed and the rates of compensation to each, and the amounts contemplated to be expended for each of any other objects or classes of expenditures specified or contemplated in the estimate; and

Second, the number of persons, if any, employed and the rates of compensation paid each, and the amounts expended for each other object or class of expenditures out of the appropriation corresponding to the estimate so submitted, during the completed fiscal year next preceding the period for which the estimate is submitted. [*\$7 Stat. L. 487.*]

SEC. 7. [*Regular appropriations restricted to fiscal year — exceptions.*] No specific or indefinite appropriation made hereafter in any regular annual ap-

appropriation Act shall be construed to be permanent or available continuously without reference to a fiscal year unless it belongs to one of the following five classes: "Rivers and harbors," "lighthouses," "fortifications," "public buildings," and "pay of the Navy and Marine Corps," last specifically named in and excepted from the operation of the provisions of the so-called "covering-in Act" approved June twentieth, eighteen hundred and seventy-four, or unless it is made in terms expressly providing that it shall continue available beyond the fiscal year for which the appropriation Act in which it is contained makes provision. [37 Stat. L. 487.]

The above secs. 6 and 7 are from the Sunday Civil Appropriation Act of Aug. 24, 1912, ch. 355.

For the provision from the Act of June 20, 1874, above referred to, see 2 Fed. Stat. Annot. 913.

SEC. 7. [*Lump sum appropriations — restriction on salaries paid from.*] That no part of any money contained herein or hereafter appropriated in lump sum shall be available for the payment of personal services at a rate of compensation in excess of that paid for the same or similar services during the preceding fiscal year; nor shall any person employed at a specific salary be hereafter transferred and hereafter paid from a lump-sum appropriation a rate of compensation greater than such specific salary, and the heads of departments shall cause this provision to be enforced: *Provided*, That this section shall not apply to mechanics, artisans, their helpers and assistants, laborers, or any other employees whose duties are of similar character and required in carrying on the various manufacturing or constructing operations of the Government. [37 Stat. L. 790.]

The above sec. 7 is from the Deficiencies Appropriation Act of Aug. 26, 1912, ch. 408. It was amended to read as here given by the Legislative, Executive, and Judicial Appropriation Act of March 4, 1913, ch. 142. Originally this section was as follows:

"SEC. 7. No part of any money contained herein or hereafter appropriated in lump sum shall be available for the payment of personal services at a rate of compensation in

excess of that paid for the same or similar services during the fiscal year nineteen hundred and twelve; nor shall any person employed at a specific salary be hereafter transferred and hereafter paid from a lump-sum appropriation a rate of compensation greater than such specific salary, and the heads of departments shall cause this provision to be enforced." [37 Stat. L. 626.]

SEC. 3. [*Rented buildings, District of Columbia — statement to include details of floor space, etc.*] Hereafter the statement of buildings rented within the District of Columbia for use of the Government, required by the Act of July sixteenth, eighteen hundred and ninety-two (Statutes at Large, volume twenty-seven, page one hundred and ninety-nine), shall indicate as to each building rented the area thereof in square feet of available floor space for Government uses, the rate paid per square foot for such floor space, the assessed valuation of each building, and what proportion, if any, of the rental paid includes heat, light, elevator, or other service. [38 Stat. L. 3.]

This is from the Legislative, Executive, and Judicial Appropriation Act of May 1, 1913, ch. 1.

For the provision from Act of July 16, 1892, above referred to, see 2 Fed. Stat. Annot. 922.

**SEC. 3.** [*Estimates of appropriations — official to be designated to supervise and prepare, for each department, etc.*] That hereafter the head of each executive department and other Government establishment shall, on or before July first in every fiscal year, designate from among the officials employed therein one person whose duty it shall be to supervise the classification and compilation of all estimates of appropriations, including supplemental and deficiency estimates to be submitted by such department or establishment. In the performance of their duties persons so designated shall have due regard for the requirements of all laws respecting the preparation of estimates, including the manner and time of their submission through the Treasury Department to Congress; they shall also, as nearly as may be practicable, eliminate from all such estimates unnecessary words and make uniform the language commonly used in expressing purposes or conditions of appropriations. [*33 Stat. L. 75.*]

This is from the Sundry Civil Appropriation Act of June 23, 1913, ch. 3.

## EVIDENCE.

Act of February 26, 1913, Ch. 79, 141.

*United States Courts — Admitted Handwriting Allowed as Evidence,*  
141.

Act of March 3, 1913, Ch. 114, 142.

*United States Courts — Depositions in Anti-trust Cases to be Taken in Public,* 142.

### CROSS-REFERENCE.

*Copies of Records of Interior Department, see INTERIOR DEPARTMENT.*

**An Act Relating to proof of signatures and handwriting.**

[*Act of February 26, 1913, ch. 79.*]

[*United States courts — admitted handwriting allowed as evidence.*] That in any proceeding before a court or judicial officer of the United States where the genuineness of the handwriting of any person may be involved, any admitted or proved handwriting of such person shall be competent evidence as a basis for comparison by witnesses, or by the jury, court, or officer conducting such proceeding, to prove or disprove such genuineness. [*37 Stat. L. 683.*]

This law changes the common-law rule in regard to the comparison of writings where the genuineness of the handwriting of any person may be involved. The rule of the common law would not permit a comparison

of handwriting unless the writing to be compared was properly in the case for other purposes than mere comparison. *Maxey v. United States*, (C. C. A. 8th Cir. 1913) 207 Fed. 327.

An Act Providing for publicity in taking evidence under Act of July second, eighteen hundred and ninety.

[Act of March 3, 1913, ch. 114.]

[*United States courts — depositions in anti-trust cases to be taken in public.*] That in the taking of depositions of witnesses for use in any suit in equity brought by the United States under the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety, and in the hearings before any examiner or special master appointed to take testimony therein, the proceedings shall be open to the public as freely as are trials in open court; and no order excluding the public from attendance on any such proceedings shall be valid or enforceable. [37 Stat. L. 731.]

For the Act of July 2, 1890, see 7 Fed. Stat. Annot. 336.

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## EXCISE TAX.

See INTERNAL REVENUE.

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## EXECUTIVE DEPARTMENTS.

Act of August 23, 1912, Ch. 350, 142.

Sec. 6. *Contingent Funds, etc. — Apportionment of Amount to Be Expended by Each Office or Bureau — No Change Except on Written Order — Purchases Limited to Contingent Funds, 142.*

7. *Telephone Service — No Expenditures for, in Private Residences, etc., 143.*

8. *Distribution of Publications — All Work Connected with, to Be Done by Public Printer — Equipment, etc., to Be Transferred — Mailing Lists, etc. — Furnishing Copies — Employment of Persons in Departments, etc., to Cease — Salaries to Lapse — Statement to Congress — Department Orders, etc., Excepted — Congressional Distribution Not Changed, 143.*

9. *Annual Estimates to be Made as Now Required by Law, 144.*

10. *Inconsistent Laws Repealed, 144.*

### CROSS-REFERENCES.

*Department of Labor Created, see LABOR.*

*Estimates and Appropriations, see ESTIMATES, APPROPRIATIONS, AND REPORTS.*

See also CIVIL SERVICE.

SEC. 6. [*Contingent funds, etc. — apportionment of amount to be expended by each office or bureau — no change except on written order — purchases lim-*

*ited to contingent funds.*] That in addition to the apportionment required by the so-called antideficiency Act, approved February twenty-seventh, nineteen hundred and six (Statutes at Large, volume thirty-four, page forty-nine), the head of each executive department shall, on or before the beginning of each fiscal year, apportion to each office or bureau of his department the maximum amount to be expended therefor during the fiscal year out of the contingent fund or funds appropriated for the entire year for the department, and the amounts so apportioned shall not be increased or diminished during the year for which made except upon the written direction of the head of the department, in which there shall be fully expressed his reasons therefor; and hereafter there shall not be purchased out of any other fund any article for use in any office or bureau of any executive department in Washington, District of Columbia, which could be purchased out of the appropriations made for the regular contingent funds of such department or of its offices or bureaus. [37 Stat. L. 414.]

SEC. 7. [*Telephone service — no expenditures for, in private residences, etc.*] That no money appropriated by this or any other Act shall be expended for telephone service installed in any private residence or private apartment or for tolls or other charges for telephone service from private residences or private apartments, except for long-distance telephone tolls required strictly for the public business, and so shown by vouchers duly sworn to and approved by the head of the department, division, bureau, or office in which the official using such telephone or incurring the expense of such tolls shall be employed. [37 Stat. L. 414.]

SEC. 8. [*Distribution of publications — all work connected with, to be done by public printer — equipment, etc., to be transferred — mailing lists, etc. — furnishing copies — employment of persons in departments, etc., to cease — salaries to lapse — statement to Congress — department orders, etc., excepted — Congressional distribution not changed.*] That no money appropriated by this or any other Act shall be used after the first day of October, nineteen hundred and twelve, for services in any executive department or other Government establishment at Washington, District of Columbia, in the work of addressing, wrapping, mailing, or otherwise dispatching any publication for public distribution, except maps, weather reports, and weather cards issued by an executive department or other Government establishment at Washington, District of Columbia, or for the purchase of material or supplies to be used in such work; and on and after October first, nineteen hundred and twelve, it shall be the duty of the Public Printer to perform such work at the Government Printing Office. Prior to October first, nineteen hundred and twelve, each executive department and other Government establishment at Washington, District of Columbia, shall transfer to the Public Printer such machines, equipment, and materials as are used in addressing, wrapping, mailing, or otherwise dispatching publications; and each head of such executive department and other Government establishment at Washington, District of Columbia, shall furnish from time to time to the Public Printer mailing lists, in convenient form, and changes therein, or franked slips, for use in the public distribution of publications issued by such department or establishment; and the Public Printer shall furnish copies of any publication only in accordance with the provisions of law or the instruction of the head of the department or establishment issuing the publication. The employment of all persons in the several

executive departments and other Government establishments at Washington, District of Columbia, wholly in connection with the duties herein transferred to the Public Printer, or whose services can be dispensed with or devolved upon another because of such transfer, shall cease and determine on or before the first day of October, nineteen hundred and twelve, and their salaries or compensation shall lapse for the remainder of the fiscal year nineteen hundred and thirteen and be covered into the Treasury. A detailed statement of all machines, equipment, and material transferred to the Government Printing Office by operation of this provision and of all employments discontinued shall be submitted to Congress at its next session by the head of each executive department and other Government establishments at Washington, District of Columbia, in the annual estimates of appropriations: *Provided*, That nothing in this section shall be construed as applying to orders, instructions, directions, notices, or circulars of information, printed for and issued by any of the executive departments or other Government establishments or to the distribution of public documents by Senators or Members of the House of Representatives or to the folding rooms and documents rooms of the Senate or House of Representatives. [37 Stat. L. 414.]

SEC. 9. [*Annual estimates to be made as now required by law.*] That until otherwise provided by law, the regular annual estimates of appropriations for expenses of the Government of the United States shall be prepared and submitted to Congress, by those charged with the duty of such preparation and submission, only in the form and at the time now required by law, and in no other form and at no other time. [37 Stat. L. 415.]

SEC. 10. [*Inconsistent laws repealed.*] That all laws or parts of laws inconsistent with this Act are repealed. [37 Stat. L. 415.]

The above secs. 6-10 are from the Legislative, Executive, and Judicial Appropriation Act of Aug. 23, 1912, ch. 350.

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## EXPERIMENT STATION.

See AGRICULTURE.

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## EXPORTS.

See IMPORTS AND EXPORTS.

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## EXTRADITION.

Canal Zone, see RIVERS, HARBORS, AND CANALS.

## FEDERAL RESERVE ACT.

See *NATIONAL BANKS*.

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## FOOD AND DRUGS.

Act of August 10, 1912, Ch. 284, 145.

*Sanitary Regulation of Renovated Butter Factories*, 145.

Act of August 23, 1912, Ch. 352, 145.

*Pure Food Act — New Paragraph — Misbranding Defined — Drugs — False Name — False Contents — Failure to State Narcotics, etc. Used — False Statement of Curative, etc., Effect*, 145.

Act of March 3, 1913, Ch. 117, 146.

*Sec. 1. Pure Food Regulations — Misbranding*, 146

*2. In Effect at Once — Penalties Deferred*, 147.

### CROSS-REFERENCES.

*Examiner of Drugs*, see *CUSTOMS DUTIES*.

*Standard Barrels for Apples*, see *AGRICULTURE*.

*Viruses, Serums, and Toxins*, see *HEALTH AND QUARANTINE*.

[*Sanitary regulation of renovated butter factories.*] \* \* \* That the sanitary provisions for slaughtering, meat canning, or similar establishments, as set forth in the Act of June thirtieth, nineteen hundred and six (Thirty-fourth Statutes, page six hundred and seventy-six), are hereby extended to cover renovated butter factories as defined in the Act of May ninth, nineteen hundred and two (Thirty-second Statutes, page one hundred and ninety-six), under such regulations as the Secretary of Agriculture may prescribe. [37 Stat. L. 273.]

This is from the Agricultural Department Appropriation Act of Aug. 10, 1912, ch. 284.

For the Act of June 30, 1906, see 1909 Supp. Fed. Stat. Annot. 137; for the Act of May 9, 1902, see 3 Fed. Stat. Annot. 127.

An Act To amend section eight of the food and drugs Act approved June thirtieth, nineteen hundred and six.

[*Act of August 23, 1912, ch. 352.*]

[*Pure food act — new paragraph — misbranding defined — drugs — false name — false contents — failure to state narcotics, etc., used — false statement*

of curative, etc., effect.] That that part of section eight of the food and drugs Act of June thirtieth, nineteen hundred and six, defining what shall be misbranding in the case of drugs, be, and the same is hereby, amended by adding thereto a third paragraph to read as follows:

"If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent."

So that the said part of said section eight shall read as follows:

"SEC. 8. That the term 'misbranded,' as used herein, shall apply to all drugs or articles of food or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

"That for the purposes of this Act an article shall also be deemed to be misbranded. In case of drugs:

"First. If it be an imitation of or offered for sale under the name of another article.

"Second. If the contents of the package as originally put up shall have been removed, in whole or in part, and other contents shall have been placed in such package, or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any such substances contained therein.

"Third. If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic [sic] effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent." [37 Stat. L. 416.]

For sec. 8 of the Act of June 30, 1906, as originally enacted, see 1909 Supp. Fed. Stat. Annot. 139.

An Act To amend section eight of an Act entitled "An Act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes," approved June thirtieth, nineteen hundred and six.

[Act of March 3, 1913, ch. 117.]

[SEC. 1.] [Pure-food regulations — misbranding.] That section eight of an Act entitled "An Act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes," approved June thirtieth, nineteen hundred and six, be, and the same is hereby, amended by striking out the words "Third. If in package form, and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package," and inserting in lieu thereof the following:

"Third. If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count: *Provided, however,* That reasonable variations shall be permitted, and tolerances and also exemptions as to small packages



Act of March 3, 1913.      *GAME ANIMALS AND BIRDS.*      Act of Aug. 10, 1912.

shall be established by rules and regulations made in accordance with the provisions of Section three of this Act.["] [37 Stat. L. 732.]

For sec. 8 of the Act of June 30, 1906, as it read prior to this amendment, see 1909 Supp. Fed. Stat. Annot. 139.

SEC. 2. [*In effect at once — penalties deferred.*] That this Act shall take effect and be in force from and after its passage: *Provided, however,* That no penalty of fine, imprisonment, or confiscation shall be enforced for any violation of its provisions as to domestic products prepared or foreign products imported prior to eighteen months after its passage. [37 Stat. L. 732.]

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## FOREST RESERVES.

See *TIMBER LANDS AND FOREST RESERVES.*

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## FUR SEALS.

See *ALASKA.*

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## GAME ANIMALS AND BIRDS.

Act of August 10, 1912, Ch. 284, 147.

*Wind Cave National Game Preserve — Establishment of, for Buffalo Range, etc. — Lands for Water Supply, etc.* 147.

Act of March 4, 1913, Ch. 145, 148.

*Migratory Game Birds — Deemed under Protection of United States — Regulations Prescribing Closed Seasons, etc., to be Adopted,* 148.

[*Wind Cave National Game Preserve — establishment of, for buffalo range, etc. — lands for water supply, etc.*] \* \* \* For the establishment of a national game preserve, to be known as the Wind Cave National Game Preserve, upon the land embraced within the boundaries of the Wind Cave National Park, in the State of South Dakota, for a permanent national range for a herd of buffalo to be presented to the United States by the American Bison Society, and for such other native American game animals as may be placed therein. The Secretary of Agriculture is authorized to acquire by purchase or condemnation such adjacent lands as may be necessary for the purpose of assuring an adequate, permanent water supply, and to enclose the said game

preserve with a good and substantial fence and to erect thereon all necessary sheds and buildings for the proper care and maintenance of the said animals, twenty-six thousand dollars, to be available until expended. [37 Stat. L. 293.]

This is from the Agricultural Department Appropriation Act of Aug. 10, 1912, ch. 284.

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[*Migratory game birds — deemed under protection of United States — regulations prescribing closed seasons, etc., to be adopted.*] \* \* \* All wild geese, wild swans, brant, wild ducks, snipe, plover, woodcock, rail, wild pigeons, and all other migratory game and insectivorous birds which in their northern and southern migrations pass through or do not remain permanently the entire year within the borders of any State or Territory, shall hereafter be deemed to be within the custody and protection of the Government of the United States, and shall not be destroyed or taken contrary to regulations hereinafter provided therefor.

The Department of Agriculture is hereby authorized and directed to adopt suitable regulations to give effect to the previous paragraph by prescribing and fixing closed seasons, having due regard to the zones of temperature, breeding habits, and times and line of migratory flight, thereby enabling the department to select and designate suitable districts for different portions of the country, and it shall be unlawful to shoot or by any device kill or seize and capture migratory birds within the protection of this law during said closed seasons, and any person who shall violate any of the provisions or regulations of this law for the protection of migratory birds shall be guilty of a misdemeanor and shall be fined not more than \$100 or imprisoned not more than ninety days, or both, in the discretion of the court.

The Department of Agriculture, after the preparation of said regulations, shall cause the same to be made public, and shall allow a period of three months in which said regulations may be examined and considered before final adoption, permitting, when deemed proper, public hearings thereon, and after final adoption shall cause the same to be engrossed and submitted to the President of the United States for approval: *Provided, however,* That nothing herein contained shall be deemed to affect or interfere with the local laws of the States and Territories for the protection of nonmigratory game or other birds resident and breeding within their borders, nor to prevent the States and Territories from enacting laws and regulations to promote and render efficient the regulations of the Department of Agriculture provided under this statute. [37 Stat. L. 847.]

This is from the Agricultural Department Appropriation Act of March 4, 1913, ch. 145.

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## GOVERNMENT EMPLOYEES.

See LABOR.

## **GREAT LAKES.**

*See SHIPPING AND NAVIGATION.*

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## **HANDWRITING.**

*See EVIDENCE.*

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## **HAWAII.**

*See AGRICULTURE.*

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## **HEALTH AND QUARANTINE.**

**Act of August 14, 1912, Ch. 288, 150.**

*Sec. 1. Public Health Service — Public Health and Marine-Hospital Service Changed to — Investigations Authorized, 150.*

*2. Salaries — Longevity Allowance, 150.*

**Act of August 24, 1912, Ch. 355, 150.**

*Public Health Service — Admission of Cases for Study, 150.*

**Act of March 4, 1913, Ch. 145, 151.**

*Viruses, Serums, Toxins, etc. — Trade in — Importations — Inspections — Licenses, 151.*

**Act of June 23, 1913, Ch. 3, 152**

*Hospital Treatment for Officers and Employees, 152.*

## CROSS-REFERENCE.

*Quarantine Funds: at Portland, Me. see LIFE SAVING.*

**As Act To change the name of the Public Health and Marine-Hospital Service to the Public Health Service, to increase the pay of officers of said service, and for other purposes.**

[Act of August 14, 1912, ch. 288.]

[**Sec. 1.** *Public Health Service — Public Health and Marine-Hospital Service changed to — investigations authorized.*] That the Public Health and Marine-Hospital Service of the United States shall hereafter be known and designated as the Public Health Service, and all laws pertaining to the Public Health and Marine-Hospital Service of the United States shall hereafter apply to the Public Health Service, and all regulations now in force, made in accordance with law for the Public Health and Marine-Hospital Service of the United States shall apply to and remain in force as regulations of and for the Public Health Service until changed or rescinded. The Public Health Service may study and investigate the diseases of man and conditions influencing the propagation and spread thereof, including sanitation and sewage and the pollution either directly or indirectly of the navigable streams and lakes of the United States, and it may from time to time issue information in the form of publications for the use of the public. [37 Stat. L. 309.]

**Sec. 2.** [*Salaries — longevity allowance.*] That beginning with the first day of October next after the passage of this Act the salaries of the commissioned medical officers of the Public Health Service shall be at the following rates per annum: Surgeon General, six thousand dollars; Assistant Surgeon General, four thousand dollars; senior surgeon, of which there shall be ten in number, on active duty, three thousand five hundred dollars; surgeon, three thousand dollars; passed assistant surgeon, two thousand four hundred dollars; assistant surgeon, two thousand dollars; and the said officers, excepting the Surgeon General, shall receive an additional compensation of ten per centum of the annual salary as above set forth for each five years' service, but not to exceed in all forty per centum: *Provided*, That the total salary, including the longevity increase, shall not exceed the following rates: Assistant Surgeon General, five thousand dollars; senior surgeon, four thousand five hundred dollars; surgeon, four thousand dollars: *Provided further*, That there may be employed in the Public Health Service such help as may be provided for from time to time by Congress. [37 Stat. L. 309.]

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[**Public Health Service — admission of cases for study.**] PUBLIC HEALTH AND MARINE HOSPITAL SERVICE. \* \* \* That there may be admitted into said hospitals for study, persons with infectious or other diseases affecting the public health, and not to exceed ten cases in any one hospital at one time. [37 Stat. L. 335.]

This is from the Sundry Civil Appropriation Act of Aug. 24, 1912, ch. 355.

[*Viruses, serums, toxins, etc. — trade in — importations — inspections — licenses.*] \* \* \* That from and after July first, nineteen hundred and thirteen, it shall be unlawful for any person, firm, or corporation to prepare, sell, barter, or exchange in the District of Columbia, or in the Territories, or in any place under the jurisdiction of the United States, or to ship or deliver for shipment from one State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, any worthless, contaminated, dangerous, or harmful virus, serum, toxin, or analogous product intended for use in the treatment of domestic animals, and no person, firm, or corporation shall prepare, sell, barter, exchange, or ship as aforesaid any virus, serum, toxin, or analogous product manufactured within the United States and intended for use in the treatment of domestic animals, unless and until the said virus, serum, toxin, or analogous product shall have been prepared, under and in compliance with regulations prescribed by the Secretary of Agriculture, at an establishment holding an unsuspended and unrevoked license issued by the Secretary of Agriculture as hereinafter authorized. That the importation into the United States, without a permit from the Secretary of Agriculture, of any virus, serum, toxin, or analogous product for use in the treatment of domestic animals, and the importation of any worthless, contaminated, dangerous, or harmful virus, serum, toxin, or analogous product for use in the treatment of domestic animals, are hereby prohibited. The Secretary of Agriculture is hereby authorized to cause the Bureau of Animal Industry to examine and inspect all viruses, serums, toxins, and analogous products, for use in the treatment of domestic animals, which are being imported or offered for importation into the United States of viruses, serums, toxins, and analogous products, for use in the treatment of domestic animals, which are worthless, contaminated, dangerous, or harmful, and if it shall appear that any such virus, serum, toxin, or analogous product, for use in the treatment of domestic animals, is worthless, contaminated, dangerous, or harmful, the same shall be denied entry and shall be destroyed or returned at the expense of the owner or importer. That the Secretary of Agriculture be, and hereby is, authorized to make and promulgate from time to time such rules and regulations as may be necessary to prevent the preparation, sale, barter, exchange, or shipment as aforesaid of any worthless, contaminated, dangerous, or harmful virus, serum, toxin, or analogous product for use in the treatment of domestic animals, and to issue, suspend, and revoke licenses for the maintenance of establishments for the preparation of viruses, serums, toxins, and analogous products, for use in the treatment of domestic animals, intended for sale, barter, exchange, or shipment as aforesaid. The Secretary of Agriculture is hereby authorized to issue permits for the importation into the United States of viruses, serums, toxins, and analogous products, for use in the treatment of domestic animals, which are not worthless, contaminated, dangerous, or harmful. All licenses issued under authority of this Act to establishments where such viruses, serums, toxins, or analogous products are prepared for sale, barter, exchange, or shipment as aforesaid, shall be issued on condition that the licensee shall permit the inspection of such establishments and of such products and their preparation; and the Secretary of Agriculture may suspend or revoke any permit or license issued under authority of this Act, after opportunity for hearing has been granted the licensee or importer, when the Secretary of Agriculture is satisfied that such license or permit is being used to facilitate or affect the preparation, sale, barter, exchange, or shipment as aforesaid, or the importation into the United States of any worthless, contaminated, dangerous, or harmful virus, serum, toxin, or analogous product for

use in the treatment of domestic animals. That any officer, agent, or employee of the Department of Agriculture duly authorized by the Secretary of Agriculture for the purpose may, at any hour during the daytime or nighttime, enter and inspect any establishment licensed under this Act where any virus, serum, toxin, or analogous product for use in the treatment of domestic animals is prepared for sale, barter, exchange, or shipment as aforesaid. That any person, firm, or corporation who shall violate any of the provisions of this Act shall be deemed guilty of a misdemeanor, and shall, upon conviction, be punished by a fine of not exceeding \$1,000 or by imprisonment not exceeding one year, or by both such fine and imprisonment, in the discretion of the court. That there is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to be expended as the Secretary of Agriculture may direct, for the purposes and objects of this Act, the sum of \$25,000, which appropriation shall become available on July first, nineteen hundred and thirteen, and may be expended at any time before July first, nineteen hundred and fourteen. [*37 Stat. L. 832.*]

This is from the Agricultural Department Appropriation Act of March 4, 1913, ch. 145.

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[*Hospital treatment for officers and employees.*] \* \* \* That hereafter commissioned officers and pharmacists, and those employees of the [Public Health] service devoting all their time to field work, shall be entitled to hospital relief when taken sick or injured in line of duty. [*38 Stat. L. 24.*]

This is from the Sundry Civil Appropriation Act of June 23, 1913, ch. 3.

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## **HOMESTEADS.**

See *PUBLIC LANDS.*

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## **HORTICULTURAL BOARD.**

See *AGRICULTURE.*

## HOSPITALS AND ASYLUMS.

Act of August 22, 1912, Ch. 335, 153

*Naval Home — Deposit of Moneys, etc., of Deceased Inmates —  
Inquiries for Next of Kin — Payment of Claims, 153*

Act of August 24, 1912, Ch. 355, 153.

*State and Territorial Homes for Disabled Soldiers — Intoxicants —  
Collections from Inmates, 153.*

*Government Hospital for Insane — Determining Per Capita Cost of  
Patients, 154*

Act of August 26, 1912, Ch. 408, 154

*Collections from Inmates of Soldiers' Homes, 154*

Act of June 23, 1913, Ch. 3, 154.

*Board of Managers for National Home for Disabled Volunteer Sol-  
diers, 154.*

### CROSS-REFERENCE.

See also *HEALTH AND QUARANTINE.*

[*Naval home — deposit of moneys, etc., of deceased inmates — inquiries for next of kin — payment of claims.*] \* \* \* All moneys belonging to a deceased inmate of the Naval Home or derived from the sale of his personal effects, and which are not claimed by his next of kin, shall be deposited in the Treasury by the governor of the home, as agent, and if any sum so deposited has been or shall hereafter be unclaimed for a period of five years from the death of such inmate it shall be covered into the Treasury as miscellaneous receipts: *Provided*, That the governor of the Naval Home is hereby authorized and directed, under such regulations as may be prescribed by the Secretary of the Navy, to make diligent inquiry in every instance after the death of an inmate to ascertain the whereabouts of his next of kin: *And provided further*, That claims may be presented hereunder at any time, and when supported by competent proof in any case more than five years after the death of an inmate shall be certified to Congress for consideration. [37 Stat. L. 335.]

This is from the Navy Appropriation Act of Aug. 22, 1912, ch. 335.

[*State and territorial homes for disabled soldiers — intoxicants — collections from inmates.*] \* \* \* State or Territorial homes for disabled soldiers and sailors: For continuing aid to State or Territorial homes for the support of disabled volunteer soldiers, in conformity with the Act approved August twenty-seventh, eighteen hundred and eighty-eight, including all classes of soldiers admissible to the National Home for Disabled Volunteer Soldiers, \$1,200,000:

*Provided*, That no part of this appropriation shall be apportioned to any State or Territorial home that maintains a bar or canteen where intoxicating liquors are sold: *Provided further*, That for any sum or sums collected in any manner from inmates of such State or Territorial homes to be used for the support of said homes a like amount shall be deducted from the aid herein provided for, but this proviso shall not apply to any State or Territorial home into which the wives or widows of soldiers are admitted and maintained. [37 Stat. L. 453.]

[*Government hospital for insane — determining per capita cost of patients.*] \* \* \* Hereafter in determining the per capita cost of maintenance and treatment of patients in the Government Hospital for the Insane the expenditures for repair of buildings, roadways, and walks shall be included. [37 Stat. L. 461.]

The above two paragraphs are from the Sundry Civil Appropriation Act of Aug. 24, 1912, ch. 355.

[*Collections from inmates of soldiers' homes.*] \* \* \* That for any sum or sums collected in any manner from inmates of such State or Territorial homes to be used for the support of said homes a like amount shall be deducted from the aid herein provided for, but this proviso shall not apply to any State or Territorial home into which the wives or widows of soldiers are admitted and maintained. [37 Stat. L. 602.]

This is from the Deficiencies Appropriation Act of Aug. 26, 1912, ch. 408.

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[*Board of Managers for National Home for Disabled Volunteer Soldiers.*] \* \* \* Hereafter vacancies occurring in the membership of the Board of Managers of the National Home for Disabled Volunteer Soldiers shall not be filled until the whole number of members of such board is reduced to five, and thereafter the number of members constituting said board shall not exceed five. [38 Stat. L. 43.]

This is from the Sundry Civil Appropriation Act of June 23, 1913, ch. 3.



## IMMIGRATION.

Act of February 25, 1913, Ch. 73, 155.

*Sec. 1. Immigrant Stations — To be Established at Interior Places, 155.*

*2. Appropriation for Station in Chicago, Ill. 155.*

Act of October 22, 1913, Ch. 32, 155.

*Temporary Detention of Aliens — Expenses to be Paid by Transportation Lines, 155.*

### CROSS-REFERENCE.

See also *CHINESE EXCLUSION*.

An Act To extend the power of the Commissioner General of Immigration, subject to the approval of the Secretary of Commerce and Labor.

[Act of February 25, 1913, ch. 73.]

[SEC. 1.] [*Immigrant stations — to be established at interior places.*] That for the purpose of making effective the power of establishing rules and regulations for protecting the United States and aliens migrating thereto from fraud and loss, conferred upon the Commissioner General of Immigration, subject to the direction and with the approval of the Secretary of Commerce and Labor, by section twenty-two of an Act entitled "An Act to regulate the immigration of aliens into the United States," approved February twentieth, nineteen hundred and seven, the Secretary of Commerce and Labor shall establish and maintain immigrant stations at such interior places as may be necessary, and, in the discretion of the said Secretary, aliens in transit from ports of landing to such interior stations shall be accompanied by immigrant inspectors: *Provided*, That nothing in this Act shall be construed as authorizing the Commissioner General of Immigration to pay the cost of transportation of any arriving alien. [37 Stat. L. 682.]

For sec. 22 of the Act of Feb. 20, 1907, see 1909 Supp. Fed. Stat. Annot. 171.

SEC. 2. [*Appropriation for station in Chicago, Ill.*] That for the establishment and maintenance of such a station in the city of Chicago for the fiscal year ending June thirtieth, nineteen hundred and fourteen, there is hereby authorized, from moneys in the Treasury not otherwise appropriated, the sum of seventy-five thousand dollars, which shall be expended in such manner consistent with the purposes hereof as the Secretary of Commerce and Labor may direct. [37 Stat. L. 682.]

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[*Temporary detention of aliens — expenses to be paid by transportation lines.*] \* \* \* Whenever aliens arriving at any port of the United States are temporarily removed from a vessel in accordance with the provisions of section sixteen of the immigration Act approved February twentieth, nineteen hundred and seven, the transportation lines which brought them and the masters, owners, agents, and consignees of the vessel on which they arrive shall pay all expenses of such removal and all expenses arising during subsequent deten-

tion pending decision of the eligibility of such aliens to enter the United States and until they are either allowed to land or returned to the care of the line or to the vessel which brought them, and such expenses shall include those of maintenance, medical treatment in hospital or elsewhere, burial in the event of death, and charges for transfer to the vessel in the event of deportation, excepting only where such expenses arise under the terms of any of the provisos of section nineteen of the said immigration Act; and aliens shall not be temporarily removed from any vessel unless the master, owner, agent, or consignee thereof shall guarantee in a manner prescribed by and to the satisfaction of the Secretary of Labor that said expenses will be paid. [38 Stat. L. 226.]

This is from the Deficiencies Appropriation Act of Oct. 22, 1913, ch. 32.

For sec. 16 of the Act of Feb. 20, 1907, see 1909 Supp. Fed. Stat. Annot. 163.

## IMPORTS AND EXPORTS.

Joint Resolution No. 10 of March 14, 1912, 156.

*Sec. 1. Export of War Material — President May Limit Export of Arms to American Country where Domestic Violence Exists, 156.*

*2. Punishment for Violations, 157.*

### CROSS-REFERENCES.

*Grain and Seeds, see AGRICULTURE.*

*Nursery Stock, see AGRICULTURE.*

*Importations Prohibited, see CUSTOMS DUTIES.*

*Viruses, Serums, and Toxins, see HEALTH AND QUARANTINE.*

*Matches Imported, see INTERNAL REVENUE.*

*Tokens, etc., Similar to Coins, see PENAL LAWS.*

*And see in general CUSTOMS DUTIES.*

Joint Resolution To amend the joint resolution to prohibit the export of coal or other material used in war from any seaport of the United States.

[Joint Resolution No. 10, of March 14, 1912.]

[SEC. 1.] [*Export of war material — President may limit export of arms to American country where domestic violence exists.*] That the joint resolution to prohibit the export of coal or other material used in war from any seaport of the United States, approved April twenty-second, eighteen hundred and ninety-eight, be, and hereby is, amended to read as follows:

That whenever the President shall find that in any American country conditions of domestic violence exist which are promoted by the use of arms or munitions of war procured from the United States, and shall make proclamation thereof, it shall be unlawful to export except under such limitations and exceptions as the President shall prescribe any arms or munitions of war from any place in the United States to such country until otherwise ordered by the President or by Congress. [37 Stat. L. 630.]

SEC. 2. [*Punishment for violations.*] That any shipment of material hereby declared unlawful after such a proclamation shall be punishable by fine not exceeding ten thousand dollars, or imprisonment not exceeding two years, or both. [*37 Stat. L. 630.*]

For the Resolution of April 22, 1898, here amended, see 3 Fed. Stat. Annot. 320.

Meaning of "export."—Accurately speaking, exportation in the complete sense consists of two essential ingredients, the sending of merchandise from this to a foreign country and its landing in such country. But as used in the statute "export" includes a shipment to a foreign country which has not been landed. *United States v. Chavez*, (1913) 228 U. S. 525, 33 S. Ct. 595, 57 U. S. (L. ed.) 950, wherein the court said: "Putting out of view the parenthetical clause in the text of the resolution concerning the proclamation of the President, it reads as follows: 'It shall be unlawful to export any arms or munitions of war from any place in the United States to such country,' that is, the country brought within the terms of the resolution by a proclamation of the President. Conceding for argument's sake that if the words 'to export' stood alone in the text, that is, were not accompanied by explanatory or defining words, they would have to be interpreted with reference to the meaning of export in the complete sense, that is, as including landing in the foreign country, such concession is not here controlling or persuasive. We say this because, as we have seen, the words 'to export' are expressly qualified by a clause which serves, in a sense, to define their meaning, and, at all events, to make clear the nature and character of the acts intended to be embraced by the prohibition against exporting. In other words, the resolution does not say it shall be unlawful to export, but it adds, 'any arms or munitions of war from any place in the United States to such foreign country.' In view of the accepted significance of the words 'to export' when used in their complete sense, and of the fact that in the preceding sentences of the resolution the causes leading to its adoption are expressly stated to be the violence and confusion sometimes promoted in foreign countries 'by the use of arms or munitions of war procured from the United States,' the insertion of words of definition and the omission from such words of all reference to landing of the prohibited merchandise would seem to make it clear

that the prohibition of the resolution was directed against the act of sending from this to the foreign and prohibited country without reference to the completion of such act by the landing or delivery of the prohibited merchandise at its destination; in other words, that the object was to forbid the act of shipment from the United States of the prohibited munitions of war to a foreign country, without reference to the fulfillment of the complete act of export by the landing of the contraband goods. If there be room for hesitancy, that is to say, ambiguity, as to the correctness of this construction of the first section, we think there can be no ground for such doubt if the context of the resolution be considered, that is, if the second section be taken into view as illustrating and making clear the text of the first section. There can be no doubt that the object of the second section was to make the prohibition of the first section operative by punishing violations of its provisions. Now, the second section does not purport to punish the act of exporting, but in express terms it only punishes 'any shipment,' thus affixing the construction which we have given to the first section and causing it in reason to be impossible to say that the first section simply prohibits export in the completed sense. And this construction of the second section becomes irresistible when it is observed that for the purpose of preventing misconception the words 'any shipment' are explained and their meaning made more emphatic by the declaration that they constitute the act 'hereby made unlawful,' thus again in express terms affixing a significance to the first section and confirming the meaning which we have given it." See also *United States v. Mesa*, (1913) 228 U. S. 533, 33 S. Ct. 597, 57 U. S. (L. ed.) 953.

The validity of this statute has been recognized in the following cases:—*United States v. Chavez*, (1913) 228 U. S. 525, 33 S. Ct. 595, 57 U. S. (L. ed.) 950; *United States v. Mesa*, (1913) 228 U. S. 533, 33 S. Ct. 597, 57 U. S. (L. ed.) 953; *Talbott v. United States*, (C. C. A. 5th Cir. 1913) 206 Fed. 144.

## INCOME TAX.

See *INTERNAL REVENUE*.

## INDIANS.

### **Act of February 19, 1912, Ch. 40, 159.**

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- 2. Rights of Mining Leaseholders, 160.*
- 3. Sales Subject to Mining Rights, etc. 161.*
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- 2. Lands Reserved for Agency, etc. — Town Site on Agency Lands — Intoxicants Prohibited, 166.*
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*Sec. 1. Oaths of Employees in Indian Service—Determining Heirs of Indian Allottees, 172.*

*18. Cemetery Lands—Transfers Authorized—Osage Indians—Payments to be Withheld if Children Not Placed in School—Five Civilized Tribes—Contracts as to Tribal Funds, etc., Subject to Official Approval, 172.*

*26. Bureau of Indian Affairs—System of Bookkeeping to be Installed—Detailed Statement in Annual Report—Allotment of Appropriations before Expenditures—Estimates to Contain Classified Statement, 173.*

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*Choctaw and Chickasaw Coal and Asphalt Lands—Classification and Appraisalment, 173.*

#### CROSS-REFERENCES.

*Indian Reservation, see PUBLIC LANDS.*

*Indian Service Records, see INTERIOR DEPARTMENT.*

**An Act To provide for the sale of the surface of the segregated coal and asphalt lands of the Choctaw and Chickasaw Nations, and for other purposes.**

[Act of Feb. 19, 1912, ch. 40.]

[SEC. 1.] [Surface of segregated Choctaw and Chickasaw lands to be sold.]

That the Secretary of the Interior is hereby authorized to sell at not less than

the appraised price, to be fixed as hereinafter provided, the surface, leased and unleased, of the lands of the Choctaw and Chickasaw Nations in Oklahoma segregated and reserved by order of the Secretary of the Interior dated March twenty-fourth, nineteen hundred and three, authorized by the Act approved July first, nineteen hundred and two. The surface herein referred to shall include the entire estate save the coal and asphalt reserved. Before offering such surface for sale the Secretary of the Interior, under such regulations as he may prescribe, shall cause the same to be classified and appraised by three appraisers, to be appointed by the President, at a compensation to be fixed by him, not to exceed for salary and expenses for each appraiser the sum of fifteen dollars per day for the time actually engaged in making such classification and appraisal. The classification and appraisal of the surface shall be by tracts, according to the Government survey of said lands, except that lands which are especially valuable by reason of proximity to towns or cities may, in the discretion of the Secretary of the Interior, be subdivided into lots or tracts containing not less than one acre. In appraising said surface the value of any improvements thereon belonging to the Choctaw and Chickasaw Nations, except such improvements as have been placed on coal or asphalt lands leased for mining purposes, shall be taken into consideration. The surface shall be classified as agricultural, grazing, or as suitable for town lots. The classification and appraisal provided for herein shall be completed within six months from the date of the passage of this Act, shall be sworn to by the appraisers, and shall become effective when approved by the Secretary of the Interior: *Provided*, That in the proceedings and deliberation of said appraisers in the process of said appraisal and in the approval thereof the Choctaw and Chickasaw Nations may present for consideration facts, figures, and arguments bearing upon the value of said property. [37 Stat. L. 67.]

**Amendment—classification and appraisal.**—See provision from the Indian Appropriation Act of June 30, 1913, ch. 4, given *infra*, p. 163, immediately following this Act.

**SEC. 2. [Rights of mining leaseholders.]** That after such classification and appraisal has been made each holder of a coal or asphalt lease shall have a right for sixty days, after notice in writing, to purchase, at the appraised value and upon the terms and conditions hereinafter prescribed, a sufficient amount of the surface of the land covered by his lease to embrace improvements actually used in present mining operations or necessary for future operations up to five per centum of such surface, the number, location, and extent of the tracts to be thus purchased to be approved by the Secretary of the Interior: *Provided*, That the Secretary of the Interior may, in his discretion, enlarge the amount of land to be purchased by any such lessee to not more than ten per centum of such surface: *Provided further*, That such purchase shall be taken and held as a waiver by the purchaser of any and all rights to appropriate to his use any other part of the surface of such land, except for the purpose of future operations, prospecting, and for ingress and egress, as hereinafter reserved: *Provided further*, That if any lessee shall fail to apply to purchase under the provisions of this section within the time specified the Secretary of the Interior may, in his discretion, with the consent of the lessee, designate and reserve from sale such tract or tracts as he may deem proper and necessary to embrace improvements actually used in present mining operations, or necessary for future operations, under any existing lease, and dispose of the remaining portion of the surface within such lease free and clear of any claim by the lessee, except for

the purposes of future operations, prospecting, and for ingress and egress, as hereinafter reserved. [37 Stat. L. 68.]

SEC. 3. [*Sales subject to mining rights, etc.*] That sales of the surface under this Act shall be upon the conditions that the Choctaw and Chickasaw Nations, their grantees, lessees, assigns, or successors, shall have the right at all times to enter upon said lands for the purpose of prospecting for coal or asphalt thereon, and also the right of underground ingress and egress, without compensation to the surface owner, and upon the further condition that said nations, their grantees, lessees, assigns, or successors, shall have the right to acquire such portions of the surface of any tract, tracts, or rights thereto as may be reasonably necessary for prospecting or for the conduct of mining operations or for the removal of deposits of coal and asphalt upon paying a fair valuation for the portion of the surface so acquired. If the owner of the surface and the then owner or lessee of such mineral deposits shall be unable to agree upon a fair valuation for the surface so acquired, such valuation shall be determined by three arbitrators, one to be appointed, in writing, a copy to be served on the other party by the owner of the surface, one in like manner by the owner or lessee of the mineral deposits, and the third to be chosen by the two so appointed; and in case the two arbitrators so appointed should be unable to agree upon a third arbitrator within thirty days, then and in that event, upon the application of either interested party, the United States district judge in the district within which said land is located shall appoint the third arbitrator: *Provided*, That the owner of such mineral deposits or lessee thereof shall have the right of entry upon the surface so to be acquired for mining purposes immediately after the failure of the parties to agree upon a fair valuation and the appointment, as above provided, of an arbitrator by the said owner or lessee. [37 Stat. L. 68.]

SEC. 4. [*Sale of lands undisposed of.*] That upon the expiration of two years after the lands have been first offered for sale the Secretary of the Interior, under rules and regulations to be prescribed by him, shall cause to be sold to the highest bidder for cash the surface of any lands remaining unsold and of any surface lands forfeited by reason of nonpayment of any part of the purchase price, without regard to the appraised value thereof: *Provided*, That the Secretary of the Interior is authorized to sell at not less than the appraised value to the McAlester Country Club, of McAlester, Oklahoma, the surface of not to exceed one hundred and sixty acres in section seventeen, township five north, range fifteen east: *Provided further*, That the mineral underlying the surface of the lands condemned for the State penitentiary at McAlester, Oklahoma, under the Indian appropriation Act approved March third, nineteen hundred and nine, shall be subject to condemnation, under the laws of the State of Oklahoma, for State penitentiary purposes: *And provided further*, That said mineral shall not be mined for other than State penitentiary purposes. [37 Stat. L. 69.]

SEC. 5. [*Terms of sale, etc.*] That the sales herein provided for shall be at public auction under rules and regulations and upon terms to be prescribed by the Secretary of the Interior, except that no payment shall be deferred longer than two years after the sale is made. All agricultural lands shall be sold in tracts not to exceed one hundred and sixty acres, and deeds shall not be issued to any one person for more than one hundred and sixty acres of agricultural land, grazing lands in tracts not to exceed six hundred and forty acres, and lands

especially valuable by reason of proximity to towns or cities may, in the discretion of the Secretary of the Interior, be sold in lots or tracts containing not less than one acre each. All deferred payments shall bear interest at five per centum per annum, and if default be made in any payment when due all rights of the purchaser thereunder shall, at the discretion of the Secretary of the Interior, cease and the lands shall be taken possession of by him for the benefit of the two nations, and the money paid as the purchase price of such lands shall be forfeited to the Choctaw and Chickasaw Tribes of Indians. [*§7 Stat. L. 69.*]

SEC. 6. [*Sales of both surface and minerals.*] That if the mining trustees of the Choctaw and Chickasaw Nations and the three appraisers herein provided for, or a majority of the said trustees and appraisers, shall find that such tract or tracts can not be profitably mined for coal or asphalt and can be more advantageously disposed of by selling the surface and the coal and asphalt together, such tract or tracts may be sold in that manner, in the discretion of the Secretary of the Interior, and patents issued for said lands as provided by existing laws: *Provided*, That this section shall not apply to land now leased for the purpose of mining coal or asphalt within the segregated and reserved area herein described. [*§7 Stat. L. 69.*]

SEC. 7. [*Conveyances to specify reservations, etc.*] That when full purchase price for any property sold herein is paid, the chief executives of the two tribes shall execute and deliver, with the approval of the Secretary of the Interior, to each purchaser an appropriate patent or instrument of conveyance conveying to the purchaser the property so sold, and all conveyances made under this Act shall convey the fee in the land with reservation to the Choctaw and Chickasaw Tribes of Indians of the coal and asphalt in such land, and shall contain a clause or clauses reciting and containing the reservations, restrictions, covenants, and conditions under which the said property was sold, as herein provided, and said conveyances shall specifically provide that the reservations, restrictions, covenants, and conditions therein contained shall run with the land and bind the grantees, successors, representatives, and assigns of the purchaser of the surface: *Provided*, That the purchaser of the surface of any coal or asphalt land shall have the right at any time before final payment is due to pay the full purchase price on the surface of said coal or asphalt land, with accrued interest, and shall thereupon be entitled to patent therefor, as herein provided. [*§7 Stat. L. 70.*]

SEC. 8. [*Appropriation.*] That there is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated belonging to the Choctaw and Chickasaw Tribes of Indians, the sum of fifty thousand dollars to pay expenses of the classification, appraisal, and sales herein provided for, and the proceeds received from the sales of lands hereunder shall be paid into the Treasury of the United States to the credit of the Choctaws and Chickasaws and disposed of in accordance with section seventeen of an Act entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in Indian Territory, and for other purposes," approved April twenty-sixth, nineteen hundred and six, and the Indian Appropriation Act approved March third, nineteen hundred and eleven. [*§7 Stat. L. 70.*]

SEC. 9. [*Rules, etc., to be established.*] That the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules, regulations, terms, and conditions not inconsistent with this Act as he may deem necessary to carry



out its provisions, including the establishment of an office during the sale of this land at McAlester, Pittsburg County, Oklahoma. [37 Stat. L. 70.]

[*Choctaw and Chickasaw coal, etc., lands — time extended for completing classification, etc., of.*] \* \* \* That the Act of Congress approved February nineteenth, nineteen hundred and twelve (Thirty-seventh Statutes at Large, page sixty-seven), being "An Act to provide for the sale of the surface of the coal and asphalt lands of the Choctaw and Chickasaw Nations, and for other purposes," be, and the same is hereby, amended to provide that the classification and appraisement of such lands shall be completed not later than December first, nineteen hundred and thirteen, and the sum of \$10,000, to be paid out of the Choctaw and Chickasaw tribal funds, is hereby appropriated for the completion of the work. [38 Stat. L. 95.]

This is from the Indian Appropriation Act of June 30, 1913, ch. 4.

The Act of Feb. 19, 1912, is given immediately preceding this provision, beginning p. 159.

The Indian Appropriation Act of Aug. 24, 1912, ch. 388, contained a prior amendment providing that the classification and appraisement be completed not later than Dec. 1, 1912.

An Act Supplementary to and amendatory of the Act entitled "An Act for the division of the lands and funds of the Osage Nation of Indians in Oklahoma," approved June twenty-eighth, nineteen hundred and six, and for other purposes.

[Act of April 18, 1912, ch. 83.]

[SEC. 1.] [*Osage Indians — payment of taxes on inherited lands.*] That until the inherited lands of the deceased members of the Osage Tribe of Indians shall be partitioned or sold the Secretary of the Interior be, and he hereby is, authorized to pay the taxes on said land out of any money due and payable to the heirs from the segregated decedent's funds in the Treasury of the United States. [37 Stat. L. 86.]

SEC. 2. [*Exchange of surplus allotments.*] That the Secretary of the Interior be, and he hereby is, authorized, where the same would be to the best interests of Osage allottees, and the same is submitted to the Osage council for recommendation and approved by it, to permit the exchange of surplus allotments, or any portions thereof, of Osage allottees under such rules and regulations as he may prescribe and upon such terms as he shall approve. The Secretary shall have authority to do any and all things necessary to make these exchanges effective. [37 Stat. L. 86.]

SEC. 3. [*Property of deceased or incompetent allottees, subject to county courts — supervision over executors, guardians, etc. — jurisdiction of county courts — guardians — approval of sales.*] That the property of deceased and of orphan minor, insane, or other incompetent allottees of the Osage Tribe, such incompetency being determined by the laws of the State of Oklahoma, which are hereby extended for such purpose to the allottees of said tribe, shall, in probate matters, be subject to the jurisdiction of the county courts of the State of Oklahoma, but a copy of all papers filed in the county court shall be served on the superintendent of the Osage Agency at the time of filing, and said superintendent is authorized, whenever the interests of the allottee require, to appear in the county court for the protection of the interests of the

allottee. The superintendent of the Osage Agency or the Secretary of the Interior, whenever he deems the same necessary, may investigate the conduct of executors, administrators, and guardians or other persons having in charge the estate of any deceased allottee or of minors or persons incompetent under the laws of Oklahoma, and whenever he shall be of opinion that the estate is in any manner being dissipated or wasted or is being permitted to deteriorate in value by reason of the negligence, carelessness, or incompetency of the guardian or other person in charge of the estate, the superintendent of the Osage Agency or the Secretary of the Interior or his representative shall have power, and it shall be his duty, to report said matter to the county court and take the necessary steps to have such case fully investigated, and also to prosecute any remedy, either civil or criminal, as the exigencies of the case and the preservation and protection of the interests of the allottee or his estate may require, the costs and expenses of the civil proceedings to be a charge upon the estate of the allottee or upon the executor, administrator, guardian, or other person in charge of the estate of the allottee and his surety, as the county court shall determine. Every bond of the executor, administrator, guardian, or other person in charge of the estate of any Osage allottee shall be subject to the provisions of this section and shall contain therein a reference hereto: *Provided*, That no guardian shall be appointed for a minor whose parents are living, unless the estate of said minor is being wasted or misused by such parents: *Provided further*, That no land shall be sold or alienated under the provisions of this section without the approval of the Secretary of the Interior. [37 Stat. L. 86.]

SEC. 4. [*Tribal oil and mineral rights unchanged.*] That nothing herein shall be construed as in any way changing the rights of the Osage Tribe in oil, gas, coal, and other minerals as fixed in the Osage Act of June twenty-eighth, nineteen hundred and six, or in any manner be construed to change or amend the provisions of said Act in regard to oil, gas, coal, or other minerals. [37 Stat. L. 87.]

SEC. 5. [*Payment of individual funds to allottees — restriction — disposal of funds of minors or incompetents.*] That the Secretary of the Interior, in his discretion, hereby is authorized, under rules and regulations to be prescribed by him and upon application therefor, to pay to Osage allottees, including the blind, insane, crippled, aged, or helpless, all or part of the funds in the Treasury of the United States to their individual credit: *Provided*, That he shall be first satisfied of the competency of the allottee or that the release of said individual trust funds would be to the manifest best interests and welfare of the allottee: *Provided further*, That no trust funds of a minor or a person above mentioned who is incompetent shall be released and paid over except to a guardian of such person duly appointed by the proper court and after the filing by such guardian and approval by the court of a sufficient bond conditioned to faithfully administer the funds released and the avails thereof. [37 Stat. L. 87.]

SEC. 6. [*Partition of lands of deceased allottees — conditions.*] That from and after the approval of this act the lands of deceased Osage allottees, unless the heirs agree to partition the same, may be partitioned or sold upon proper order of any court of competent jurisdiction in accordance with the laws of the State of Oklahoma: *Provided*, That no partition or sale of the restricted lands of a deceased Osage allottee shall be valid until approved by the Secretary

of the Interior. Where some of the heirs are minors, the said court shall appoint a guardian ad litem for said minors in the matter of said partition, and partition of said land shall be valid when approved by the court and the Secretary of the Interior. When the heirs of such deceased allottees have certificates of competency or are not members of the tribe, the restrictions on alienation are hereby removed. If some of the heirs are competent and others have not certificates of competency, the proceeds of such part of the sale as the competent heirs shall be entitled to shall be paid to them without the intervention of an administrator. The shares due minor heirs, including such minor Indian heirs as may not be tribal members and those Indian heirs not having certificates of competency, shall be paid into the Treasury of the United States and placed to the credit of the Indians upon the same conditions as attached to segregated shares of the Osage national fund, or with the approval of the Secretary of the Interior paid to the duly appointed guardian. The same disposition as herein provided for with reference to the proceeds of inherited lands sold shall be made of the money in the Treasury of the United States to the credit of deceased Osage allottees. [37 Stat. L. 87.]

SEC. 7. [*Restriction on encumbering lands — not subject to prior debts — funeral expenses — taxes.*] That the lands allotted to members of the Osage tribe shall not in any manner whatsoever be encumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the issuance of a certificate of competency, or removal of restrictions on alienation; nor shall the lands or funds of Osage tribal members be subject to any claim against the same arising prior to grant of a certificate of competency. That no lands or moneys inherited from Osage allottees shall be subject to or be taken or sold to secure the payment of any indebtedness incurred by such heir prior to the time such lands and moneys are turned over to such heirs: *Provided*, however, That inherited moneys shall be liable for funeral expenses and expenses of last illness of deceased Osage allottees, to be paid upon order of the county court of Osage County, State of Oklahoma: *Provided further*, That nothing herein shall be construed so as to exempt any such property from liability for taxes. [37 Stat. L. 88.]

SEC. 8. [*Disposal of all property by will — approval required.*] That any adult member of the Osage Tribe of Indians not mentally incompetent may dispose of any or all of his estate, real, personal, or mixed, including trust funds, from which restrictions as to alienation have not been removed, by will, in accordance with the laws of the State of Oklahoma: *Provided*, That no such will shall be admitted to probate or have any validity unless approved before or after the death of the testator by the Secretary of the Interior. [37 Stat. L. 88.]

SEC. 9. [*"Competent" defined.*] The word "competent," as used in this Act, shall mean a person to whom a certificate has been issued authorizing alienation of all the lands comprising his allotment, except his homestead. [37 Stat. L. 88.]

SEC. 10. [*Osage agency — funds reserved for agency and emergencies — agency salaries not subject to limit of general law.*] That section four, paragraph four, of the Osage allotment Act, approved June twenty-eighth, nineteen hundred and six, be, and the same hereby is, amended to read as follows:

"Fourth. There shall be set aside and reserved from the royalties received

from oil, gas, or other tribal mineral rights or other tribal funds, however arising, not to exceed forty thousand dollars per annum for agency purposes and as an emergency fund, which money shall be paid out from time to time upon the requisition of the Osage tribal council with the approval of the Secretary of the Interior: *Provided*, That the provision in the Act entitled 'An Act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes,' approved June seventh, eighteen hundred and ninety-seven (Thirtieth Statutes at Large, page ninety), limiting the amount of money to be expended for salaries of regular employees at any one agency shall not hereafter apply to the Osage Agency." [37 Stat. L. 88.]

For sec. 4 of the Act of June 28, 1906, as originally enacted, see 1909 Supp. Fed. Stat. Annot. 225.

SEC. 11. [*Inconsistent laws repealed.*] That all Acts or parts of Acts inconsistent herewith be, and the same hereby are, repealed. [37 Stat. L. 88.]

**An Act To provide for the disposal of the unallotted land on the Omaha Indian Reservation, in the State of Nebraska.**

[Act of May 11, 1912, ch. 121.]

[SEC. 1.] [*Omaha Indian reservation — disposal of unallotted lands on.*] That the Secretary of the Interior be, and he is hereby, authorized to cause to be surveyed, if necessary, and appraised, in such manner as he may direct, in tracts of forty acres each, or as nearly as to the Secretary may seem practicable, and, after such survey and appraisal, to sell and convey, in quantities not to exceed one hundred and sixty acres to any one purchaser, all the unallotted lands on the Omaha Indian Reservation, in the State of Nebraska, except such tracts as are hereinafter specifically reserved: *Provided*, That the said land shall be sold to the highest bidder under such regulations as the Secretary of the Interior may prescribe, but no part of said land shall be sold at less than the appraised value thereof: *And provided further*, That prior to such appraisal and sale any member of the Omaha Tribe whose allotment is subject to erosion by the Missouri River shall be permitted to relinquish such allotment and select lieu lands of equal area from the unallotted lands, the lands so relinquished to become a part of the unallotted tribal lands and subject to appraisal and sale under the terms of this Act. [37 Stat. L. 111.]

SEC. 2. [*Lands reserved for agency, etc. — town site on agency lands — intoxicants prohibited.*] That the Secretary of the Interior is hereby directed to reserve from sale, under the terms of this Act, the following tracts of land for the purposes designated: Forty-nine acres of the land now used for agency purposes to be reserved for agency and school purposes for so long as the need thereof exists; ten acres to be selected by the tribe for use as a tribal cemetery; ten acres of the land now reserved for the use of the Presbyterian Church to be selected by the officials of said church for the use of the church so long as needed for religious or educational purposes; two acres of the land on which is standing what is known as the old Presbyterian mission building, and the Secretary of the Interior is hereby authorized to cause a patent in fee simple to issue therefor in the name of the State Historical Society of Nebraska: *Provided*, That of the land now reserved for agency purposes the Secretary of the

Interior is directed to reserve and set aside for town-site purposes one hundred and sixty-four acres other than the forty-nine acres hereinbefore reserved, and shall cause the same to be surveyed and platted into town lots, streets, alleys, and parks, the lots to be appraised and sold under the terms of this Act, and the streets, alleys, and parks are hereby dedicated to public use: *Provided further*, That the lands allotted, those retained or reserved, and the surplus lands sold, set aside for town-site purposes, or otherwise disposed of, shall be subject for a period of twenty-five years to all of the laws of the United States prohibiting the introduction of intoxicants into the Indian country. [37 Stat. L. 111.]

SEC. 3. [*Pra rata division of net proceeds.*] That the proceeds of such sale, after paying all the expenses incident to and necessary for carrying out the provisions of this Act, and after reimbursing the general trust fund of the tribe for any assessment paid therefrom for protecting the unallotted tribal lands from overflow, shall be divided pro-rata among the children of the Omaha Tribe living on the date of the passage and approval of this Act who have not received allotments of land under the Acts of August seventh, eighteen hundred and eighty-two (Twenty-second United States Statutes at Large, page three hundred and forty-one), and March third, eighteen hundred and ninety-three (Twenty-third United States Statutes at Large, page six hundred and thirty), and shall be expended for the benefit of said Indians when and in such manner as in the opinion of the Secretary of the Interior shall be to their best interests, and pending such expenditure by the said Secretary the sums due the respective Indians shall be placed to the credit of the said Indians in the Treasury of the United States, and shall bear interest at the rate of five per centum per annum, but in the event of the death of any such Indian while there remains in the Treasury to his credit any part of the sum so deposited the said sum shall be paid at once to his heirs, who shall be determined by the Secretary of the Interior in accordance with the laws of descent in force in the State of Nebraska, and the action of the Secretary of the Interior in determining the legal heirs of any deceased Indian, as provided herein, shall in all respects be conclusive and final. [37 Stat. L. 111.]

SEC. 4. [*Appropriation.*] That for the purpose of carrying out the provisions of this Act there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of three thousand dollars, or so much thereof as may be necessary, to be reimbursable out of the funds arising from the sale of said lands. [37 Stat. L. 112.]

An Act Authorizing the Secretary of the Interior to classify and appraise unallotted Indian lands.

[Act of June 6, 1912, ch. 155.]

[*Indian reservations — classification, etc., of unallotted lands authorized.*] That the Secretary of the Interior be, and he is hereby, authorized to cause to be classified or reclassified and appraised or reappraised, in such manner as he may deem advisable, the unallotted or otherwise unreserved lands within any Indian reservation opened to settlement and entry but not classified and appraised in the manner provided for in the Act or Acts opening such reservations to settlement and entry, or where the existing classification or appraisal is, in the opinion of the Secretary of the Interior, erroneous. [37 Stat. L. 125.]

## An Act For the relief of the Winnebago Indians of Nebraska and Wisconsin.

[Act of July 1, 1912, ch. 190.]

[*Winnebago Indians — distribution of tribal funds to, per capita.*] That the Secretary of the Interior is hereby authorized when the amount of tribal funds due the Winnebagoes in Wisconsin shall have been ascertained, in accordance with the enrollment as hereinafter provided, to expend said funds for their benefit in such manner, including the purchase of lands for said Indians, as he may deem proper, or, in his discretion, to distribute said funds, or any part thereof, per capita among said Indians: *Provided*, That the Secretary of the Interior is hereby authorized to adjust the differences, not already provided for by statute, between the two branches of the tribe, arising from errors in the payment of annuities, and to settle the same before the final division of the trust funds is made: *Provided further*, That a special census of the two branches of the Winnebago Tribe shall be taken as of June thirtieth, nineteen hundred and twelve, and that the final division of the capitalized funds of the tribe shall be based upon the number of persons belonging to each branch who are alive on that date. [37 Stat. L. 187.]

## An Act To provide for the payment of drainage assessments on Indian lands in Oklahoma.

[Act of July 19, 1912, ch. 240.]

[SEC. 1.] [*Oklahoma — drainage assessments on certain Indian allotments in, approved.*] That the Secretary of the Interior be, and he is hereby, authorized, in his discretion, to approve the assessments, together with maps showing right of way and definite location of proposed drainage ditches made under the laws of the State of Oklahoma upon the allotments of certain Absentee Shawnee and Citizen Pottawatomie allottees in Little River drainage district, in Pottawatomie County, Oklahoma, and upon the allotments of certain Sac and Fox allottees in Deep Fork drainage districts, in Lincoln County, Oklahoma. [37 Stat. L. 194.]

SEC. 2. [*Payment — appropriation — repayment from rentals, etc.*] That the Secretary of the Interior be, and he is hereby, authorized, in his discretion, to pay the amount assessed against each of said allotments: *Provided*, That said assessment shall not exceed fifteen dollars per acre on any allotment or portion thereof; and there is hereby appropriated for said purpose, out of any money in the Treasury not otherwise appropriated, the sum of forty thousand dollars, to be immediately available, the said sum to be reimbursable from the rentals of said allotments, not to exceed fifty per centum of the amount of rents received annually, or from any funds belonging to the said allottees, in the discretion of the Secretary of the Interior. [37 Stat. L. 194.]

SEC. 3. [*Approval of right of way — payment of damages — general approval of assessment on restricted allotments — unpaid assessment to become a lien — satisfaction.*] That the Secretary of the Interior be, and he is hereby, authorized, in his discretion, to approve deeds for right of way from such said allottees or their heirs as may be necessary to permit the construction and maintenance of said drainage ditch upon the payment of adequate damages therefor.

That the Secretary of the Interior is hereby authorized to approve the

assessments upon all other restricted allotments located within any proposed drainage district located and made under the laws of the State of Oklahoma.

That in the event any allottees shall receive a patent in fee to an allotment of land in any lawfully constituted drainage district within the State of Oklahoma, before the United States shall have been wholly reimbursed as herein provided, the amount remaining unpaid shall become a first lien on such allotment, and the fact of such lien shall be recited on the face of each patent in fee issued and the amount of the lien set forth thereon, and the receipt of the Secretary of the Interior, or of the officer, agent, or employee duly authorized by him for that purpose, for the payment of the amount assessed against any allotment as herein provided shall, when duly recorded by the recorder of deeds in the county wherein the land is located, operate as a satisfaction of such lien. [37 Stat. L. 194.]

SEC. 4. [*Adoption of rules, etc.*] That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect. [37 Stat. L. 195.]

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[*Indian office — estimates for all personal services to be submitted — restriction.*] \* \* \* For the fiscal year nineteen hundred and fourteen and annually thereafter estimates in detail shall be submitted for all personal services required in the Indian Office, and after the end of the fiscal year nineteen hundred and thirteen it shall not be lawful to employ in said office any personal services other than those specifically appropriated for in the legislative, executive, and judicial appropriation Acts, except temporary details of field employees for service connected solely with their respective employments. [37 Stat. L. 396.]

This is from the Legislative, Executive, and Judicial Appropriation Act of Aug. 23, 1912, ch. 350.

An Act To amend an Act entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," approved April twenty-sixth, nineteen hundred and six (Thirty-fourth Statutes at Large, page one hundred and thirty-seven.)

[Act of August 24, 1912, ch. 368.]

[*Sale of reserved Choctaw lands, etc., in, authorized.*] That the Secretary of the Interior be, and he is hereby, authorized to sell, upon such terms and conditions, under such regulations, and in such tracts as he shall deem advisable, the land and timber, together or separately, reserved from allotment under the provisions of section seven of the Act entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," approved April twenty-sixth, nineteen hundred and six (Thirty-fourth Statutes at Large, page one hundred and thirty-seven.) [37 Stat. L. 497.]

For sec. 7 of the Act of April 26, 1906, see 1909 Supp. Fed. Stat. Annot. 193.

[*Educational leaves to employees of Indian schools.*] \* \* \* That hereafter employees of Indian schools may be allowed, in addition to annual leave, educational leave not to exceed fifteen days per calendar year for attendance at educational gatherings, conventions, institutions, or training schools, if the interests of the service require, and under such regulations as the Secretary of the Interior may prescribe, and no additional salary or expense on account of this leave of absence shall be incurred. [37 Stat. L. 519.]

This and the four paragraphs following are from the Indian Appropriation Act of Aug. 24, 1912, ch. 388.

[*Sacramental wines in Indian country.*] \* \* \* That hereafter it shall not be unlawful to introduce and use wines solely for sacramental purposes, under church authority, at any place within the Indian country or any Indian reservation, including the Pueblo Reservations in New Mexico: *Provided, also,* That the powers conferred by section seven hundred and eighty-eight of the Revised Statutes upon marshals and their deputies are hereby conferred upon the chief special officer for the suppression of the liquor traffic among Indians and duly authorized officers working under his supervision whose appointments are made or affirmed by the Commissioner of Indian Affairs or the Secretary of the Interior. [37 Stat. L. 519.]

For R. S. sec. 788, see 4 Fed. Stat. Annot. 161.

[*Agency employees — limit for salaries increased.*] \* \* \* That so much of the provision of the Indian appropriation Act of June seventh, eighteen hundred and ninety-seven (Thirtieth Statutes at Large, pages sixty-two to ninety), as limits the amount that may be paid for salaries or compensation to employees regularly employed at any one agency to ten thousand dollars, and at a consolidated agency to fifteen thousand dollars, is hereby amended by increasing the amounts to fifteen thousand dollars and twenty thousand dollars, respectively. [37 Stat. L. 521.]

[*Board of Indian commissioners — secretary allowed — pay.*] \* \* \* That hereafter the Board of Indian Commissioners is authorized to employ a secretary, not a member of said board, and pay his salary out of the appropriation herein made or which shall hereafter be made for said board. [37 Stat. L. 521.]

[*Five Civilized Tribes — town lots — acceptance of payments on, forfeited.*] \* \* \* That the Secretary of the Interior be, and he is hereby, authorized, in his discretion, to accept payment to the full amount of the purchase money due, including interest to date of payment, on any town lots originally sold as provided in agreements with any of the Five Civilized Tribes and declared forfeited by reason of nonpayment of amount due and not resold. [37 Stat. L. 532.]

#### An Act Regulating Indian allotments disposed of by will.

[Act of February 14, 1913, ch. 55.]

[*Indian trust allotments, etc.*] That section two of an Act entitled "An Act to provide for determining the heirs of deceased Indians, for the disposition and sale of allotments of deceased Indians, for the leasing of allotments, and



for other purposes," approved June twenty-fifth, nineteen hundred and ten, be amended to read as follows:

"SEC. 2. That any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: *Provided, however,* That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior: *Provided further,* That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator, and in case where a will has been approved and it is subsequently discovered that there has been fraud in connection with the execution or procurement of the will the Secretary of the Interior is hereby authorized within one year after the death of the testator to cancel the approval of the will, and the property of the testator shall thereupon descend or be distributed in accordance with the laws of the State wherein the property is located: *Provided further,* That the approval of the will and the death of the testator shall not operate to terminate the trust or restrictive period, but the Secretary of the Interior may, in his discretion, cause the lands to be sold and the money derived therefrom, or so much thereof as may be necessary, used for the benefit of the heir or heirs entitled thereto, remove the restrictions, or cause patent in fee to be issued to the devisee or devisees, and pay the moneys to the legatee or legatees either in whole or in part from time to time as he may deem advisable, or use it for their benefit: *Provided also,* That sections one and two of this Act shall not apply to the Five Civilized Tribes or the Osage Indians." [37 Stat. L. 678.]

For sec. 2 of the Act of June 25, 1910, as originally enacted, see 1912 Supp. Fed. Stat. Annot. 97.

**An Act For the relief of Indians occupying railroad lands in Arizona, New Mexico, or California.**

[Act of March 4, 1913, ch. 153.]

[*Relinquishment to Indian occupants of lands in railroad grants, Arizona, New Mexico, and California.*] That the Secretary of the Interior be, and he is hereby, authorized in his discretion to request of the present claimant under any railroad land grant a relinquishment or reconveyance of any lands situated within the States of Arizona, New Mexico, or California passing under the grant which are shown to have been occupied for five years or more by an Indian entitled to receive the tract in allotment under existing law but for the grant to the railroad company, and upon the execution and filing of such relinquishment or reconveyance the lands shall thereupon become available for allotment, and the company relinquishing or reconveying shall be entitled to select within a period of three years after the approval of this Act and have patented to it other vacant nonmineral, nontimbered, surveyed public lands of equal area and value situated in the same State, as may be agreed upon by the Secretary of the Interior, provided that the total area of land that may be exchanged under the provisions of this Act shall not exceed three thousand

acres in Arizona, sixteen thousand acres in New Mexico, and five thousand acres in California. [37 Stat. L. 1007.]

**An Act Authorizing the Secretary of the Interior to lease to the operators of coal mines in Oklahoma additional acreage from the unleased segregated coal land of the Choctaw and Chickasaw Nations.**

[Act of March 4, 1913, ch. 152.]

[*Choctaw and Chickasaw coal lands — operators may lease additional acreage.*] That the Secretary of the Interior, under rules and regulations to be prescribed by him, may grant to the operator of any coal mine or mines in the State of Oklahoma the right to lease additional acreage from the unleased segregated coal land of the Choctaw and Chickasaw Nations, in the State of Oklahoma not to exceed, in any case six hundred and forty acres of land: *Provided*, That the land sought to be leased adjoins and is contiguous to the coal-mining property of the applicant in operation: *And provided further*, That the right to lease such additional lands shall extend only to coal-mining corporations, individual or individuals actually operating coal mines in said State in good faith, and in only such cases as may be found necessary for the successful administration of such mine: *And provided further*, That the lease or leases on such additional coal lands shall not be made for a longer period of time than existing leases of the respective applicants and shall not be made at a less rate of royalty than the rate of royalty paid on existing leases now in operation in said State of Oklahoma. [37 Stat. L. 1007.]

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[SEC. 1.] [*Oaths of employees in Indian service.*] \* \* \* That superintendents and acting superintendents in charge of Indian reservations, schools, irrigation and allotment projects are hereby authorized and empowered to administer the oath of office required of employees placed under their jurisdiction. [38 Stat. L. 80.]

[*Determining heirs of Indian allottees.*] \* \* \* That hereafter upon the determination of the heirs of a deceased Indian by the Secretary of the Interior there shall be paid by such heirs or from the estate of such deceased Indian or deducted from the proceeds from the sale of the land of the deceased allottee or from any trust funds belonging to the estate of the decedent, the sum of \$15, to cover the cost of determining the heirs to the estate of the said deceased allottee, which amount shall be accounted for and paid into the Treasury of the United States and a report made annually to Congress by the Secretary of the Interior on or before the first Monday in December of all moneys collected and deposited as herein directed. [38 Stat. L. 80.]

This section and secs. 18 and 26 following are from the Indian Appropriation Act of June 30, 1913, ch. 4.

SEC. 18. [*Cemetery lands — transfers authorized.*] \* \* \* That where any cemetery now exists within the lands of the Five Civilized Tribes, said land within said cemetery, together with the land adjoining the same, where necessary, not exceeding twenty acres in the aggregate to any one cemetery, shall be transferred by the Secretary of the Interior to the proper party, association, or corporation, or to the county commissioners of the State of Oklahoma, for ceme-

tery purposes only, under such terms, conditions, and regulations as he may prescribe. [38 Stat. L. 96.]

[*Osage Indians — payments to be withheld if children not placed in school.*]  
\* \* \* That hereafter the Commissioner of Indian Affairs is authorized in his discretion to withhold any annuities or other payments due to Osage Indian minors, above six years of age, whose parents fail, neglect, or refuse to place such minors in some established school for a reasonable portion of each year and to keep such children in regular attendance thereof. The Commissioner of Indian Affairs is authorized to make such rules and regulations as may be necessary to put this provision into force and effect. [38 Stat. L. 96.]

[*Five civilized tribes — contracts as to tribal funds, etc., subject to official approval.*]  
\* \* \* No contract made with any Indian, where such contract relates to the tribal funds or property in the hands of the United States, shall be valid, nor shall any payment for services rendered in relation thereto be made unless the consent of the United States has previously been given. [38 Stat. L. 97.]

SEC. 26. [*Bureau of Indian Affairs — system of bookkeeping to be installed — detailed statement in annual report — allotment of appropriations before expenditures — estimates to contain classified statement.*] On or before the first day of July, nineteen hundred and fourteen, the Secretary of the Interior shall cause a system of bookkeeping to be installed in the Bureau of Indian Affairs, which will afford a ready analysis of expenditures by appropriations and allotments and by units of the service, showing for each class of work or activity carried on, the expenditures for the operation of the service, for repairs and preservation of property, for new and additional property, salaries and wages of employees, and for other expenditures. Provision shall be made by the Secretary of the Interior for further analysis of each of the foregoing classes of expenditures, if, in his judgment, he shall deem it advisable. Annually, after July first, nineteen hundred and fourteen, a detailed statement of expenditures, as hereinbefore described, shall be incorporated in the annual report of the Commissioner of Indian Affairs and transmitted by the Secretary of the Interior to Congress on or before the first Monday in December. Before any appropriation for the Indian Service is obligated or expended, the Secretary of the Interior shall make allotments thereof in conformity with the intent and purpose of this Act, and such allotments shall not be altered or modified except with his approval. After July first, nineteen hundred and fourteen, the estimates for appropriations for the Indian Service submitted by the Secretary of the Interior, shall be accompanied by a detailed statement, classified in the manner prescribed in the first paragraph of this section, showing the purposes for which the appropriations are required. [38 Stat. L. 103.]

Joint Resolution Extending time for completion of classification and appraisement of surface of segregated coal and asphalt lands of the Choctaw and Chickasaw Nations and of the improvements thereon, and making appropriation therefor.

[*Joint Resolution of Dec. 8, 1913, No. 14.*]

[*Choctaw and Chickasaw coal and asphalt lands — classification and appraisement.*] That the Act of Congress approved February nineteenth, nineteen hundred and twelve (Thirty-seventh Statutes at Large, page sixty-seven), being

"An Act to provide for the sale of the surface of the segregated coal and asphalt lands of the Choctaw and Chickasaw Nations, and for other purposes," be, and the same is hereby, amended to provide that the classification and appraisement of the surface of said segregated lands as required by said Act and the classification and appraisement of the improvements thereon as required by section eighteen of the Act of Congress approved August twenty-fourth, nineteen hundred and twelve (Thirty-seventh Statutes at Large, pages five hundred and eighteen to five hundred and thirty-one), shall be completed not later than sixty days from the date of approval of this resolution: *Provided*, That at the expiration of such time any classification, appraisement, or other work incident thereto remaining unfinished shall be completed by the Secretary of the Interior under rules and regulations to be prescribed by him, and the sum of \$5,000, to be paid out of the Choctaw and Chickasaw tribal funds, is hereby appropriated for such purpose. [*38 Stat. L. —.*]

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## INDUSTRIAL RELATIONS.

*Commission On, see LABOR.*

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## INJUNCTIONS.

*Interlocutory Injunctions, see JUDICIARY.*

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## INSPECTION.

*Nursery Stock Imported, see AGRICULTURE.*

*Steamboat Inspection, see STEAM VESSELS.*

*Viruses, Serums and Toxins, see HEALTH AND QUARANTINE.*

## INTERIOR DEPARTMENT.

Act of August 24, 1912, Ch. 370, 175.

*Sec. 1. Copies of Records to be Furnished — Schedule of Fees — Verification — No Charge for Official Use — Authenticated Copies of Printed Rules, etc. 175.*

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*5. Authority to Recorders of Land Office Repealed — Laws Not Changed — Indian Service Records — Fee for Certificate of Official Character, 176.*

*6. Deposit of Receipts, 176.*

### CROSS-REFERENCE.

See also *INDIANS*.

An Act To make uniform charges for furnishing copies of records of the Department of the Interior and of its several bureaus.

[Act of August 24, 1912, ch. 370.]

[SEC. 1.] [*Copies of records to be furnished — schedule of fees — verification — no charge for official use — authenticated copies of printed rules, etc.*] That the Secretary of the Interior, the head of any bureau, office, or institution, or any officer of that department, may, when not prejudicial to the interests of the Government, furnish authenticated or unauthenticated copies of any official books, records, papers, documents, maps, plats, or diagrams within his custody, and charge therefor the following fees: For all written copies, at the rate of fifteen cents for each hundred words therein; for each photolithographic copy, twenty-five cents where such copies are authorized by law; for photographic copies, fifteen cents for each sheet; and for tracings or blue prints the cost of the production thereof to be determined by the officer furnishing such copies, and in addition to these fees the sum of twenty-five cents shall be charged for each certificate of verification and the seal attached to authenticated copies: *Provided*, That there shall be no charge for the making or verification of copies required for official use by the officers of any branch of the Government: *Provided further*, That only a charge of twenty-five cents shall be made for furnishing authenticated copies of any rules, regulations, or instructions printed by the Government for gratuitous distribution. [37 Stat. L. 497.]

SEC. 2. [*Inspection of records.*] That nothing in this Act shall be construed to limit or restrict in any manner the authority of the Secretary of the Interior to prescribe such rules and regulations as he may deem proper governing the inspection of the records of said department and its various bureaus

by the general public, and any person having any particular interest in any of such records may be permitted to take copies of such records under such rules and regulations as may be prescribed by the Secretary of the Interior. [37 Stat. L. 498.]

SEC. 3. [*Acceptance as evidence.*] That all authenticated copies furnished under this Act shall be admitted in evidence equally with the originals thereof.

SEC. 4. [*Use of seal.*] That all officers who furnish authenticated copies under this Act shall attest their authentication by the use of an official seal, which is hereby authorized for that purpose. [37 Stat. L. 498.]

SEC. 5. [*Authority to recorders of Land Office repealed — laws not changed — Indian service records — fee for certificate of official character.*] That the Act of Congress approved April nineteenth, nineteen hundred and four, chapter thirteen hundred and ninety-six, be, and the same is hereby, repealed; but nothing in this Act shall be so construed as to repeal the provisions of sections four hundred and ninety to four hundred and ninety-three, inclusive, and forty-nine hundred and thirty-four of the Revised Statutes, fixing the rates for patent fees; or the Act approved March third, eighteen hundred and ninety-one, chapter five hundred and forty-one, fixing a rate for certifying printed copies of specifications and drawings of patents; or of section fourteen of the Act of February twentieth, nineteen hundred and five, chapter five hundred and ninety-two, to authorize the registration of trade-marks used in commerce with foreign nations or among the several States or with Indian tribes, and to protect the same; nor shall anything in this Act be construed to repeal any of the provisions of section eight of the Act approved April twenty-sixth, nineteen hundred and six, chapter eighteen hundred and seventy-six, authorizing the officer having charge of the custody of any records pertaining to the enrollment of members of the Five Civilized Tribes of Indians to furnish certified copies of such records and charge for that service such fees as the Secretary of the Interior may prescribe; nor shall anything herein contained prevent the Secretary of the Interior, under his general power of supervision over Indian affairs, from prescribing such charges or fees for furnishing certified copies of the records of any Indian agency or Indian school as he may deem proper; and the said Secretary is hereby authorized to charge a fee of twenty-five cents for each certified copy issued by him as to the official character of any officer of his department. [37 Stat. L. 498.]

For the Act of April 19, 1904, here repealed, see 10 Fed. Stat. Annot. 354.

SEC. 6. [*Deposit of receipts.*] That all sums received under the provisions of this Act shall be deposited in the Treasury to the credit of miscellaneous receipts. [37 Stat. L. 498.]

## INTERNAL REVENUE.

Act of August 9, 1912, Ch. 75, 178.

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#### CROSS-REFERENCES.

*Appointment of Bonded Deputies*, see CIVIL SERVICE.

*Bonded Manufacturing Warehouses*, see CUSTOMS DUTIES.

*Certified Checks in Payment of Taxes*, see CUSTOMS DUTIES.

*Printing Stamps*, see PUBLIC PRINTING.

*Tobacco Statistics*, see CENSUS.

An Act To provide for a tax upon white phosphorus matches, and for other purposes.

[Act of Aug. 9, 1912, ch. 75.]

[SEC. 1.] [*Tax on white phosphorus matches — meaning of "white phosphorus."*] That for the purposes of this Act the words "white phosphorus" shall be understood to mean the common poisonous white or yellow phosphorus used in the manufacture of matches and not to include the nonpoisonous forms or the nonpoisonous compounds of white or yellow phosphorus. [37 Stat. L. 81.]

SEC. 2. [*Manufacturer to register with internal revenue collector — penalty for failure — regulation of business — bond.*] That every manufacturer of white phosphorus matches shall register with the collector of internal revenue of the district his name or style, place of manufactory, and the place where such business is to be carried on; and a failure to register as herein provided and required shall subject such person to a penalty of not more than five hundred dollars. Every manufacturer of white phosphorus matches shall file with the collector of internal revenue of the district in which his manufactory is located such notices, inventories, and bonds, shall keep such books and render such returns in relation to the business, shall put up such signs and affix such



number to his factory, and conduct his business under such surveillance of officers and agents as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may, by regulation, require. The bond required of such manufacturer shall be with sureties satisfactory to the collector of internal revenue and in the penal sum of not less than one thousand dollars; and the sum of said bond may be increased from time to time and additional sureties required at the discretion of the collector or under instructions of the Commissioner of Internal Revenue. [37 Stat. L. 81.]

SEC. 3. [*Packages required — tax levied — stamps to be affixed — penalty for not canceling stamps.*] That all white phosphorus matches shall be packed by the manufacturer thereof in packages containing one hundred, two hundred, five hundred, one thousand, or one thousand five hundred matches each, which shall then be packed by the manufacturer in packages containing not less than fourteen thousand four hundred matches, and upon white phosphorus matches manufactured, sold, or removed there shall be levied and collected a tax at the rate of two cents per one hundred matches, which shall be represented by adhesive stamps, and this tax shall be paid by the manufacturer thereof, who shall affix to every package containing one hundred, two hundred, five hundred, one thousand, or one thousand five hundred matches such stamp of the required value and shall place thereon the initials of his name and the date on which such stamp is affixed, so that the same may not again be used. Every person who fraudulently makes use of an adhesive stamp to denote any tax imposed by this section without so effectually canceling such stamp shall forfeit the sum of fifty dollars for every stamp in respect to which such offense is committed. [37 Stat. L. 81.]

SEC. 4. [*Punishment for selling, etc., unstamped matches — evasion of tax.*] That every manufacturer of matches who manufactures, sells, removes, distributes, or offers to sell or distribute white phosphorus matches without there being affixed thereto an adhesive stamp, denoting the tax required by this Act, effectually canceled as provided by the preceding section, shall for each offense be fined not more than one thousand dollars and be imprisoned not more than two years. Every manufacturer of matches who, to evade the tax chargeable thereon or any part thereof, hides or conceals, or causes to be hidden or concealed, or removes or conveys away, or deposits or causes to be removed or conveyed away from or deposited in any place any white phosphorus matches, shall for each offense be fined not more than one thousand dollars and be imprisoned not more than two years, or both, and all such matches shall be forfeited. [37 Stat. L. 82.]

SEC. 5. [*Punishment for use of insufficient stamps.*] That every person who affixes a stamp on any package of white phosphorus matches denoting a less amount of tax than that required by law shall for each offense be fined not more than one thousand dollars or be imprisoned not more than two years, or both. [37 Stat. L. 82.]

SEC. 6. [*Penalty for reusing stamps, etc.*] That every person who removes, defaces, or causes or permits or suffers the removal or defacement of any such stamp, or who uses any stamp or any package to which any stamp is affixed to cover any other white phosphorus matches than those originally contained in such package with such stamp when first used, to evade the tax imposed by this Act, shall for every such package in respect to which any such offense is com-

mitted be fined fifty dollars, and all such matches shall also be forfeited. [37 Stat. L. 82.]

SEC. 7. [*Forfeiture of factory, etc., for attempts to defraud — unstamped packages.*] That every manufacturer of white phosphorus matches who defrauds or attempts to defraud the United States of the tax imposed by this Act, or any part thereof, shall forfeit the factory and manufacturing apparatus used by him and all the white phosphorus matches and all raw material for the production of white phosphorus matches found in the factory and on the factory premises, or owned by him, and shall be fined not more than five thousand dollars or be imprisoned not more than three years, or both. All packages of white phosphorus matches subject to tax under this Act that shall be found without stamps as herein provided shall be forfeited to the United States. [37 Stat. L. 82.]

SEC. 8. [*Special stamps to be issued — sale, etc. — counterfeiting, etc., laws applicable.*] That the Commissioner of Internal Revenue shall cause to be prepared suitable and special stamps for payment of the tax on white phosphorus matches provided for by this Act. Such stamps shall be furnished to collectors, who shall sell the same only to duly qualified manufacturers. Every collector shall keep an account of the number and denominate values of the stamps sold by him to each manufacturer. All the provisions and penalties of existing laws governing the engraving, issuing, sale, affixing, cancellation, accountability, effacement, destruction, and forgery of stamps provided for internal revenue are hereby made to apply to stamps provided for by this Act. [37 Stat. L. 82.]

SEC. 9. [*Assessment of tax on matches sold without stamps.*] That whenever any manufacturer of white phosphorus matches sells or removes any white phosphorus matches without the use of the stamps required by this Act, it shall be the duty of the Commissioner of Internal Revenue, within a period of not more than two years after such sale or removal, upon satisfactory proof, to estimate the amount of tax which has been omitted to be paid, and to make an assessment therefor and certify the same to the collector, who shall collect the same according to law. The tax so assessed shall be in addition to the penalties imposed by law for such sale or removal. [37 Stat. L. 82.]

SEC. 10. [*Importation prohibited after January 1, 1913 — certificate required on all matches imported.*] That on and after January first, nineteen hundred and thirteen, white phosphorus matches, manufactured wholly or in part in any foreign country, shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited. All matches imported into the United States shall be accompanied by such certificate of official inspection by the government of the country in which such matches were manufactured as shall satisfy the Secretary of the Treasury that they are not white phosphorus matches. The Secretary of the Treasury is authorized and directed to prescribe such regulations as may be necessary for the enforcement of the provisions of this section. [37 Stat. L. 83.]

SEC. 11. [*Exportation unlawful after January 1, 1914 — penalty for violation.*] That after January first, nineteen hundred and fourteen, it shall be unlawful to export from the United States any white phosphorus matches. Any person guilty of violation of this section shall be fined not less than one thousand dollars and not more than five thousand dollars, and any white phosphorus

matches exported or attempted to be exported shall be confiscated to the United States and destroyed in such manner as may be prescribed by the Secretary of the Treasury, who shall have power to issue such regulations to customs officers as are necessary to the enforcement of this section. [37 Stat. L. 83.]

SEC. 12. [*Marking factory number — penalty for omission — label required — penalty for neglect.*] That every manufacturer of matches shall mark, brand, affix, stamp, or print, in such manner as the Commissioner of Internal Revenue shall prescribe, on every package of white phosphorus matches manufactured, sold, or removed by him, the factory number required under section two of this Act. Every such manufacturer who omits to mark, brand, affix, stamp, or print such factory number on such package shall be fined not more than fifty dollars for each package in respect of which such offense is committed. Every manufacturer of white phosphorus matches shall securely affix by pasting on each original package containing stamped packages of white phosphorus matches manufactured by him a label, on which shall be printed, besides the number of the manufactory and the district in which it is situated, these words: "Notice.—The manufacturer of the white phosphorus matches herein contained has complied with all the requirements of law. Every person is cautioned not to use again the stamps on the packages herein contained under the penalty provided by law in such cases." Every manufacturer of white phosphorus matches who neglects to affix such label to any original package containing stamped packages of white phosphorus matches made by him or sold or removed by or for him, and every person who removes any such label so affixed from any such original package, shall be fined not more than fifty dollars for each package in respect of which such offense is committed. [37 Stat. L. 83.]

SEC. 13. [*General penalty.*] That if any manufacturer of white phosphorus matches, or any importer or exporter of matches, shall omit, neglect, or refuse to do or cause to be done any of the things required by law in carrying on or conducting his business, or shall do anything by this Act prohibited, if there be no specific penalty or punishment imposed by any other section of this Act for the neglecting, omitting, or refusing to do, or for the doing or causing to be done, the thing required or prohibited, he shall be fined one thousand dollars for each offense, and all the white phosphorus matches owned by him or in which he has any interest as owner shall be forfeited to the United States. [37 Stat. L. 83.]

SEC. 14. [*Recovery of fines, etc.*] That all fines, penalties, and forfeitures imposed by this Act may be recovered in any court of competent jurisdiction. [37 Stat. L. 83.]

SEC. 15. [*Regulations.*] That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may make all needful regulations for the carrying into effect of this Act. [37 Stat. L. 83.]

SEC. 16. [*Internal revenue provisions and penalties made applicable.*] That sections thirty-one hundred and sixty-four to thirty-one hundred and seventy-seven, thirty-one hundred and seventy-nine to thirty-two hundred and forty-three, thirty-three hundred and forty-six as amended, thirty-four hundred and twenty-nine as amended, thirty-four hundred and forty-five to thirty-four hundred and forty-eight, thirty-four hundred and fifty to thirty-four hundred and sixty-three, all inclusive, of the Revised Statutes of the United States, and all other provisions and penalties of existing law relating to internal revenue so

far as applicable, are hereby made to extend to and include and apply to the taxes imposed by this Act and to the articles upon which and to the persons upon whom they are imposed. [37 Stat. L. 83.]

For the provisions referred to in the above section, see 3 Fed. Stat. Annot. 540 et seq.

SEC. 17. [*Exceptions.*] That this Act shall take effect on July first, nineteen hundred and thirteen, except as previously provided in this Act; and except as to its application to the sale or removal of white phosphorus matches by the manufacturers, as to which it shall take effect on January first, nineteen hundred and fifteen. [37 Stat. L. 84.]

An Act For the relief of scientific institutions or colleges of learning having violated sections thirty-two hundred and ninety-seven and thirty-two hundred and ninety-seven a of the Revised Statutes and the regulations thereunder.

[Act of June 4, 1912, ch. 150.]

[*Remission of tax on alcohol withdrawn for colleges, etc., erroneously used.*] That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is authorized on appeal to him made to abate, remit, and refund all taxes or assessments for taxes the liability for which is asserted against any scientific institution or college of learning on account of any alcohol withdrawn from bond free of tax in accordance with the provisions of sections thirty-two hundred and ninety-seven and thirty-two hundred and ninety-seven \* a, Revised Statutes, and not used as authorized by the above-mentioned law and regulations thereunder: *Provided*, That no assessment made of tax imposed shall be abated or refunded as to any alcohol so withdrawn and used for beverage purposes: *And provided further*, That all applications for relief under this Act shall be filed in the office of the Commissioner of Internal Revenue within one year from the date of the approval of this Act, and no liability incurred on or after March first, nineteen hundred and twelve, shall be relieved against hereunder. [37 Stat. L. 122.]

For R. S. sec. 3297 see 3 Fed. Stat. Annot. 672.

[*Collection districts reduced.*] \* \* \* On and after October first, nineteen hundred and twelve, the whole number of collection districts for the collection of internal revenue and the whole number of collectors of internal revenue shall not exceed sixty-three. [37 Stat. L. 381.]

This is from the Legislative, Executive, and Judicial Appropriation Act of Aug. 23, 1912, ch. 350.

[*Punishing violations of internal-revenue laws.*] \* \* \* Punishment for violations of internal-revenue laws: For detecting and bringing to trial and punishment persons guilty of violating the internal-revenue laws or conniving at the same, including payments for information and detection of such violations, \$140,000; and the Commissioner of Internal Revenue shall make a de-

tailed statement to Congress once in each year as to how he has expended this sum, and also a detailed statement of all miscellaneous expenditures in the Bureau of Internal Revenue for which appropriation is made in this Act. [37 Stat. L. 431.]

This is from the Sundry Civil Appropriation Act of Aug. 24, 1912, ch. 355.

An Act Amending section thirty-three hundred and ninety-two of the Revised Statutes of the United States, as amended by section thirty-two of the Act of August fifth, nineteen hundred and nine.

[Act of February 10, 1913, ch. 34.]

[Cigars and cigarettes — new boxes required — retail sales — allowance to employees without tax — packages required for cigarettes — imported cigarettes.] That section thirty-three hundred and ninety-two of the Revised Statutes of the United States, as amended by section thirty-two of the Act of August fifth, nineteen hundred and nine, be, and the same is hereby, amended to read as follows:

**“Sec. 3392.** All cigars weighing more than three pounds per thousand shall be packed in boxes not before used for that purpose containing, respectively, five, ten, twelve, thirteen, twenty-five, fifty, one hundred, two hundred, two hundred and fifty, or five hundred cigars each; and every person who sells, or offers for sale, or delivers, or offers to deliver, any cigars in any other form than in new boxes as above described, or who packs in any box any cigars in excess of or less than the number provided by law to be put in each box, respectively, or who falsely brands any box, or affixes a stamp on any box denoting a less amount of tax than that required by law, shall be fined for each offense not more than one thousand dollars, and be imprisoned not more than two years: *Provided*, That nothing in this section shall be construed as preventing the sale of cigars at retail by retail dealers from boxes packed, stamped, and branded in the manner prescribed by law: *Provided further*, That each employee of a manufacturer of cigars shall be permitted to use, for personal consumption and for experimental purposes, not to exceed twenty-one cigars per week without the manufacturer of cigars being required to pack the same in boxes or to stamp or pay any internal-revenue tax thereon, such exemption to be allowed under such rules and regulations as the Secretary of the Treasury may prescribe: *And provided further*, That every manufacturer of cigarettes shall put up all the cigarettes that he manufactures or has manufactured for him and sells or removes for consumption or use in packages or parcels containing five, eight, ten, fifteen, twenty, fifty, or one hundred cigarettes each, and shall securely affix to each of said packages or parcels a suitable stamp denoting the tax thereon, and shall properly cancel the same prior to such sale or removal for consumption or use, under such regulations as the Commissioner of Internal Revenue shall prescribe; and all cigarettes imported from a foreign country shall be packed, stamped, and the stamps canceled in like manner, in addition to the import stamp indicating inspection of the custom-house before they are withdrawn therefrom.” [37 Stat. L. 664.]

For R. S. sec. 3392 as it read prior to this amendment see 1909 Supp. Fed. Stat. Annot. 326.

An Act To provide for refund or abatement under certain conditions of penalty taxes imposed by section thirty-eight of the Act of August fifth, nineteen hundred and nine, known as the special excise corporation-tax law.

[Act of March 3, 1913, ch. 120.]

[Corporation tax — refund of additional tax authorized — payment if neglect unintentional.] That any corporation, joint-stock company, association, or any insurance company subject to the special excise tax provided by section thirty-eight of the Act of August fifth, nineteen hundred and nine, known as the special excise corporation-tax law, which has been or may be compelled to pay or become liable for any additional tax within the provisions of subsection five of said section thirty-eight, which additional tax has been or may hereafter be imposed for a neglect to file a return as provided in said corporation-tax law on or before the first of March of any year, may, within one year after the passage of this act, or within one year after the date of notice of assessment where such notice is given after the passage of this act, make application to the Commissioner of Internal Revenue for a refund of such additional tax. And the Commissioner of Internal Revenue, with the advice and consent of the Solicitor of Internal Revenue, is hereby directed to remit, abate, or pay back all such additional taxes in excess of \$100 for any single year whenever in any case it appears to his satisfaction that the additional tax was assessed or imposed solely because of a neglect to make a return at the time or times specified in said act, and without any intention or design on the part of any officer of such corporation, joint-stock company, association, or insurance company to hinder or delay the United States in the collection of the tax originally assessed. [37 Stat. L. 734.]

For section 38 of the Act of Aug. 5, 1909, see 1909 Supp. Fed. Stat. Annot. 829.

An Act to amend section thirty-one hundred and eighty-six of the Revised Statutes of the United States.

[Act of March 4, 1913, ch. 166.]

That section thirty-one hundred and eighty-six of the Revised Statutes be, and the same is hereby, amended so as to read as follows:

“Sec. 3186. [Unpaid taxes a lien on property.] If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States from the time when the assessment list was received by the collector, except when otherwise provided, until paid, with the interest, penalties, and costs that may accrue in addition thereto upon all property and rights to property belonging to such person: *Provided, however,* That such lien shall not be valid as against any mortgagee, purchaser, or judgment creditor until notice of such lien shall be filed by the collector in the office of the clerk of the district court of the district within which the property subject to such lien is situated: *Provided further,* Whenever any State by appropriate legislation authorizes the filing of such notice in the office of the registrar or recorder of deeds of the counties of that State, or in the State of Louisiana in the parishes thereof, then such lien shall not be valid in that State as against any mortgagee, purchaser, or judgment creditor, until such notice shall be filed

in the office of the registrar or recorder of deeds of the county or counties, or parish or parishes in the State of Louisiana, within which the property subject to the lien is situated." [37 Stat. L. 1016.]

R. S. sec. 3186 as it read prior to this amendment is set forth in 3 Fed. Stat. Annot. 585.

**An Act To reduce tariff duties and to provide revenue for the Government, and for other purposes.**

[Act of October 3, 1913, ch. 16, 38 Stat. L. 114.]

## [SECTION I.]

[The Tariff Act of 1913, see CUSTOMS DUTIES, ante, p. 59.]

## SECTION II. [INCOME TAX.]

A. Subdivision 1. [*One per cent levied on net incomes of citizens.*] That there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States, whether residing at home or abroad, and to every person residing in the United States, though not a citizen thereof, a tax of 1 per centum per annum upon such income, except as hereinafter provided; and a like tax shall be assessed, levied, collected, and paid annually upon the entire net income from all property owned and of every business, trade, or profession carried on in the United States by persons residing elsewhere.

Subdivision 2. [*Additional tax on incomes exceeding \$20,000 — personal returns to be made — individual share of undistributed profits of companies included — condition — statement to be furnished by companies.*] In addition to the income tax provided under this section (herein referred to as the normal income tax) there shall be levied, assessed, and collected upon the net income of every individual an additional income tax (herein referred to as the additional tax) of 1 per centum per annum upon the amount by which the total net income exceeds \$20,000 and does not exceed \$50,000, and 2 per centum per annum upon the amount by which the total net income exceeds \$50,000 and does not exceed \$75,000, 3 per centum per annum upon the amount by which the total net income exceeds \$75,000 and does not exceed \$100,000, 4 per centum per annum upon the amount by which the total net income exceeds \$100,000 and does not exceed \$250,000, 5 per centum per annum upon the amount by which the total net income exceeds \$250,000 and does not exceed \$500,000, and 6 per centum per annum upon the amount by which the total net income exceeds \$500,000. All the provisions of this section relating to individuals who are to be chargeable with the normal income tax, so far as they are applicable and are not inconsistent with this subdivision of paragraph A, shall apply to the levy, assessment, and collection of the additional tax imposed under this section. Every person subject to this additional tax shall, for the purpose of its assessment and collection, make a personal return of his total net income from all sources, corporate or otherwise, for the preceding calendar year, under rules and regulations to be prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury.

For the purpose of this additional tax the taxable income of any individual shall embrace the share to which he would be entitled of the gains and profits, if divided or distributed, whether divided or distributed or not, of all corporations, joint-stock companies, or associations however created or organized, formed or fraudulently availed of for the purpose of preventing the imposition of such tax through the medium of permitting such gains and profits to accumulate instead of being divided or distributed; and the fact that any such corporation, joint-stock company, or association, is a mere holding company, or that the gains and profits are permitted to accumulate beyond the reasonable needs of the business shall be prima facie evidence of a fraudulent purpose to escape such tax; but the fact that the gains and profits are in any case permitted to accumulate and become surplus shall not be construed as evidence of a purpose to escape the said tax in such case unless the Secretary of the Treasury shall certify that in his opinion such accumulation is unreasonable for the purposes of the business. When requested by the Commissioner of Internal Revenue, or any district collector of internal revenue, such corporation, joint-stock company, or association shall forward to him a correct statement of such profits and the names of the individuals who would be entitled to the same if distributed.

B. [*Determination of net income.*] That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever, including the income from but not the value of property acquired by gift, bequest, devise, or descent: *Provided*, That the proceeds of life insurance policies paid upon the death of the person insured or payments made by or credited to the insured, on life insurance, endowment, or annuity contracts, upon the return thereof to the insured at the maturity of the term mentioned in the contract, or upon surrender of contract, shall not be included as income.

That in computing net income for the purpose of the normal tax there shall be allowed as deductions: First, the necessary expenses actually paid in carrying on any business, not including personal, living, or family expenses; second, all interest paid within the year by a taxable person on indebtedness; third, all national, State, county, school, and municipal taxes paid within the year, not including those assessed against local benefits; fourth, losses actually sustained during the year, incurred in trade or arising from fires, storms, or shipwreck, and not compensated for by insurance or otherwise; fifth, debts due to the taxpayer actually ascertained to be worthless and charged off within the year; sixth, a reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the business, not to exceed, in the case of mines, 5 per centum of the gross value at the mine of the output for the year for which the computation is made, but no deduction shall be made for any amount of expense of restoring property or making good the exhaustion thereof for which an allowance is or has been made: *Provided*, That no deduction shall be allowed for any amount paid out for new buildings, permanent improvements, or betterments, made to increase the value of any property or estate;



seventh, the amount received as dividends upon the stock or from the net earnings of any corporation, joint stock company, association, or insurance company which is taxable upon its net income as hereinafter provided; eighth, the amount of income, the tax upon which has been paid or withheld for payment at the source of the income, under the provisions of this section, provided that whenever the tax upon the income of a person is required to be withheld and paid at the source as hereinafter required, if such annual income does not exceed the sum of \$3,000 or is not fixed or certain, or is indefinite, or irregular as to amount or time of accrual, the same shall not be deducted in the personal return of such person.

The net income from property owned and business carried on in the United States by persons residing elsewhere shall be computed upon the basis prescribed in this paragraph and that part of paragraph G of this section relating to the computation of the net income of corporations, joint-stock and insurance companies, organized, created, or existing under the laws of foreign countries, in so far as applicable.

That in computing net income under this section there shall be excluded the interest upon the obligations of a State or any political subdivision thereof, and upon the obligations of the United States or its possessions; also the compensation of the present President of the United States during the term for which he has been elected, and of the judges of the supreme and inferior courts of the United States now in office, and the compensation of all officers and employees of a State or any political subdivision thereof except when such compensation is paid by the United States Government.

C. [*Deductions.*] That there shall be deducted from the amount of the net income of each of said persons, ascertained as provided herein, the sum of \$3,000, plus \$1,000 additional if the person making the return be a married man with a wife living with him, or plus the sum of \$1,000 additional if the person making the return be a married woman with a husband living with her; but in no event shall this additional exemption of \$1,000 be deducted by both a husband and a wife: *Provided*, That only one deduction of \$4,000 shall be made from the aggregate income of both husband and wife when living together.

D. [*Computation for calendar year — returns to be made.*] The said tax shall be computed upon the remainder of said net income of each person subject thereto, accruing during each preceding calendar year ending December thirty-first: *Provided, however*, That for the year ending December thirty-first, nineteen hundred and thirteen, said tax shall be computed on the net income accruing from March first to December thirty-first, nineteen hundred and thirteen, both dates inclusive, after deducting five-sixths only of the specific exemptions and deductions herein provided for. On or before the first day of March, nineteen hundred and fourteen, and the first day of March in each year thereafter, a true and accurate return, under oath or affirmation, shall be made by each person of lawful age, except as hereinafter provided, subject to the tax imposed by this section, and having a net income of \$3,000 or over for the taxable year, to the collector of internal revenue for the district in which such person resides or has his principal place of business, or, in the case of a person residing in a foreign country, in the place where his principal business is carried on within the United States, in such form as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treas-

ury, shall prescribe, setting forth specifically the gross amount of income from all separate sources and from the total thereof, deducting the aggregate items or expenses and allowance herein authorized; guardians, trustees, executors, administrators, agents, receivers, conservators, and all persons, corporations, or associations acting in any fiduciary capacity, shall make and render a return of the net income of the person for whom they act, subject to this tax, coming into their custody or control and management, and be subject to all the provisions of this section which apply to individuals: *Provided*, That a return made by one of two or more joint guardians, trustees, executors, administrators, agents, receivers, and conservators, or other persons acting in a fiduciary capacity, filed in the district where such person resides, or in the district where the will or other instrument under which he acts is recorded, under such regulations as the Secretary of the Treasury may prescribe, shall be a sufficient compliance with the requirements of this paragraph; and also all persons, firms, companies, copartnerships, corporations, joint-stock companies or associations, and insurance companies, except as hereinafter provided, in whatever capacity acting, having the control, receipt, disposal, or payment of fixed or determinable annual or periodical gains, profits, and income of another person subject to tax, shall in behalf of such person deduct and withhold from the payment an amount equivalent to the normal income tax upon the same and make and render a return, as aforesaid, but separate and distinct, of the portion of the income of each person from which the normal tax has been thus withheld, and containing also the name and address of such person or stating that the name and address or the address, as the case may be, are unknown: *Provided*, That the provision requiring the normal tax of individuals to be withheld at the source of the income shall not be construed to require any of such tax to be withheld prior to the first day of November, nineteen hundred and thirteen: *Provided further*, That in either case above mentioned no return of income not exceeding \$3,000 shall be required: *Provided further*, That any persons carrying on business in partnership shall be liable for income tax only in their individual capacity, and the share of the profits of a partnership to which any taxable partner would be entitled if the same were divided, whether divided or otherwise, shall be returned for taxation and the tax paid, under the provisions of this section, and any such firm, when requested by the Commissioner of Internal Revenue, or any district collector, shall forward to him a correct statement of such profits and the names of the individuals who would be entitled to the same, if distributed: *Provided further*, That persons liable for the normal income tax only, on their own account or in behalf of another, shall not be required to make return of the income derived from dividends on the capital stock or from the net earnings of corporations, joint-stock companies or associations, and insurance companies taxable upon their net income as hereinafter provided. Any person for whom return has been made and the tax paid, or to be paid as aforesaid, shall not be required to make a return unless such person has other net income, but only one deduction of \$3,000 shall be made in the case of any such person. The collector or deputy collector shall require every list to be verified by the oath or affirmation of the party rendering it. If the collector or deputy collector have reason to believe that the amount of any income returned is understated, he shall give due notice to the person making the return to show cause why the amount of the return should not be increased, and upon proof of the amount understated may increase the same accordingly. If dissatisfied with the decision of the collector, such person may submit the case, with all the papers, to the Commis-

sioner of Internal Revenue for his decision, and may furnish sworn testimony of witnesses to prove any relevant facts.

E. [*Notification of assessment, and payment.*] That all assessments shall be made by the Commissioner of Internal Revenue and all persons shall be notified of the amount for which they are respectively liable on or before the first day of June of each successive year, and said assessments shall be paid on or before the thirtieth day of June, except in cases of refusal or neglect to make such return and in cases of false or fraudulent returns, in which cases the Commissioner of Internal Revenue shall, upon the discovery thereof, at any time within three years after said return is due, make a return upon information obtained as provided for in this section or by existing law, and the assessment made by the Commissioner of Internal Revenue thereon shall be paid by such person or persons immediately upon notification of the amount of such assessment; and to any sum or sums due and unpaid after the thirtieth day of June in any year, and for ten days after notice and demand thereof by the collector, there shall be added the sum of 5 per centum on the amount of tax unpaid, and interest at the rate of 1 per centum per month upon said tax from the time the same became due, except from the estates of insane, deceased, or insolvent persons.

All persons, firms, copartnerships, companies, corporations, joint-stock companies or associations, and insurance companies, in whatever capacity acting, including lessees or mortgagors of real or personal property, trustees acting in any trust capacity, executors, administrators, agents, receivers, conservators, employers, and all officers and employees of the United States having the control, receipt, custody, disposal, or payment of interest, rent, salaries, wages, premiums, annuities, compensation, remuneration, emoluments, or other fixed or determinable annual gains, profits, and income of another person, exceeding \$3,000 for any taxable year, other than dividends on capital stock, or from the net earnings of corporations and joint-stock companies or associations subject to like tax, who are required to make and render a return in behalf of another, as provided herein, to the collector of his, her, or its district, are hereby authorized and required to deduct and withhold from such annual gains, profits, and income such sum as will be sufficient to pay the normal tax imposed thereon by this section, and shall pay to the officer of the United States Government authorized to receive the same; and they are each hereby made personally liable for such tax. In all cases where the income tax of a person is withheld and deducted and paid or to be paid at the source, as aforesaid, such person shall not receive the benefit of the deduction and exemption allowed in paragraph C of this section except by an application for refund of the tax unless he shall, not less than thirty days prior to the day on which the return of his income is due, file with the person who is required to withhold and pay tax for him, a signed notice in writing claiming the benefit of such exemption and thereupon no tax shall be withheld upon the amount of such exemption: *Provided*, That if any person for the purpose of obtaining any allowance or reduction by virtue of a claim for such exemption, either for himself or for any other person, knowingly makes any false statement or false or fraudulent representation, he shall be liable to a penalty of \$300; nor shall any person under the foregoing conditions be allowed the benefit of any deduction provided for in subsection B of this section unless he shall, not less than thirty days prior to the day on which the return of his income is due, either file with the person who is required to withhold and pay tax for him a true and cor-

rect return of his annual gains, profits, and income from all other sources, and also the deductions asked for, and the showing thus made shall then become a part of the return to be made in his behalf by the person required to withhold and pay the tax, or likewise make application for deductions to the collector of the district in which return is made or to be made for him: *Provided further*, That if such person is a minor or an insane person, or is absent from the United States, or is unable owing to serious illness to make the return and application above provided for, the return and application may be made for him or her by the person required to withhold and pay the tax, he making oath under the penalties of this Act that he has sufficient knowledge of the affairs and property of his beneficiary to enable him to make a full and complete return for him or her, and that the return and application made by him are full and complete: *Provided further*, That the amount of the normal tax hereinbefore imposed shall be deducted and withheld from fixed and determinable annual gains, profits, and income derived from interest upon bonds and mortgages, or deeds of trust or other similar obligations of corporations, joint-stock companies or associations, and insurance companies, whether payable annually or at shorter or longer periods, although such interest does not amount to \$3,000, subject to the provisions of this section requiring the tax to be withheld at the source and deducted from annual income and paid to the Government; and likewise the amount of such tax shall be deducted and withheld from coupons, checks, or bills of exchange for or in payment of interest upon bonds of foreign countries and upon foreign mortgages or like obligations (not payable in the United States), and also from coupons, checks, or bills of exchange for or in payment of any dividends upon the stock or interest upon the obligations of foreign corporations, associations, and insurance companies engaged in business in foreign countries; and the tax in each case shall be withheld and deducted for and in behalf of any person subject to the tax hereinbefore imposed, although such interest, dividends, or other compensation does not exceed \$3,000, by any banker or person who shall sell or otherwise realize coupons, checks, or bills of exchange drawn or made in payment of any such interest or dividends (not payable in the United States), and any person who shall obtain payment (not in the United States), in behalf of another of such dividends and interest by means of coupons, checks, or bills of exchange, and also any dealer in such coupons who shall purchase the same for any such dividends or interest (not payable in the United States), otherwise than from a banker or another dealer in such coupons; but in each case the benefit of the exemption and the deduction allowable under this section may be had by complying with the foregoing provisions of this paragraph.

All persons, firms, or corporations undertaking as a matter of business or for profit the collection of foreign payments of such interest or dividends by means of coupons, checks, or bills of exchange shall obtain a license from the Commissioner of Internal Revenue, and shall be subject to such regulations enabling the Government to ascertain and verify the due withholding and payment of the income tax required to be withheld and paid as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe; and any person who shall knowingly undertake to collect such payments as aforesaid without having obtained a license therefor, or without complying with such regulations, shall be deemed guilty of a misdemeanor and for each offense be fined in a sum not exceeding \$5,000, or imprisoned for a term not exceeding one year, or both, in the discretion of the court.

Nothing in this section shall be construed to release a taxable person from

liability for income tax, nor shall any contract entered into after this Act takes effect be valid in regard to any Federal income tax imposed upon a person liable to such payment.

The tax herein imposed upon annual gains, profits, and income not falling under the foregoing and not returned and paid by virtue of the foregoing shall be assessed by personal return under rules and regulations to be prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury.

The provisions of this section relating to the deduction and payment of the tax at the source of income shall only apply to the normal tax hereinbefore imposed upon individuals.

F. [*Penalties.*] That if any person, corporation, joint-stock company, association, or insurance company liable to make the return or pay the tax aforesaid shall refuse or neglect to make a return at the time or times hereinbefore specified in each year, such person shall be liable to a penalty of not less than \$20 nor more than \$1,000. Any person or any officer of any corporation required by law to make, render, sign, or verify any return who makes any false or fraudulent return or statement with intent to defeat or evade the assessment required by this section to be made shall be guilty of a misdemeanor, and shall be fined not exceeding \$2,000 or be imprisoned not exceeding one year, or both, at the discretion of the court, with the costs of prosecution.

G. [*Tax on net incomes of corporations.*] (a) That the normal tax hereinbefore imposed upon individuals likewise shall be levied, assessed, and paid annually upon the entire net income arising or accruing from all sources during the preceding calendar year to every corporation, joint-stock company or association, and every insurance company, organized in the United States, no matter how created or organized, not including partnerships; but if organized, authorized, or existing under the laws of any foreign country, then upon the amount of net income accruing from business transacted and capital invested within the United States during such year: *Provided, however,* That nothing in this section shall apply to labor, agricultural, or horticultural organizations, or to mutual savings banks not having a capital stock represented by shares, or to fraternal beneficiary societies, orders, or associations operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and providing for the payment of life, sick, accident, and other benefits to the members of such societies, orders, or associations and dependents of such members, nor to domestic building and loan associations, nor to cemetery companies, organized and operated exclusively for the mutual benefit of their members, nor to any corporation or association organized and operated exclusively for religious, charitable, scientific, or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual, nor to business leagues, nor to chambers of commerce or boards of trade, not organized for profit or no part of the net income of which inures to the benefit of the private stockholder or individual; nor to any civic league or organization not organized for profit, but operated exclusively for the promotion of social welfare: *Provided further,* That there shall not be taxed under this section any income derived from any public utility or from the exercise of any essential governmental function accruing to any State, Territory, or the District of Columbia, or any political subdivision of a State, Territory, or the District of Columbia, nor any income accruing to

the government of the Philippine Islands or Porto Rico, or of any political subdivision of the Philippine Islands or Porto Rico: *Provided*, That whenever any State, Territory, or the District of Columbia, or any political subdivision of a State or Territory, has, prior to the passage of this Act, entered in good faith into a contract with any person or corporation, the object and purpose of which is to acquire, construct, operate or maintain a public utility, no tax shall be levied under the provisions of this Act upon the income derived from the operation of such public utility, so far as the payment thereof will impose a loss or burden upon such State, Territory, or the District of Columbia, or a political subdivision of a State or Territory; but this provision is not intended to confer upon such person or corporation any financial gain or exemption or to relieve such person or corporation from the payment of a tax as provided for in this section upon the part or portion of the said income to which such person or corporation shall be entitled under such contract.

(b) Such net income shall be ascertained by deducting from the gross amount of the income of such corporation, joint-stock company or association, or insurance company, received within the year from all sources, (first) all the ordinary and necessary expenses paid within the year in the maintenance and operation of its business and properties, including rentals or other payments required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year and not compensated by insurance or otherwise, including a reasonable allowance for depreciation by use, wear and tear of property, if any; and in the case of mines a reasonable allowance for depletion of ores and all other natural deposits, not to exceed 5 per centum of the gross value at the mine of the output for the year for which the computation is made; and in case of insurance companies the net addition, if any, required by law to be made within the year to reserve funds and the sums other than dividends paid within the year on policy and annuity contracts: *Provided*, That mutual fire insurance companies requiring their members to make premium deposits to provide for losses and expenses shall not return as income any portion of the premium deposits returned to their policyholders, but shall return as taxable income all income received by them from all other sources plus such portions of the premium deposits as are retained by the companies for purposes other than the payment of losses and expenses and reinsurance reserves: *Provided further*, That mutual marine insurance companies shall include in their return of gross income gross premiums collected and received by them less amounts paid for reinsurance, but shall be entitled to include in deductions from gross income amounts repaid to policyholders on account of premiums previously paid by them and interest paid upon such amounts between the ascertainment thereof and the payment thereof and life insurance companies shall not include as income in any year such portion of any actual premium received from any individual policyholder as shall have been paid back or credited to such individual policyholder, or treated as an abatement of premium of such individual policyholder, within such year; (third) the amount of interest accrued and paid within the year on its indebtedness to an amount of such indebtedness not exceeding one-half of the sum of its interest bearing indebtedness and its paid-up capital stock outstanding at the close of the year, or if no capital stock, the amount of interest paid within the year on an amount of its indebtedness not exceeding the amount of capital employed in the business at the close of the year: *Provided*, That in case of indebtedness wholly secured by collateral the subject of sale in ordinary business of such corporation, joint-stock company, or association, the total interest

secured and paid by such company, corporation, or association within the year on any such indebtedness may be deducted as a part of its expense of doing business: *Provided further*, That in the case of bonds or other indebtedness, which have been issued with a guaranty that the interest payable thereon shall be free from taxation, no deduction for the payment of the tax herein imposed shall be allowed; and in the case of a bank, banking association, loan, or trust company, interest paid within the year on deposits or on moneys received for investment and secured by interest-bearing certificates of indebtedness issued by such bank, banking association, loan or trust company; (fourth) all sums paid by it within the year for taxes imposed under the authority of the United States or of any State or Territory thereof, or imposed by the Government of any foreign country: *Provided*, That in the case of a corporation, joint-stock company or association, or insurance company, organized, authorized, or existing under the laws of any foreign country, such net income shall be ascertained by deducting from the gross amount of its income accrued within the year from business transacted and capital invested within the United States, (first) all the ordinary and necessary expenses actually paid within the year out of earnings in the maintenance and operation of its business and property within the United States, including rentals or other payments required to be made as a condition to the continued use or possession of property; (second) all losses actually sustained within the year in business conducted by it within the United States and not compensated by insurance or otherwise, including a reasonable allowance for depreciation by use, wear and tear of property, if any, and in the case of mines a reasonable allowance for depletion of ores and all other natural deposits, not to exceed 5 per centum of the gross value at the mine of the output for the year for which the computation is made; and in case of insurance companies the net addition, if any, required by law to be made within the year to reserve funds and the sums other than dividends paid within the year on policy and annuity contracts: *Provided further*, That mutual fire insurance companies requiring their members to make premium deposits to provide for losses and expenses shall not return as income any portion of the premium deposits returned to their policyholders, but shall return as taxable income all income received by them from all other sources plus such portions of the premium deposits as are retained by the companies for purposes other than the payment of losses and expenses and reinsurance reserves: *Provided further*, That mutual marine insurance companies shall include in their return of gross income gross premiums collected and received by them less amounts paid for reinsurance, but shall be entitled to include in deductions from gross income amounts repaid to policyholders on account of premiums previously paid by them, and interest paid upon such amounts between the ascertainment thereof and the payment thereof and life insurance companies shall not include as income in any year such portion of any actual premium received from any individual policyholder as shall have been paid back or credited to such individual policyholder, or treated as an abatement of premium of such individual policyholder, within such year; (third) the amount of interest accrued and paid within the year on its indebtedness to an amount of such indebtedness not exceeding the proportion of one-half of the sum of its interest bearing indebtedness and its paid-up capital stock outstanding at the close of the year, or if no capital stock, the capital employed in the business at the close of the year which the gross amount of its income for the year from business transacted and capital invested within the United States bears to the gross amount of its income derived from all sources within and without the United States: *Provided*, That in the case of

bonds or other indebtedness which have been issued with a guaranty that the interest payable thereon shall be free from taxation, no deduction for the payment of the tax herein imposed shall be allowed; (fourth) all sums paid by it within the year for taxes imposed under the authority of the United States or of any State or Territory thereof or the District of Columbia. In the case of assessment insurance companies, whether domestic or foreign, the actual deposit of sums with State or Territorial officers, pursuant to law, as additions to guarantee or reserve funds shall be treated as being payments required by law to reserve funds.

(c) The tax herein imposed shall be computed upon its entire net income accrued within each preceding calendar year ending December thirty-first: *Provided, however*, That for the year ending December thirty-first, nineteen hundred and thirteen, said tax shall be imposed upon its entire net income accrued within that portion of said year from March first to December thirty-first, both dates inclusive, to be ascertained by taking five-sixths of its entire net income for said calendar [sic] year: *Provided further*, That any corporation, joint-stock company or association, or insurance company subject to this tax may designate the last day of any month in the year as the day of the closing of its fiscal year and shall be entitled to have the tax payable by it computed upon the basis of the net income ascertained as herein provided for the year ending on the day so designated in the year preceding the date of assessment instead of upon the basis of the net income for the calendar year preceding the date of assessment; and it shall give notice of the day it has thus designated as the closing of its fiscal year to the collector of the district in which its principal business office is located at any time not less than thirty days prior to the date upon which its annual return shall be filed. All corporations, joint-stock companies or associations, and insurance companies subject to the tax herein imposed, computing taxes upon the income of the calendar year, shall, on or before the first day of March, nineteen hundred and fourteen, and the first day of March in each year thereafter, and all corporations, joint-stock companies or associations, and insurance companies, computing taxes upon the income of a fiscal year which it may designate in the manner hereinbefore provided, shall render a like return within sixty days after the close of its said fiscal year, and within sixty days after the close of its fiscal year in each year thereafter, or in the case of a corporation, joint-stock company or association, or insurance company, organized or existing under the laws of a foreign country, in the place where its principal business is located within the United States, in such form as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe, shall render a true and accurate return under oath or affirmation of its president, vice president, or other principal officer, and its treasurer or assistant treasurer, to the collector of internal revenue for the district in which it has its principal place of business, setting forth (first) the total amount of its paid-up capital stock outstanding, or if no capital stock, its capital employed in business, at the close of the year; (second) the total amount of its bonded and other indebtedness at the close of the year; (third) the gross amount of its income, received during such year from all sources, and if organized under the laws of a foreign country the gross amount of its income received within the year from business transacted and capital invested within the United States; (fourth) the total amount of all its ordinary and necessary expenses paid out of earnings in the maintenance and operation of the business and properties of such corporation, joint-stock company or association, or insurance



company within the year, stating separately all rentals or other payments required to be made as a condition to the continued use or possession of property, and if organized under the laws of a foreign country the amount so paid in the maintenance and operation of its business within the United States; (fifth) the total amount of all losses actually sustained during the year and not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property, and in case of insurance companies the net addition, if any, required by law to be made within the year to reserve funds and the sums other than dividends paid within the year on policy and annuity contracts: *Provided further*, That mutual fire insurance companies requiring their members to make premium deposits to provide for losses and expenses shall not return as income any portion of the premium deposits returned to their policyholders, but shall return as taxable income all income received by them from all other sources plus such portions of the premium deposits as are retained by the companies for purposes other than the payment of losses and expenses and reinsurance reserves: *Provided further*, That mutual marine insurance companies shall include in their return of gross income gross premiums collected and received by them less amounts paid for reinsurance, but shall be entitled to include in deductions from gross income amounts repaid to policyholders on account of premiums previously paid by them, and interest paid upon such amounts between the ascertainment thereof and the payment thereof and life insurance companies shall not include as income in any year such portion of any actual premium received from any individual policyholder as shall have been paid back or credited to such individual policyholder, or treated as an abatement of premium of such individual policyholder, within such year; and in case of a corporation, joint-stock company or association, or insurance company, organized under the laws of a foreign country, all losses actually sustained by it during the year in business conducted by it within the United States, not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property, and in case of insurance companies the net addition, if any, required by law to be made within the year to reserve funds and the sums other than dividends paid within the year on policy and annuity contracts: *Provided further*, That mutual fire insurance companies requiring their members to make premium deposits to provide for losses and expenses shall not return as income any portion of the premium deposits returned to their policyholders, but shall return as taxable income all income received by them from all other sources plus such portions of the premium deposits as are retained by the companies for purposes other than the payment of losses and expenses and reinsurance reserves: *Provided further*, That mutual marine insurance companies shall include in their return of gross income gross premiums collected and received by them less amounts paid for reinsurance, but shall be entitled to include in deductions from gross income amounts repaid to policyholders on account of premiums previously paid by them and interest paid upon such amounts between the ascertainment thereof and the payment thereof and life insurance companies shall not include as income in any year such portion of any actual premium received from any individual policyholder as shall have been paid back or credited to such individual policyholder, or treated as an abatement of premium of such individual policyholder, within such year; (sixth) the amount of interest accrued and paid within the year on its bonded or other indebtedness not exceeding one-half of the sum of its interest bearing indebtedness and its paid-up capital stock, outstanding at the close of the year, or if no capital stock, the amount of interest paid within the year on an amount

of indebtedness not exceeding the amount of capital employed in the business at the close of the year, and in the case of a bank, banking association, or trust company, stating separately all interest paid by it within the year on deposits; or in case of a corporation, joint-stock company or association, or insurance company, organized under the laws of a foreign country, interest so paid on its bonded or other indebtedness to an amount of such bonded or other indebtedness not exceeding the proportion of its paid-up capital stock outstanding at the close of the year, or if no capital stock, the amount of capital employed in the business at the close of the year, which the gross amount of its income for the year from business transacted and capital invested within the United States bears to the gross amount of its income derived from all sources within and without the United States; (seventh) the amount paid by it within the year for taxes imposed under the authority of the United States and separately the amount so paid by it for taxes imposed by the Government of any foreign country; (eighth) the net income of such corporation, joint-stock company or association, or insurance company, after making the deductions in this subsection authorized. All such returns shall as received be transmitted forthwith by the collector to the Commissioner of Internal Revenue.

All assessments shall be made and the several corporations, joint-stock companies or associations, and insurance companies shall be notified of the amount for which they are respectively liable on or before the first day of June of each successive year, and said assessment shall be paid on or before the thirtieth day of June: *Provided*, That every corporation, joint-stock company or association, and insurance company, computing taxes upon the income of the fiscal year which it may designate in the manner hereinbefore provided, shall pay the taxes due under its assessment within one hundred and twenty days after the date upon which it is required to file its list or return of income for assessment; except in cases of refusal or neglect to make such return, and in cases of false or fraudulent returns, in which cases the Commissioner of Internal Revenue shall, upon the discovery thereof, at any time within three years after said return is due, make a return upon information obtained as provided for in this section or by existing law, and the assessment made by the Commissioner of Internal Revenue thereon shall be paid by such corporation, joint-stock company or association, or insurance company immediately upon notification of the amount of such assessment; and to any sum or sums due and unpaid after the thirtieth day of June in any year, or after one hundred and twenty days from the date on which the return of income is required to be made by the taxpayer, and after ten days notice and demand thereof by the collector, there shall be added the sum of 5 per centum on the amount of tax unpaid and interest at the rate of 1 per centum per month upon said tax from the time the same becomes due.

(d) When the assessment shall be made, as provided in this section, the returns, together with any corrections thereof which may have been made by the commissioner, shall be filed in the office of the Commissioner of Internal Revenue and shall constitute public records and be open to inspection as such: *Provided*, That any and all such returns shall be open to inspection only upon the order of the President, under rules and regulations to be prescribed by the Secretary of the Treasury and approved by the President: *Provided further*, That the proper officers of any State imposing a general income tax may, upon the request of the governor thereof, have access to said returns or to an abstract thereof, showing the name and income of each such corporation,

joint stock company, association or insurance company, at such times and in such manner as the Secretary of the Treasury may prescribe.

If any of the corporations, joint-stock companies or associations, or insurance companies aforesaid, shall refuse or neglect to make a return at the time or times hereinbefore specified in each year, or shall render a false or fraudulent return, such corporation, joint-stock company or association, or insurance company shall be liable to a penalty of not exceeding \$10,000.

H. [*"State" and "United States" construed.*] That the word "State" or "United States" when used in this section shall be construed to include any Territory, Alaska, the District of Columbia, Porto Rico, and the Philippine Islands, when such construction is necessary to carry out its provisions.

I. [*Sections of Revised Statutes amended.*] That sections thirty-one hundred and sixty-seven, thirty-one hundred and seventy-two, thirty-one hundred and seventy-three, and thirty-one hundred and seventy-six of the Revised Statutes of the United States as amended are hereby amended so as to read as follows:

"**Sec. 3167.** It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties, or the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return by any person or corporation, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return or any part thereof or the amount or source of income, profits, losses, or expenditures appearing in any income return; and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding \$1,000 or by imprisonment not exceeding one year, or both, at the discretion of the court; and if the offender be an officer or employee of the United States he shall be dismissed from office and be incapable thereafter of holding any office under the Government.

"**Sec. 3172.** Every collector shall, from time to time, cause his deputies to proceed through every part of his district and inquire after and concerning all persons therein who are liable to pay any internal-revenue tax, and all persons owning or having the care and management of any objects liable to pay any tax, and to make a list of such persons and enumerate said objects.

"**Sec. 3173.** It shall be the duty of any person, partnership, firm, association, or corporation, made liable to any duty, special tax, or other tax imposed by law, when not otherwise provided for, in case of a special tax, on or before the thirty-first day of July in each year, in case of income tax on or before the first day of March in each year, and in other cases before the day on which the taxes accrue, to make a list or return, verified by oath or affirmation, to the collector or a deputy collector of the district where located, of the articles or objects, including the amount of annual income charged with a duty or tax, the quantity of goods, wares, and merchandise made or sold and charged with a tax, the several rates and aggregate amount, according to the forms and regulations to be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, for which such person, partnership,

firm, association, or corporation is liable: *Provided*, That if any person liable to pay any duty or tax, or owning, possessing, or having the care or management of property, goods, wares, and merchandise, articles or objects liable to pay any duty, tax, or license, shall fail to make and exhibit a list or return required by law, but shall consent to disclose the particulars of any and all the property, goods, wares, and merchandise, articles, and objects liable to pay any duty or tax, or any business or occupation liable to pay any tax as aforesaid, then, and in that case, it shall be the duty of the collector or deputy collector to make such list or return, which, being distinctly read, consented to, and signed and verified by oath or affirmation by the person so owning, possessing, or having the care and management as aforesaid, may be received as the list of such person: *Provided further*, That in case no annual list or return has been rendered by such person to the collector or deputy collector as required by law, and the person shall be absent from his or her residence or place of business at the time the collector or a deputy collector shall call for the annual list or return, it shall be the duty of such collector or deputy collector to leave at such place of residence or business, with some one of suitable age and discretion, if such be present, otherwise to deposit in the nearest post office, a note or memorandum addressed to such person, requiring him or her to render to such collector or deputy collector the list or return required by law within ten days from the date of such note or memorandum, verified by oath or affirmation. And if any person, on being notified or required as aforesaid, shall refuse or neglect to render such list or return within the time required as aforesaid, or whenever any person who is required to deliver a monthly or other return of objects subject to tax fails to do so at the time required, or delivers any return which, in the opinion of the collector, is false or fraudulent, or contains any undervaluation or understatement, it shall be lawful for the collector to summon such person, or any other person having possession, custody, or care of books of account containing entries relating to the business of such person, or any other person he may deem proper, to appear before him and produce such books, at a time and place named in the summons, and to give testimony or answer interrogatories, under oath, respecting any objects liable to tax or the returns thereof. The collector may summon any person residing or found within the State in which his district lies; and when the person intended to be summoned does not reside and can not be found within such State, he may enter any collection district where such person may be found and there make the examination herein authorized. And to this end he may there exercise all the authority which he might lawfully exercise in the district for which he was commissioned.

**"Sec. 3176.** When any person, corporation, company, or association refuses or neglects to render any return or list required by law, or renders a false or fraudulent return or list, the collector or any deputy collector shall make, according to the best information which he can obtain, including that derived from the evidence elicited by the examination of the collector, and on his own view and information, such list or return, according to the form prescribed, of the income, property, and objects liable to tax owned or possessed or under the care or management of such person or corporation, company or association, and the Commissioner of Internal Revenue shall assess all taxes not paid by stamps, including the amount, if any, due for special tax, income or other tax, and in case of any return of a false or fraudulent list or valuation intentionally he shall add 100 per centum to such tax; and in case of a refusal or neglect, except in cases of sickness or absence, to make a list or return, or to verify

the same as aforesaid, he shall add 50 per centum to such tax. In case of neglect occasioned by sickness or absence as aforesaid the collector may allow such further time for making and delivering such list or return as he may deem necessary, not exceeding thirty days. The amount so added to the tax shall be collected at the same time and in the same manner as the tax unless the neglect or falsity is discovered after the tax has been paid, in which case the amount so added shall be collected in the same manner as the tax; and the list or return so made and subscribed by such collector or deputy collector shall be held *prima facie* good and sufficient for all legal purposes."

For R. S. secs. 3167, 3172, 3173, 3176, see 3 Fed. Stat. Annot. 574, 576, 577, 580.

J. [*Receipts for payment.*] That it shall be the duty of every collector of internal revenue, to whom any payment of any taxes other than the tax represented by an adhesive stamp or other engraved stamp is made under the provisions of this section, to give to the person making such payment a full written or printed receipt, expressing the amount paid and the particular account for which such payment was made; and whenever such payment is made such collector shall, if required, give a separate receipt for each tax paid by any debtor, on account of payments made to or to be made by him to separate creditors in such form that such debtor can conveniently produce the same separately to his several creditors in satisfaction of their respective demands to the amounts specified in such receipts; and such receipts shall be sufficient evidence in favor of such debtor to justify him in withholding the amount therein expressed from his next payment to his creditor; but such creditor may, upon giving to his debtor a full written receipt, acknowledging the payment to him of whatever sum may be actually paid, and accepting the amount of tax paid as aforesaid (specifying the same) as a further satisfaction of the debt to that amount, require the surrender to him of such collector's receipt.

K. [*Jurisdiction of district courts.*] That jurisdiction is hereby conferred upon the district courts of the United States for the district within which any person summoned under this section to appear to testify or to produce books shall reside, to compel such attendance, production of books, and testimony by appropriate process.

L. [*General laws applicable.*] That all administrative, special, and general provisions of law, including the laws in relation to the assessment, remission, collection, and refund of internal-revenue taxes not heretofore specifically repealed and not inconsistent with the provisions of this section, are hereby extended and made applicable to all the provisions of this section and to the tax herein imposed.

M. [*Porto Rico and Philippines.*] That the provisions of this section shall extend to Porto Rico and the Philippine Islands: *Provided*, That the administration of the law and the collection of the taxes imposed in Porto Rico and the Philippine Islands shall be by the appropriate internal-revenue officers of those governments, and all revenues collected in Porto Rico and the Philippine Islands thereunder shall accrue intact to the general governments, thereof, respectively: *And provided further*, That the jurisdiction in this section conferred upon the district courts of the United States shall, so far as the Philippine Islands are concerned, be vested in the courts of the first instance of said islands: *And provided further*, That nothing in this section shall be

held to exclude from the computation of the net income the compensation paid any official by the governments of the District of Columbia, Porto Rico and the Philippine Islands or the political subdivisions thereof.

N. [*Appropriation — officers — expenses.*] That for the purpose of carrying into effect the provisions of Section II of this Act, and to pay the expenses of assessing and collecting the income tax therein imposed, and to pay such sums as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may deem necessary, for information, detection, and bringing to trial and punishment persons guilty of violating the provisions of this section, or conniving at the same, in cases where such expenses are not otherwise provided for by law, there is hereby appropriated out of any money in the Treasury not otherwise appropriated for the fiscal year ending June thirtieth, nineteen hundred and fourteen, the sum of \$800,000, and the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is authorized to appoint and pay from this appropriation all necessary officers, agents, inspectors, deputy collectors, clerks, messengers and janitors, and to rent such quarters, purchase such supplies, equipment, mechanical devices, and other articles as may be necessary for employment or use in the District of Columbia or any collection district in the United States, or any of the Territories thereof: *Provided*, That no agent paid from this appropriation shall receive compensation at a rate higher than that now received by traveling agents on accounts in the Internal Revenue Service, and no inspector shall receive a compensation higher than \$5 a day and \$3 additional in lieu of subsistence, and no deputy collector, clerk, messenger, or other employee shall be paid at a rate of compensation higher than the rate now being paid for the same or similar work in the Internal Revenue Service.

In the office of the Commissioner of Internal Revenue at Washington, District of Columbia there shall be appointed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury one additional deputy commissioner, at a salary of \$4,000 per annum; two heads of divisions, whose compensation shall not exceed \$2,500 per annum; and such other clerks, messengers, and employees, and to rent such quarters and to purchase such supplies as may be necessary: *Provided*, That for a period of two years from and after the passage of this Act the force of agents, deputy collectors, inspectors, and other employees not including the clerical force below the grade of chief of division employed in the Bureau of Internal Revenue in the city of Washington, District of Columbia authorized by this section of this Act shall be appointed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, under such rules and regulations as may be fixed by the Secretary of the Treasury to insure faithful and competent service, and with such compensation as the Commissioner of Internal Revenue may fix, with the approval of the Secretary of the Treasury, within the limitations herein prescribed: *Provided further*, That the force authorized to carry out the provisions of Section II of this Act, when not employed as herein provided, shall be employed on general internal-revenue work. [*38 Stat. L. 166.*]

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SUBSECTION 2. [*Alcohol for denaturization.*] That from and after the first day of January, nineteen hundred and fourteen, under such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary

of the Treasury may prescribe, any farmer or association of farmers, any fruit grower or association of fruit growers, or other person or persons may manufacture alcohol free of tax for denaturation only, out of any of the products of farms, fruit orchards, or any substance whatever, on condition that such alcohol shall be directly conveyed from the still by continuous closed pipes to locked and sealed receptacles in which the same may be rendered unfit for use as an intoxicating beverage by an admixture of such denaturing materials as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe, or where such alcohol is of insufficient proof to be denatured, the same may be transferred in bond from such locked and sealed receptacles to a central distilling and denaturing plant as hereinafter provided.

That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may authorize the establishment of central distilling and denaturing plants to which alcohol produced under the provisions of this Act, free of tax, may be transferred, redistilled and denatured under such regulations, and upon the execution of such notices and bonds as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe.

That any central distilling and denaturing plant provided for in section two of this Act may, in addition to the spirits produced under section one of this Act, use any of the products of farms, fruit orchards, or any substance whatever, for the manufacture of alcohol for denaturation only: *Provided*, That at such distilleries the use of cisterns or tanks of such size and construction as may be deemed expedient shall be permitted in lieu of distillery bonded warehouses under such rules and regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe.

That any person who under the provisions of this Act shall fail to register, or shall falsely register, any still or distilling apparatus used by him, or who shall fraudulently remove or conceal any distilled spirits produced by him, or who shall fail to comply with all the requirements of this Act, or any regulations issued pursuant thereto, respecting the production and denaturation of distilled spirits; and any person who shall recover or attempt to recover by redistillation or by any other process or means, any distilled spirits after the same has been denatured, shall, on conviction, for each offense, be fined not more than \$5,000 or be imprisoned for not more than five years, or both, and shall in addition thereto forfeit to the United States all real and personal property used in connection therewith.

That subsection two of section thirty-two hundred and forty-four of the Revised Statutes of the United States shall not apply to stills and worms manufactured for use in distilling, provided for in section one of this Act, but the manufacturer or owner of such distilling apparatus shall give notice to the collector of internal revenue of the district in which the said apparatus is made or to which it is removed, of each still, or worm, manufactured, sold, used, or exchanged under such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe.

Section four of the Act of March second, nineteen hundred and seven, amendatory of the Act of June seventh, nineteen hundred and six, is hereby repealed, and the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall exempt distillers operating under this Act from the provisions of sections thirty-two hundred and eighty-three and thirty-three hundred and nine of the Revised Statutes of the United States, and

Act of Oct. 3, 1913.

## INTERNAL REVENUE.

Act of Oct. 3, 1913.

from such other provisions of existing laws relating to distilleries, including the giving of bonds, as may be deemed expedient by said officials: *Provided, however,* That the Commissioner of Internal Revenue shall assess and collect the tax on any spirits unlawfully produced or produced and not accounted for by any such distiller. [38 Stat. L. 199.]

This is from paragraph N, section IV of the Tariff Act of Oct. 3, 1913, ch. 16.  
For sec. 4 of the Act of March 2, 1907, here

repealed, see 1909 Supp. Fed. Stat. Annot. 252. For R. S. secs. 3233, 3309, see 3 Fed. Stat. Annot. 655, 678.

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## INTERNATIONAL CONGRESSES.

See *PRESIDENT*.

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## INTERNATIONAL PRISON COMMISSION.

See *PRISONS AND PRISONERS*.



## INTERSTATE COMMERCE.

Act of February 13, 1913, Ch. 50, 203.

*Sec. 1. Larceny, etc., of Goods in Interstate Commerce, 203.*

*2. Jurisdiction of State Courts Unimpaired, 204.*

Act of March 1, 1913, Ch. 92, 204.

*Interstate Commerce Regulations — Physical Valuation of Property of Common Carriers, 204.*

### CROSS-REFERENCES.

*Combination Trusts and Corporate Trusts, see TRADE UNIONS, COMBINATIONS, AND CORPORATE TRUSTS.*

*Imported Nursery Stock, see AGRICULTURE.*

*Panama Canal Regulations, see RIVERS, HARBORS, AND CANALS.*

*Pictorial Representations of Prize Fights, see PRIZE FIGHTS.*

*Standard Barrels for Apples, see AGRICULTURE.*

*Wireless Telegraphy, see RADIO COMMUNICATION.*

See also TRADEMARKS.

**An Act To punish the unlawful breaking of seals of railroad cars containing interstate or foreign shipments, the unlawful entering of such cars, the stealing of freight and express packages or baggage or articles in process of transportation in interstate shipment, and the felonious asportation of such freight or express packages or baggage or articles therefrom into another district of the United States, and the felonious possession or reception of the same.**

[Act of February 13, 1913, ch. 50.]

[SEC. 1.] [*Larceny, etc., of goods in interstate commerce.*] That whoever shall unlawfully break the seal of any railroad car containing interstate or foreign shipments of freight or express, or shall enter any such car with intent, in either case, to commit larceny therein; or whoever shall steal or unlawfully take, carry away, or conceal, or by fraud or deception obtain from any railroad car, station house, platform, depot, steamboat, vessel, or wharf, with intent to convert to his own use any goods or chattels moving as, or which are a part of or which constitute, an interstate or foreign shipment of freight or express, or shall buy, or receive, or have in his possession any such goods or chattels, knowing the same to have been stolen; or whoever shall steal or shall unlawfully take, carry away, or by fraud or deception obtain, with intent to convert to his own use, any baggage which shall have come into the possession of any common carrier for transportation from one State or Territory or the District of Columbia to another State or Territory or the District of Columbia, or to a foreign country, or from a foreign country to any State or Territory or the District of Columbia, or shall break into, steal, take, carry away, or conceal any of the contents of such baggage, or shall buy, receive, or have in his possession any such baggage or any article therefrom of whatsoever nature, knowing the same to have been

stolen, shall in each case be fined not more than five thousand dollars or imprisoned not more than ten years, or both, and prosecutions therefor may be instituted in any district wherein the crime shall have been committed. The carrying or transporting of any such freight, express, baggage, goods, or chattels from one State or Territory or the District of Columbia into another State or Territory or the District of Columbia, knowing the same to have been stolen, shall constitute a separate offense and subject the offender to the penalties above described for unlawful taking, and prosecutions therefor may be instituted in any district into which such freight, express, baggage, goods, or chattels shall have been removed or into which they shall have been brought by such offender. [37 Stat. L. 670.]

SEC. 2. [*Jurisdiction of State courts unimpaired.*] That nothing in this Act shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof; and a judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to any prosecution hereunder for the same act or acts. [37 Stat. L. 670.]

An Act To amend an Act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof by providing for a valuation of the several classes of property of carriers subject thereto and securing information concerning their stocks, bonds, and other securities.

[Act of March 1, 1913, ch. 92.]

[*Interstate commerce regulations — physical valuation of property of common carriers.*] That the Act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, as amended, be further amended by adding thereto a new section, to be known as section nineteen a, and to read as follows:

"SEC. 19a. That the commission shall, as hereinafter provided, investigate, ascertain, and report the value of all the property owned or used by every common carrier subject to the provisions of this Act. To enable the commission to make such investigation and report, it is authorized to employ such experts and other assistants as may be necessary. The commission may appoint examiners who shall have power to administer oaths, examine witnesses, and take testimony. The commission shall make an inventory which shall list the property of every common carrier subject to the provisions of this Act in detail, and show the value thereof as hereinafter provided, and shall classify the physical property, as nearly as practicable, in conformity with the classification of expenditures for road and equipment, as prescribed by the Interstate Commerce Commission.

"First. In such investigation said commission shall ascertain and report in detail as to each piece of property owned or used by said common carrier for its purposes as a common carrier, the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation, and an analysis of the methods by which these several costs are obtained, and the reason for their differences, if any. The commission shall in like manner ascertain and report separately other values, and elements of value, if any, of the property of such common carrier, and an analysis of the methods of valuation employed, and of the reasons for any differences between any such value, and each of the foregoing cost values.

"Second. Such investigation and report shall state in detail and separately

from improvements the original cost of all lands, rights of way, and terminals owned or used for the purposes of a common carrier, and ascertained as of the time of dedication to public use, and the present value of the same, and separately the original and present cost of condemnation and damages or of purchase in excess of such original cost or present value.

"Third. Such investigation and report shall show separately the property held for purposes other than those of a common carrier, and the original cost and present value of the same, together with an analysis of the methods of valuation employed.

"Fourth. In ascertaining the original cost to date of the property of such common carrier the commission, in addition to such other elements as it may deem necessary, shall investigate and report upon the history and organization of the present and of any previous corporation operating such property; upon any increases or decreases of stocks, bonds, or other securities, in any reorganization; upon moneys received by any such corporation by reason of any issues of stocks, bonds, or other securities; upon the syndicating, banking, and other financial arrangements under which such issues were made and the expense thereof; and upon the net and gross earnings of such corporations; and shall also ascertain and report in such detail as may be determined by the commission upon the expenditure of all moneys and the purposes for which the same were expended.

"Fifth. The commission shall ascertain and report the amount and value of any aid, gift, grant of right of way, or donation, made to any such common carrier, or to any previous corporation operating such property, by the Government of the United States or by any State, county, or municipal government, or by individuals, associations, or corporations; and it shall also ascertain and report the grants of land to any such common carrier, or any previous corporation operating such property, by the Government of the United States, or by any State, county, or municipal government, and the amount of money derived from the sale of any portion of such grants and the value of the unsold portion thereof at the time acquired and at the present time, also, the amount and value of any concession and allowance made by such common carrier to the Government of the United States, or to any State, county, or municipal government in consideration of such aid, gift, grant, or donation.

"Except as herein otherwise provided, the commission shall have power to prescribe the method of procedure to be followed in the conduct of the investigation, the form in which the results of the valuation shall be submitted, and the classification of the elements that constitute the ascertained value, and such investigation shall show the value of the property of every common carrier as a whole and separately the value of its property in each of the several States and Territories and the District of Columbia, classified and in detail as herein required.

"Such investigation shall be commenced within sixty days after the approval of this Act and shall be prosecuted with diligence and thoroughness, and the result thereof reported to Congress at the beginning of each regular session thereafter until completed.

"Every common carrier subject to the provisions of this Act shall furnish to the commission or its agents from time to time and as the commission may require maps, profiles, contracts, reports of engineers, and any other documents, records, and papers, or copies of any or all of the same, in aid of such investigation and determination of the value of the property of said common carrier, and shall grant to all agents of the commission free access to its right of

way, its property, and its accounts, records, and memoranda whenever and wherever requested by any such duly authorized agent, and every common carrier is hereby directed and required to cooperate with and aid the commission in the work of the valuation of its property in such further particulars and to such extent as the commission may require and direct, and all rules and regulations made by the commission for the purpose of administering the provisions of this section and section twenty of this Act shall have the full force and effect of law. Unless otherwise ordered by the commission, with the reasons therefor, the records and data of the commission shall be open to the inspection and examination of the public.

"Upon the completion of the valuation herein provided for the commission shall thereafter in like manner keep itself informed of all extensions and improvements or other changes in the condition and value of the property of all common carriers, and shall ascertain the value thereof, and shall from time to time, revise and correct its valuations, showing such revision and correction classified and as a whole and separately in each of the several States and Territories and the District of Columbia, which valuations, both original and corrected, shall be tentative valuations and shall be reported to Congress at the beginning of each regular session.

"To enable the commission to make such changes and corrections in its valuations of each class of property, every common carrier subject to the provisions of this Act shall make such reports and furnish such information as the commission may require.

"Whenever the commission shall have completed the tentative valuation of the property of any common carrier, as herein directed, and before such valuation shall become final, the commission shall give notice by registered letter to the said carrier, the Attorney General of the United States, the governor of any State in which the property so valued is located, and to such additional parties as the commission may prescribe, stating the valuation placed upon the several classes of property of said carrier, and shall allow thirty days in which to file a protest of the same with the commission. If no protest is filed within thirty days, said valuation shall become final as of the date thereof.

"If notice of protest is filed the commission shall fix a time for hearing the same, and shall proceed as promptly as may be to hear and consider any matter relative and material thereto which may be presented in support of any such protest so filed as aforesaid. If after hearing any protest of such tentative valuation under the provisions of this Act the commission shall be of the opinion that its valuation should not become final, it shall make such changes as may be necessary, and shall issue an order making such corrected tentative valuation final as of the date thereof. All final valuations by the commission and the classification thereof shall be published and shall be prima facie evidence of the value of the property in all proceedings under the Act to regulate commerce as of the date of the fixing thereof, and in all judicial proceedings for the enforcement of the Act approved February fourth, eighteen hundred and eighty-seven, commonly known as "the Act to regulate commerce," and the various Acts amendatory thereof, and in all judicial proceedings brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission.

"If upon the trial of any action involving a final value fixed by the commission, evidence shall be introduced regarding such value which is found by the court to be different from that offered upon the hearing before the commission, or additional thereto and substantially affecting said value, the court, before

proceeding to render judgment shall transmit a copy of such evidence to the commission, and shall stay further proceedings in said action for such time as the court shall determine from the date of such transmission. Upon the receipt of such evidence the commission shall consider the same and may fix a final value different from the one fixed in the first instance, and may alter, modify, amend or rescind any order which it has made involving said final value, and shall report its action thereon to said court within the time fixed by the court. If the commission shall alter, modify, or amend its order, such altered, modified, or amended order shall take the place of the original order complained of and judgment shall be rendered thereon as though made by the commission in the first instance. If the original order shall not be rescinded or changed by the commission, judgment shall be rendered upon such original order.

"The provisions of this section shall apply to receivers of carriers and operating trustees. In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with all the requirements of this section and in the manner prescribed by the commission such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in section sixteen of the Act to regulate commerce.

"That the district courts of the United States shall have jurisdiction, upon the application of the Attorney General of the United States at the request of the commission, alleging a failure to comply with or a violation of any of the provisions of this section by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of this section." [37 Stat. L. 701.]

For the Act of Feb. 4, 1887, see 3 Fed. Stat. Annot. 808.

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## INTERSTATE COMMISSION.

*Trade in Viruses, Serums and Toxins, see HEALTH AND QUARANTINE.*

## INTOXICATING LIQUORS.

Act of March 1, 1913, Ch. 90, 208.

*Shipment of Liquors into a State, etc., in Violation of Any Law Thereof, Prohibited, 208.*

An Act Divesting intoxicating liquors of their interstate character in certain cases.

[Act of March 1, 1913, ch. 90.]

[*Shipment of liquors into a State, etc., in violation of any law thereof, prohibited.*] That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited.

CHAMP CLARK,

*Speaker of the House of Representatives.*

J. H. GALLINGER,

*President of the Senate pro tempore.*

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IN THE SENATE OF THE UNITED STATES,

*February 28, 1913.*

The President of the United States having returned to the Senate, in which it originated, the bill entitled "An act divesting intoxicating liquors of their interstate character in certain cases," with his objections thereto, the Senate proceeded, in pursuance of the Constitution, to reconsider the same; and,

RESOLVED, That the said bill do pass, two-thirds of the Senate agreeing to pass the same.

Attest:

CHAS. G. BENNETT,

*Secretary.*

By H. M. ROSE,

*Assistant Secretary.*

IN THE HOUSE OF REPRESENTATIVES

OF THE UNITED STATES.

*March 1, 1913.*

The House having proceeded, in pursuance of the Constitution, to reconsider the bill (S. 4043.) entitled "An Act divesting intoxicating liquors of their interstate character in certain cases," returned to the Senate by the President of

the United States, with his objections thereto, and sent by the Senate to the House of Representatives, with the message of the President returning the bill:

RESOLVED, That the said bill do pass, two-thirds of the House of Representatives agreeing to pass the same.

Attest:

SOUTH TRIMBLE

Clerk.

By J C SOUTH

Chief Clerk

[37 Stat. L. 699.]

The constitutionality of the Webb-Kenyon Act has been sustained in *U. S. v. Oregon-Washington R. & Nav. Co.* (D. C. Ore. 1913) 210 Fed. 378; *State v. Grier* (Del. 1913) 88 Atl. 579; *State v. Van Winkle* (Del. 1913) 88 Atl. 807; *State v. United States Express Co.* (Ia. 1914) 145 N. W. 451.

Congress may, under its power to regulate commerce between the states, supplement, and in effect ratify, the prohibitory laws of the state, by extending the prohibition to interstate shipments. *State v. Grier* (Del. 1913) 88 Atl. 579.

**Purpose of Act.**—It was not the intention of this Act to interfere with the policy of the state, in regard to the importation of liquors, but merely to provide that the enforcement of a state statute would not be interfered with, or hampered, by the interstate commerce laws. In other words, the Act is in this respect passive, and it is incumbent on the states to enact legislation of an active nature, if they are desirous of prohibiting the importation of liquors for personal use or other purposes. *Atkinson v. Southern Express Co.* (1913) 94 S. C. 444, 78 S. E. 516, 49 L.R.A.(N.S.) 349.

This Act does just what the title says it was intended to do, to wit, divests intoxicating liquors of their interstate character in certain cases, and these cases are specifically set out in the Act itself. That is to say, the shipment or transportation of intoxicating liquor from one state to another, when such shipment is intended by any person therein to be received, sold, or used in violation of any law of such state (to which the shipment is made), is prohibited. This is the sum and substance of the Act. *State v. United States Express Co.* (Ia. 1914) 145 N. W. 451.

The history of the Webb-Kenyon law, the causes that led to its enactment and the evils it was intended to remedy, taken in connection with the carefully chosen words of the Act, show that the object was to aid the states in suppressing the illegal traffic in intoxicating liquors that they had been much hindered in doing by the protection afforded violators of the law by the commerce clause of the Federal Constitution, and that it was not meant by this legislation in any manner to abridge the personal liberty of the citizen in the right personally to use liquor or the right to have it in his possession for such use. *Adams Express Co. v. Commonwealth* (1913) 154 Ky. 462, 157 S. W. 908, 48 L.R.A.(N.S.) 342.

**Applicability to transportation agencies.**—Inasmuch as the Supreme Court has construed the word "arrival" in the Wilson Act to mean "arrival at destination and delivery to the consignee," the Webb-Kenyon Act, which was passed to supplement the Wilson Act, means that an interstate shipment of liquor shall be subject to state laws upon arrival at any point within the state. Clearly that was what the law was designed to accomplish by prohibiting the transportation, and the law can be made effective only by holding that it applies to transportation agencies, as well as to consignors and consignees who receive or ship the liquor for the purpose of sale. *State v. Grier* (Del. 1913) 88 Atl. 579.

But a carrier cannot be punished for receiving, carrying, and delivering, as an interstate transaction, intoxicating liquor in local option territory to a consignee who purchased it at a point in another state, and when it is not intended by any person interested therein to be received, possessed, sold, or in any manner used in violation of the law of this state. If, however, the liquor is intended to be received, possessed, sold, or in any manner used in violation of the law of this state, then the Webb-Kenyon Act applies, although the transaction may be an interstate one. *Adams Express Co. v. Commonwealth*, (1913) 154 Ky. 462, 157 S. W. 908, 48 L.R.A.(N.S.) 342.

The act does not undertake to create or describe any offense against the laws of the state. It merely withdraws the protection theretofore afforded by the laws of the United States to certain specified articles of commerce, and permits the state laws to become operative as to these articles. It is not in any sense a penal statute, and under it alone no punishment can be inflicted. Therefore, when a state has enacted a statute making it unlawful for a common carrier to bring into local option territory intoxicating liquor, the state law furnishes the sole basis upon which a prosecution against the carrier may be instituted. If the state law prohibits the thing that the carrier has done, the indictment should charge in appropriate words a violation of the state law under which the prosecution is instituted, and then, if the Webb-Kenyon Act is applicable to the transaction when treated as an interstate shipment, a conviction may be had upon sufficient evidence that the state law has been violated. *Adams Express Co. v. Commonwealth* (1913) 154 Ky. 462, 157 S. W. 908, 48 L.R.A.(N.S.) 342.

## IRRIGATION.

See *PUBLIC LANDS; WATERS.*

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## ISTHMIAN CANAL.

See *RIVERS, HARBORS, AND CANALS.*

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## JUDGES.

See *JUDICIARY.*

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## JUDGMENTS.

Act of August 17, 1912, Ch. 300, 210.

*United States Courts—Recording Judgments in State Offices, 1912*

An Act To amend an Act entitled "An Act to regulate the liens of judgments and decrees of the courts of the United States."

[*Act of August 17, 1912, ch. 300.*]

[*United States courts—recording judgments in state offices.*] That section three of an Act entitled "An Act to regulate the liens of judgments and decrees of the courts of the United States," approved August first, eighteen hundred and eighty-eight, be, and the same is hereby, repealed.

This Act shall take effect on and after January first, nineteen hundred and thirteen. [*37 Stat. L. §11.*]

The Act of Aug. 1, 1888, hereby repealed, is given in 4 Fed. Stat. Annot. 5.



## JUDICIAL OFFICERS.

Act of April 8, 1912, Ch. 71, 211.

*Connecticut Judicial District — Marshal's Pay Increased*, 211.

Act of June 23, 1913, Ch. 3, 211.

*Arkansas Western District — Pay of Attorney and Marshal*, 211.

### CROSS-REFERENCE.

*Deputy Marshals, Appointment of*, see *CIVIL SERVICE*.

An Act Providing for an increase of salary of the United States marshal for the district of Connecticut.

[*Act of April 8, 1912, ch. 71.*]

[*Connecticut judicial district — marshal's pay increased.*] That from and after the passage of this Act the salary of the United States marshal for the district of Connecticut shall be at the rate of two thousand five hundred dollars a year. [37 Stat. L. 79.]

See 4 Fed. Stat. Annot. 142.

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[*Arkansas western district — pay of attorney and marshal.*] \* \* \*  
The salaries of the United States district attorney and the United States marshal for the western district of Arkansas shall hereafter be \$4,000 per annum each. [38 Stat. L. 54.]

This is from the Sundry Civil Appropriation Act of June 23, 1913, ch. 3.

## JUDICIARY.

- Act of January 13, 1912, Ch. 9, 213.  
*Circuit Judges Authorized — Salaries; Residence — Service in Circuit Courts of Appeals — Other Duties, 213.*
- Act of January 17, 1912, Ch. 10, 213.  
*United States Courts — Alabama Middle Judicial District — Transfer of Pending Cases, 213.*
- Act of January 22, 1912, Ch. 12, 214.  
*United States Courts — Writs of Error to Supreme Court and Circuit Courts of Appeals — Issue by Clerks of District Courts, 214.*
- Act of February 1, 1912, Ch. 26, 214.  
*Vermont Judicial District, 214.*
- Act of February 1, 1912, Ch. 27, 215.  
*Rhode Island Judicial District, 215.*
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**An Act To amend an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary."**

**[Act of Jan. 13, 1912, ch. 9.]**

[*Circuit judges authorized — salaries; residence — service in circuit courts of appeals — other duties.*] That section one hundred and eighteen of the Act of March third, nineteen hundred and eleven, entitled "An Act to codify, revise, and amend the laws relating to the judiciary," be amended so as to read as follows:

"SEC. 118. There shall be in the second, seventh, and eighth circuits, respectively, four circuit judges; in the fourth circuit, two circuit judges; and in each of the other circuits, three circuit judges, to be appointed by the President, by and with the advice and consent of the Senate. They shall be entitled to receive a salary at the rate of seven thousand dollars a year each, payable monthly. Each circuit judge shall reside within his circuit. The circuit judges in each circuit shall be judges of the circuit court of appeals in that circuit, and it shall be the duty of each circuit judge in each circuit to sit as one of the judges of the circuit court of appeals in that circuit from time to time according to law: *Provided*, That nothing in this section shall be construed to prevent any circuit judge holding district court or serving in the commerce court, or otherwise, as provided for and authorized in other sections of this Act." [37 Stat. L. 52.]

Sec. 118 of the Judicial Code as originally enacted is given in 1912 Supp. Fed. Stat. Annot. 192.

**An Act To provide for the transfer of certain causes and proceedings to the southern division of the middle district of Alabama.**

**[Act of Jan. 17, 1912, ch. 10.]**

[*United States courts — Alabama middle judicial district — transfer of pending cases.*] That all civil causes and proceedings now pending in the cir-

cuit or the district court of the United States for the middle district of Alabama which arose in either of the counties now embraced in the southern division of the middle district of Alabama, as established in the Act approved March seventh, nineteen hundred and eight, entitled "An Act to provide for circuit and district courts of the United States at Dothan, Alabama," shall, upon the application of either party, be transferred to the said southern division of the middle district of Alabama for trial and disposition. [37 Stat. L. 53.]

The Act of March 7, 1908, above referred to, is given in 1909 Supp. Fed. Stat. Annot. 300.

An Act To amend section ten hundred and four of the Revised Statutes of the United States.

[Act of Jan. 22, 1912, ch. 12.]

*"United States courts — writs of error to supreme court and circuit courts of appeals — issue by clerks of district courts."* That section ten hundred and four of the Revised Statutes of the United States be, and is hereby, amended so as to read as follows, to wit:

**"Sec. 1004.** Writs of error returnable to the Supreme Court or a circuit court of appeals may be issued as well by the clerks of the district courts, under the seal thereof, as by the clerk of the Supreme Court or of a circuit court of appeals. When so issued they shall be as nearly as each case may admit agreeable to the form of a writ of error issued by the clerk of the Supreme Court or the clerk of a circuit court of appeals." [37 Stat. L. 54.]

R. S. sec. 1004 as it read prior to this amendment is given in 4 Fed. Stat. Annot. 616.

The correct construction of the amendment is that the writ of error may be issued by the clerk of the court to which it is returnable or by the clerk of the court whose judgment is to be reviewed. In re Issuing Writs of Error, C. C. A. 6th Cir. 1912; 199 Fed. 115.

Previous to the amendment, the statute made no provision for the issue of writs from the Supreme Court to the Circuit Court of Appeals, nor from the latter courts to the Circuit and District Courts, the statute having been passed before the Circuit Courts of Appeals were organized. In re Issuing Writs of Error, C. C. A. 6th Cir. 1912; 199 Fed. 115.

An Act To amend section one hundred and ten of "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

[Act of Feb. 1, 1912, ch. 26.]

*"Vermont Judicial District."* That section one hundred and ten of "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, be, and it is hereby, amended so as to read as follows:

**"Sec. 111.** The State of Vermont shall constitute one judicial district, to be known as the district of Vermont. Terms of the district court shall be held in Burlington on the fourth Tuesday in February, at Windsor on the third Tuesday in May, at Rutland on the first Tuesday in October, and at Brattleboro on the third Tuesday in December. In each year one of the stated terms of the district court may, when adjourned, be adjourned to meet at Montpelier and one at Newport. For Fed. use only. This suitable rooms and accommodations shall be furnished for the holdings of said court and for the use of the officers of said court at Brattleboro free of expense to the Government of the

United States until the public building provided for by Act of Congress shall be erected." [37 Stat. L. 58.]

Sec. 110 of the Judicial Code as originally enacted is given in 1912 Supp. Fed. Stat. Annot. 187.

An Act To amend an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

[Act of Feb. 1, 1912, ch. 27.]

[Rhode Island judicial district.] That section one hundred and four of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, be amended so as to read as follows:

"SEC. 104. The State of Rhode Island shall constitute one judicial district, to be known as the district of Rhode Island; terms of the district court shall be held at Providence on the fourth Tuesday in May and the third Tuesday in November." [37 Stat. L. 59.]

Sec. 104 of the Judicial Code as originally enacted is given in 1912 Supp. Fed. Stat. Annot. 182.

An Act To amend sections ninety, ninety-nine, one hundred and five, and one hundred and eighty-six of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

[Act of Feb. 5, 1912, ch. 28.]

[United States courts — Judicial Code amended.] That sections ninety, ninety-nine, one hundred and five, and one hundred and eighty-six of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, be, and they hereby are, amended to read as follows:

"SEC. 90. [Mississippi judicial districts.] The State of Mississippi is divided into two judicial districts, to be known as the northern and southern districts of Mississippi. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alcorn, Attala, Chickasaw, Choctaw, Clay, Itawamba, Lee, Lowndes, Monroe, Oktibeha, Pontotoc, Prentiss, Tishomingo, and Winston, which shall constitute the eastern division of said district; also the territory embraced on the date last mentioned in the counties of Benton, Coahoma, Calhoun, Carroll, De Soto, Grenada, Lafayette, Marshall, Montgomery, Panola, Quitman, Tallahatchie, Tate, Tippah, Tunica, Union, Webster, and Yalobusha, which shall constitute the western division of said district. Terms of the district court for the eastern division shall be held at Aberdeen on the first Mondays in April and October; and for the western division, at Oxford on the first Mondays in June and December, and at Clarksdale on the third Mondays in June and December: *Provided*, That suitable rooms and accommodations for holding court at Clarksdale are furnished free of expense to the United States. The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Adams, Amite, Copiah, Covington, Franklin, Hinds, Holmes, Jefferson, Jefferson Davis, Lawrence, Lincoln, Leflore, Madison, Pike, Rankin, Simpson, Smith, Scott, Wilkinson, and Yazoo, which shall constitute the Jackson division; also the territory embraced on the date last mentioned

in the counties of Bolivar, Claiborne, Issaquena, Sharkey, Sunflower, Warren, and Washington, which shall constitute the western division; also the territory embraced on the date last mentioned in the counties of Clarke, Jones, Jasper, Kemper, Lauderdale, Leake, Neshoba, Newton, Noxubee, and Wayne, which shall constitute the eastern division; also the territory embraced on the date last mentioned in the counties of Forest, George, Greene, Hancock, Harrison, Jackson, Lamar, Marion, Perry, and Pearl River, which constitutes the southern division of said district. Terms of the district court for the Jackson division shall be held at Jackson on the first Mondays in May and November; for the western division, at Vicksburg on the first Mondays in January and July; for the eastern division, at Meridian on the second Mondays in March and September; and for the southern division, at Biloxi on the third Mondays in February and August. The clerk of the court for each district shall maintain an office in charge of himself or a deputy at each place in his district at which court is now required to be held, at which he shall not himself reside, which shall be kept open at all times for the transaction of the business of the court. The marshal for each of said districts shall maintain an office in charge of himself or a deputy at each place at which court is now held in his district." [37 Stat. L. 59.]

This section in its original form is given in 1912 Supp. Fed. Stat. Annot. 174.

"SEC. 99. [North Dakota district.] The State of North Dakota shall constitute one judicial district, to be known as the district of North Dakota. The territory embraced on the first day of July, nineteen hundred and ten, in the counties of Burleigh, Stutsman, Logan, McIntosh, Emmons, Kidder, Foster, Wells, McLean, Sheridan, Adams, Bowman, Dunn, Hettinger, Morton, Stark, and McKenzie shall constitute the southwestern division of said district; and the territory embraced on the date last mentioned in the counties of Cass, Richland, Barnes, Dickey, Sargent, Lamoure, Ransom, Griggs, and Steele shall constitute the southeastern division; and the territory embraced on the date last mentioned in the counties of Grand Forks, Traill, Walsh, Pembina, Cavalier, and Nelson shall constitute the northeastern division; and the territory embraced on the date last mentioned in the counties of Ramsey, Eddy, Benson, Towner, Rolette, Bottineau, Pierce, and McHenry shall constitute the northwestern division; and the territory embraced on the date last mentioned in the counties of Ward, Williams, Montraille, Burk, and Renville shall constitute the western division. The several Indian reservations and parts thereof within said State shall constitute a part of the several divisions within which they are respectively situated. Terms of the district court for the southwestern division shall be held at Bismarck on the first Tuesday in March; for the southeastern division, at Fargo on the third Tuesday in May; for the northeastern division, at Grand Forks on the second Tuesday in November; for the northwestern division, at Devils Lake on the first Tuesday in July; and for the western division, at Minot on the second Tuesday in October. The clerk of the court shall maintain an office in charge of himself or a deputy at each place at which court is now held in his district." [37 Stat. L. 60.]

This section in its original form is given in 1912 Supp. Fed. Stat. Annot. 179.

"SEC. 105. [South Carolina judicial districts.] The State of South Carolina is divided into two districts, to be known as the eastern and western districts of South Carolina. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of

Abbeville, Anderson, Cherokee, Chester, Edgefield, Fairfield, Greenville, Greenwood, Lancaster, Laurens, Newberry, Oconee, Pickens, Saluda, Spartanburg, Union, and York. Terms of the district court for the western district shall be held at Greenville on the third Tuesdays in April and October. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Aiken, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Chesterfield, Clarendon, Colleton, Darlington, Dillon, Dorchester, Florence, Georgetown, Hampton, Horry, Kershaw, Lee, Lexington, Marion, Marlboro, Orangeburg, Richland, Sumter, and Williamsburg. Terms of the district court for the eastern district shall be held at Charleston on the first Tuesdays in June and December; at Columbia on the third Tuesday in January and the first Tuesday in November, the latter term to be solely for the trial of civil cases; and at Florence on the first Tuesday in March. The offices of the clerk of the district court shall be at Greenville and at Charleston; and the clerk shall reside in one of said cities and have a deputy in the other." [37 Stat. L. 60.]

This section in its original form is given in 1912 Supp. Fed. Stat. Annot. 182.

"SEC. 186. [*Court of claims — witnesses not excluded because of color or interest.*] No person shall be excluded as a witness in the Court of Claims on account of color or because he or she is a party to or interested in the cause or proceeding; and any plaintiff or party in interest may be examined as a witness on the part of the Government." [37 Stat. L. 61.]

This section in its original form is given in 1912 Supp. Fed. Stat. Annot. 210.

An Act To amend section one hundred and thirteen of the Act to codify, revise, and amend the laws relating to the judiciary, approved March third, nineteen hundred and eleven.

[Act of March 23, 1912, ch. 63.]

[*West Virginia judicial districts.*] That section one hundred and thirteen of the Act to codify, revise, and amend the laws relating to the judiciary, approved March third, nineteen hundred and eleven, be amended so as to read as follows:

"SEC. 113. The State of West Virginia is divided into two districts to be known as the northern and southern districts of West Virginia. The northern district shall include the territory embraced, on the first day of July, nineteen hundred and ten, in the counties of Hancock, Brooke, Ohio, Marshall, Tyler, Pleasants, Wood, Wirt, Ritchie, Doddridge, Wetzel, Monongalia, Marion, Harrison, Lewis, Gilmer, Calhoun, Upshur, Barbour, Taylor, Preston, Tucker, Randolph, Pendleton, Hardy, Grant, Mineral, Hampshire, Morgan, Berkeley, and Jefferson, with the waters thereof. Terms of the district court for the northern district shall be held at Martinsburg on the first Tuesday of April and the third Tuesday of September; at Clarksburg on the second Tuesday of April and the first Tuesday of October; at Wheeling on the first Tuesday of May and the third Tuesday of October; at Philippi on the fourth Tuesday of May and the second Tuesday of November; and at Parkersburg on the second Tuesday of January and the second Tuesday of June: *Provided*, That a place for holding court at Philippi shall be furnished free of cost to the United States by Barbour County until other provision is made therefor by law. The southern district shall include the territory embraced, on the first day of July, nineteen hundred and ten, in the counties of Jackson, Roane, Clay, Braxton,

Webster, Nicholas, Pocahontas, Greenbrier, Fayette, Boone, Kanawha, Putnam, Mason, Cabell, Wayne, Lincoln, Logan, Mingo, Raleigh, Wyoming, McDowell, Mercer, Summers, and Monroe, with the waters thereof. Terms of the district court for the southern district shall be held at Charleston on the first Tuesday in June and the third Tuesday in November; at Huntington on the first Tuesday in April and the first Tuesday after the third Monday in September; at Bluefield on the first Tuesday in May and the third Tuesday in October; at Addison on the first Tuesday in September; and at Lewisburg on the second Tuesday in July: *Provided*, That a place for holding court at Addison shall be furnished free of cost to the United States." [37 Stat. L. 76.]

Sec. 113 of the Judicial Code in its original form is given in 1912 Supp. Fed. Stat. Annot. 189.

An Act To amend section ninety of the Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, and for other purposes.

[Act of May 27, 1912, ch. 136.]

[Mississippi judicial districts.] That section ninety of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, be, and the same is hereby, amended so as to read as follows:

"SEC. 90. The State of Mississippi is divided into two judicial districts, to be known as the northern and southern districts of Mississippi. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Alcorn, Attala, Chickasaw, Choctaw, Clay, Itawamba, Lee, Lowndes, Monroe, Oktibbeha, Pontotoc, Prentiss, Tishomingo, and Winston, which shall constitute the eastern division of said district; also the territory embraced on the date last mentioned in the counties of Benton, Calhoun, Carroll, De Soto, Grenada, Lafayette, Marshall, Montgomery, Panola, Tate, Tippah, Union, Webster, and Yalobusha, which shall constitute the western division of said district; also the territory embraced on the date last mentioned in the counties of Bolivar, Coahoma, Leflore, Quitman, Sunflower, Tallahatchie, and Tunica, which shall constitute the Delta division of said district. The terms of the district court for the eastern division shall be held at Aberdeen on the first Mondays in April and October; and for the western division, at Oxford on the first Mondays in June and December; and for the Delta division, at Clarksdale on the fourth Mondays in January and July: *Provided*, That suitable rooms and accommodations for holding court at Clarksdale are furnished free of expense to the United States. The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Adams, Amite, Copiah, Covington, Franklin, Hinds, Holmes, Jefferson, Jefferson Davis, Lawrence, Lincoln, Madison, Pike, Rankin, Simpson, Smith, Scott, Wilkinson, and Yazoo, which shall constitute the Jackson division; also the territory embraced on the date last mentioned in the counties of Claiborne, Issaquena, Sharkey, Warren, and Washington, which shall constitute the western division; also the territory embraced on the date last mentioned in the counties of Clarke, Jones, Jasper, Kemper, Lauderdale, Leake, Neshoba, Newton, Noxubee, and Wayne, which shall constitute the eastern division; also the territory embraced on the date last mentioned in the counties of Forrest, Greene, Hancock, Harrison, Jackson, Lamar, Marion, Perry, and Pearl River, which shall consti-



tute the southern division of said district. Terms of the district court for the Jackson division shall be held at Jackson on the first Mondays in May and November; for the western division, at Vicksburg on the first Mondays in January and July; for the eastern division, at Meridian on the second Mondays in March and September; and for the southern division, at Biloxi on the third Mondays in February and August. The clerk of the court for each district shall maintain an office in charge of himself or a deputy at each place in his district at which court is now required to be held at which he shall not himself reside, which shall be kept open at all times for the transaction of the business of the court. The marshal for each of said districts shall maintain an office in charge of himself or a deputy at each place of holding court in his district." [37 Stat. L. 118.]

Sec. 90 of the Judicial Code as originally enacted is given in 1912 Supp. Fed. Stat. Annot. 174.

**An Act To create a new division of the southern judicial district of Texas, and to provide for terms of court at Corpus Christi, Texas, and for a clerk for said court, and for other purposes.**

[Act of May 29, 1912, ch. 144.]

[SEC. 1.] [Texas southern judicial district — new division created.] That the counties of Bee, Live Oak, Aransas, San Patricio, Nueces, Jim Wells, Duval, Brooks, and Willacy shall constitute a division of the southern judicial district of Texas. [37 Stat. L. 120.]

See sec. 108 of the Judicial Code, 1912 Supp. Fed. Stat. Annot. 185.

SEC. 2. [Terms at Corpus Christi.] That terms of the district court of the United States for the said southern district of Texas shall be held twice in each year at the city of Corpus Christi, in Nueces County, and that, until otherwise provided by law, the judge of said court shall fix the times at which said court shall be held at Corpus Christi, of which he shall make publication and give due notice. [37 Stat. L. 120.]

**An Act To fix the terms of the District Court for the Western District of Michigan.**

[Act of July 9, 1912, ch. 222.]

[Michigan western district.] That the terms of the District Court for the Western District of Michigan for the southern division shall be held at Grand Rapids, commencing on the first Tuesdays in March, June, October, and December; and for the northern division at Marquette, commencing on the second Tuesdays of April and September; and at Sault Sainte Marie, commencing on the second Tuesdays in January and July. [37 Stat. L. 190.]

See 1912 Supp. Fed. Stat. Annot. 172.

**An Act To amend section ninety-six of the "Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.**

[Act of August 9, 1912, ch. 277.]

[New Jersey judicial district.] That section ninety-six of the "Act to codify, revise, and amend the laws relating to the judiciary," approved March

third, nineteen hundred and eleven, be, and hereby is, amended so as to read as follows:

"**SEC. 96.** The State of New Jersey shall constitute one judicial district, to be known as the district of New Jersey. Terms of the district court shall be held at Trenton on the third Tuesdays in January, April, and September. At each term of the district court it shall be lawful for the judge holding such term, on consent of both parties or on application therefor and good cause shown by either party to any civil cause set for trial or hearing at said term, to order such cause to be held or tried at the city of Newark, in said district, upon the day set for that purpose by said judge: *Provided*, That such application shall be made to said judge, either in vacation or term time, at least one week before the date set for trial of said cause and on at least five days' notice to the opposite party or his or her attorney; and writs of subpoena to compel the attendance of witnesses at said city of Newark may issue, and jurors summoned to attend said term may be ordered by said judge to be in attendance upon said court in the city of Newark." [37 Stat. L. 265.]

For sec. 96 of the Judicial Code as originally enacted see 1912 Supp. Fed. Stat. Annot. 177.

**An Act To amend section one hundred and seven of the Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.**

[Act of August 20, 1912, ch. 306.]

[**Tennessee judicial districts.**] That section one hundred and seven of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, be, and the same is hereby, amended so as to read as follows:

"**SEC. 107.** The State of Tennessee is divided into three districts, to be known as the eastern, middle, and western districts of Tennessee. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Bledsoe, Bradley, Hamilton, James, McMinn, Marion, Meigs, Polk, Rhea, and Sequatchie, which shall constitute the southern division of said district; also the territory embraced on the date last mentioned in the counties of Anderson, Blount, Campbell, Claiborne, Grainger, Jefferson, Knox, Loudon, Monroe, Morgan, Roane, Sevier, Scott, and Union, which shall constitute the northern division of said district; also the territory embraced on the date last mentioned in the counties of Carter, Cocke, Greene, Hamblen, Hancock, Hawkins, Johnson, Sullivan, Unicoi, and Washington, which shall constitute the northeastern division of said district. Terms of the district court for the southern division of said district shall be held at Chattanooga on the fourth Monday in April and the second Monday in November; for the northern division, at Knoxville on the fourth Monday in May and the first Monday in December; and for the northeastern division, at Greeneville on the first Monday in March and the third Monday in September. The middle district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Bedford, Cannon, Cheatham, Coffee, Davidson, Dickson, Franklin, Giles, Grundy, Hickman, Humphreys, Houston, Lawrence, Lewis, Lincoln, Marshall, Maury, Montgomery, Moore, Robertson, Rutherford, Stewart, Sumner, Trousdale, Warren, Wayne, Williamson, and Wilson, which shall constitute the Nashville division of said district; also the territory embraced on the date last mentioned in the counties of Clay, Cumberland, Dekalb, Fentress,

Jackson, Macon, Overton, Pickett, Putnam, Smith, Van Buren, and White, which shall constitute the northeastern division of said district. Terms of the district court for the Nashville division of said district shall be held at Nashville on the second Monday in March and the fourth Monday in September; and for the northeastern division, at Cookeville on the third Monday in April and the first Monday in November: *Provided*, That suitable accommodations for holding court at Cookeville shall be provided by the county or municipal authorities without expense to the United States. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Dyer, Fayette, Haywood, Lauderdale, Shelby, and Tipton, which shall constitute the western division of said district; also the territory embraced on the date last mentioned in the counties of Benton, Carroll, Chester, Crockett, Decatur, Gibson, Hardeman, Hardin, Henderson, Henry, Lake, McNairy, Madison, Obion, Perry, and Weakley, including the waters of the Tennessee River to low water mark on the eastern shore thereof wherever such river forms the boundary line between the western and middle districts of Tennessee, from the north line of the State of Alabama north to the point in Henry County, Tennessee, where the south boundary line of the State of Kentucky strikes the east bank of the river, which shall constitute the eastern division of said district. Terms of the district court for the western division of said district shall be held at Memphis on the fourth Mondays in May and November; and for the eastern division, at Jackson on the fourth Mondays in April and October. The clerk of the court for the western district shall appoint a deputy, who shall reside at Jackson. The marshal for the western district shall appoint a deputy, who shall reside at Jackson. The marshal for the eastern district shall appoint a deputy, who shall reside at Chattanooga. The clerk of the court for the eastern district shall maintain an office in charge of himself or a deputy at Knoxville, at Chattanooga, and at Greeneville, which shall be kept open at all times for the transaction of the business of the court. [37 Stat. L. 314.]

For sec. 107 of the Judicial Code as originally enacted, see 1912 Supp. Fed. Stat. Annot. 183.

An Act To amend section ninety-five of the "Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

[Act of August 23, 1912, ch. 344.]

[*New Hampshire judicial district.*] That section ninety-five of the "Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, be, and hereby is, amended to read as follows:

"SEC. 95. The State of New Hampshire shall constitute one judicial district court or as special judge thereof; and the temporary judge so designated as court shall be held at Portsmouth on the last Tuesday in October, at Concord on the last Tuesday in April and the second Tuesday in December, and at Littleton on the third Tuesday in September." [37 Stat. L. 357.]

For sec. 95 of the Judicial Code as originally enacted see 1912 Supp. Fed. Stat. Annot. 177.

An Act To provide for holding the district court of the United States for Porto Rico during the absence from the island of the United States district judge and for the trial of cases in the event of the disqualification of or inability to act by the said judge.

[Act of January 7, 1913, ch. 6.]

[*U. S. Court for Porto Rico — absence of judge — special judge.*] That whenever the United States district judge of the district of Porto Rico shall be absent from the said district, and that fact shall be made to appear by the certificate in writing of the United States attorney or marshal of that district, filed in the office of the clerk of the United States district court for said district, or when for any reason the said judge shall or may be disqualified or unable to act as such in any cause pending in the district court of the United States for Porto Rico, and that fact shall be made to appear either by proper order entered in the record of said cause by the regular district judge, or by the certificate in writing of the United States attorney or marshal of that district filed in the office of the clerk of the United States district court for said district, the governor of Porto Rico may, by writing filed in the said clerk's office, designate a justice of the supreme court of Porto Rico either as temporary judge of said district court or as special judge thereof; and the temporary judge so designated as aforesaid shall have and may exercise within said district, during the absence of the regular district judge, all the power of every kind by law vested in said district judge, and after the return of said district judge to said district, shall continue to have and exercise said powers with respect to any cause, the trial of which shall have been commenced before him or which shall have been submitted to him for decision prior to the return of said district judge; and the special judge so designated as aforesaid shall have and may exercise within said district all the power of every kind by law vested in said district judge with respect to any cause named in the writing by the governor, filed as aforesaid, designating the said special judge as aforesaid: *Provided*, That no additional compensation shall be paid to either such temporary district judge or special district judge for services rendered pursuant to such designation. [37 Stat. L. 648.]

An Act To create a new division of the western judicial district of Texas and to provide for terms of court at Pecos, Texas, and for other purposes.

[Act of February 5, 1913, ch. 28.]

[SEC. 1.] [*Texas western judicial district.*] That the counties of Reeves, Ward, Martin, Reagan, Winkler, Ector, Gaines, Andrews, Upton, Midland, Loving, Jeff Davis, and Crane shall constitute a division of the western judicial district of Texas. [37 Stat. L. 663.]

SEC. 2. [*Terms.*] That terms of the district court of the United States for the said western district of Texas shall be held twice in each year at the city of Pecos, in Reeves County, and that, until otherwise provided by law, the judge of said court shall fix the times at which said court shall be held at Pecos, of which he shall make proclamation and give due notice: *Provided, however*, That suitable rooms and accommodations shall be furnished for the holding of said court and for the use of the officers of said court at Pecos, free of expense to the Government of the United States. [37 Stat. L. 663.]

An Act To amend section ninety-six, chapter five, of the Act of Congress of March third, nineteen hundred and eleven, entitled "The Judicial Code."

[Act of February 14, 1913, ch. 53.]

[*New Jersey judicial district.*] That section ninety-six, chapter five, of the Act of Congress approved March third, nineteen hundred and eleven, and therein designated "The Judicial Code," be amended so that the same shall read as follows:

"SEC. 96. The State of New Jersey shall constitute one judicial district, to be known as the district of New Jersey. Terms of the district court shall be held at Newark on the first Tuesday in April and the first Tuesday in November, and at Trenton on the third Tuesday in January and the second Tuesday in September of each year. The clerk of the court for the district of New Jersey shall maintain an office, in charge of himself or a deputy, at Newark and at Trenton, each of which offices shall be kept open at all times for the transaction of the business of the court; and the marshal shall also maintain an office, in charge of himself or a deputy, at Newark and at Trenton, each of which offices shall be kept open at all times for the transaction of the business of the court." [37 Stat. L. 674.]

See 1912 Supp. Fed. Stat. Annot. 177.

An Act To amend section seventy of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

[Act of February 28, 1913, ch. 59.]

[*Alabama judicial districts.*] That section seventy of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, be, and the same is hereby, amended to read as follows:

"SEC. 70. The State of Alabama is divided into three judicial districts, to be known as the northern, middle, and southern districts of Alabama. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Cullman, Jackson, Lawrence, Limestone, Madison, and Morgan, which shall constitute the northeastern division of said district; also the territory embraced on the date last mentioned in the counties of Colbert, Franklin, and Lauderdale, which shall constitute the northwestern division of said district; also the territory embraced on the date last mentioned in the counties of Cherokee, Dekalb, Etowah, Marshall, and Saint Clair, which shall constitute the middle division of said district; also the territory embraced on the date last mentioned in the counties of Blount, Jefferson, and Shelby, which shall constitute the southern division of said district; also the territory embraced on the date last mentioned in the counties of Walker, Winston, Marion, Fayette, and Lamar, which shall constitute the Jasper division of said district; also the territory embraced on the date last mentioned in the counties of Calhoun, Clay, Cleburne, and Talladega, which shall constitute the eastern division of said district; also the territory embraced on the date last mentioned in the counties of Bibb, Greene, Pickens, Sumter, and Tuscaloosa, which shall constitute the western division of said district. Terms of the district court for the northeastern division shall be held at Huntsville on the first Tuesday in April and the second Tuesday in October; for the northwestern division, at Florence on the second Tuesday in February, and the third Tuesday in October: *Provided*, That suitable rooms and accommodations for

holding court at Florence shall be furnished free of expense to the Government; for the middle division, at Gadsden on the first Tuesdays in February and August: *Provided*, That suitable rooms and accommodations for holding court at Gadsden shall be furnished free of expense to the Government; for the southern division, at Birmingham on the first Mondays in March and September, which courts shall remain in session for the transaction of business at least six months in each calendar year; for the Jasper division, at Jasper on the second Tuesdays in January and June: *Provided*, That suitable rooms and accommodations for holding court at Jasper shall be furnished free of expense to the Government; for the eastern division, at Anniston on the first Mondays in May and November; and for the western division, at Tuscaloosa on the first Tuesdays in January and June. The clerk of the court for the northern district shall maintain an office, in charge of himself or a deputy, at Anniston, at Florence, at Jasper, and at Gadsden, which shall be kept open at all times for the transaction of the business of said court. The district judge for the northern district shall reside at Birmingham. The middle district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Autauga, Barbour, Bullock, Butler, Chilton, Coosa, Covington, Crenshaw, Elmore, Lowndes, Montgomery, and Pike, which shall constitute the northern division of said district; also the territory embraced on the date last mentioned in the counties of Coffee, Dale, Geneva, Henry, and Houston, which shall constitute the southern division of said district; also the territory embraced on the date last mentioned in the counties of Chambers, Lee, Macon, Randolph, Russell, and Tallapoosa, which shall constitute the eastern division of said middle judicial district. Terms of the district court for the northern division shall be held at Montgomery on the first Tuesdays in May and December; for the southern division, at Dothan on the first Mondays in June and December; and for the eastern division, at Opelika on the first Mondays in April and November: *Provided*, That suitable rooms and accommodations for holding court at Opelika shall be furnished free of expense to the Government. The clerk of the court for the middle district shall maintain an office in charge of himself or a deputy at Dothan, and shall maintain an office in charge of himself or a deputy at Opelika, which said offices at Dothan and Opelika shall be kept open at all times for the transaction of the business of said divisions. The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Baldwin, Choctaw, Clarke, Conecuh, Escambia, Mobile, Monroe, and Washington, which shall constitute the southern division of said district; also the territory embraced on the date last mentioned in the counties of Dallas, Hale, Marengo, Perry, and Wilcox, which shall constitute the northern division of said district. Terms of the district court for the southern division shall be held at Mobile on the fourth Mondays in May and November; and for the northern division, at Selma on the first Mondays in May and November." [37 Stat. L. 698.]

See 1912 Supp. Fed. Stat. Annot. 161.

An Act To amend section one hundred and three of the Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

[Act of March 3, 1913, ch. 113.]

[*Pennsylvania judicial districts.*] That section one hundred and three of an Act entitled "An Act to codify, revise, and amend the laws relating to the

judiciary," approved March third, nineteen hundred and eleven, be, and the same is hereby, amended so as to read as follows:

"SEC. 103. That the State of Pennsylvania is divided into three judicial districts, to be known as the eastern, middle, and western districts of Pennsylvania. The eastern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Berks, Bucks, Chester, Delaware, Lancaster, Lehigh, Montgomery, Northampton, Philadelphia, and Schuylkill. Terms of the district court shall be held at Philadelphia on the second Mondays in March and June, the third Monday in September, and the second Monday in December, each term to continue until the succeeding term begins. The middle district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Adams, Bradford, Cameron, Carbon, Center, Clinton, Columbia, Cumberland, Dauphin, Franklin, Fulton, Huntingdon, Juniata, Lackawanna, Lebanon, Luzerne, Lycoming, Mifflin, Monroe, Montour, Northumberland, Perry, Pike, Potter, Snyder, Sullivan, Susquehanna, Tioga, Union, Wayne, Wyoming, and York. Terms of the district court shall be held at Scranton on the second Monday in March and the third Monday in October, at Harrisburg on the first Mondays in May and December, at Sunbury on the second Monday in January, and at Williamsport on the first Monday in June. The clerk of the court for the middle district shall maintain an office, in charge of himself or a deputy, at Harrisburg, and civil suits instituted at that place shall be tried there, if either party resides nearest that place of holding court, unless by consent of parties they are removed to another place for trial. The western district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Allegheny, Armstrong, Beaver, Bedford, Blair, Butler, Cambria, Clarion, Clearfield, Crawford, Elk, Erie, Fayette, Forest, Greene, Indiana, Jefferson, Lawrence, McKean, Mercer, Somerset, Venango, Warren, Washington, and Westmoreland. Terms of the district court shall be held at Pittsburgh on the first Monday in May and the third Monday in October, and at Erie on the third Monday in July and the second Monday in January." [37 Stat. L. 730.]

See 1912 Supp. Fed. Stat. Annot. 182.

An Act To amend section eighty-one of the Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, and for other purposes.

[Act of March 3, 1913, ch. 122.]

[Iowa judicial districts.] That section eighty-one of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, be, and the same is hereby, amended so as to read as follows:

"SEC. 81. The State of Iowa is divided into two judicial districts, to be known as the northern and southern districts of Iowa. The northern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Allamakee, Dubuque, Buchanan, Clayton, Delaware, Fayette, Winneshiek, Howard, Chickasaw, Bremer, Blackhawk, Floyd, Mitchell, and Jackson, which shall constitute the eastern division of said district; also the territory embraced on the date last mentioned in the counties of Jones, Cedar, Linn, Johnson, Iowa, Benton, Tama, Grundy, and Hardin, which shall

constitute the Cedar Rapids division; also the territory embraced on the date last mentioned in the counties of Emmet, Palo Alto, Pocahontas, Calhoun, Carroll, Kossuth, Humboldt, Webster, Winnebago, Hancock, Wright, Hamilton, Worth, Cerro Gordo, Franklin, and Butler, which shall constitute the central division; also the territory embraced on the date last mentioned in the counties of Dickinson, Clay, Buena Vista, Sac, Osceola, O'Brien, Cherokee, Ida, Lyon, Sioux, Plymouth, Woodbury, and Monona, which shall constitute the western division. Terms of the district court for the eastern division shall be held at Dubuque on the fourth Tuesday in April and the first Tuesday in December, and at Waterloo on the second Tuesdays in May and September; for the Cedar Rapids division, at Cedar Rapids on the first Tuesday in April and the fourth Tuesday in September; for the central division at Fort Dodge on the second Tuesdays in June and November; and for the western division, at Sioux City on the fourth Tuesday in May and the third Tuesday in October. The southern district shall include the territory embraced on the first day of July, nineteen hundred and ten, in the counties of Louisa, Henry, Des Moines, Lee, and Van Buren, which shall constitute the eastern division of said district; also the territory embraced on the date last mentioned in the counties of Marshall, Story, Boone, Greene, Guthrie, Dallas, Polk, Jasper, Poweshiek, Marion, Warren, and Madison, which shall constitute the central division of said district; also the territory embraced on the date last mentioned in the counties of Crawford, Harrison, Shelby, Audubon, Cass, Pottawattamie, Mills, and Montgomery, which shall constitute the western division of said district; also the territory embraced on the date last mentioned in the counties of Adair, Adams, Clarke, Decatur, Fremont, Lucas, Page, Ringgold, Taylor, Union, and Wayne, which shall constitute the southern division of said district; also the territory embraced on the date last mentioned in the counties of Scott, Muscatine, Washington, and Clinton, which shall constitute the Davenport division of said district; also the territory embraced on the date last mentioned in the counties of Davis, Appanoose, Mahaska, Keokuk, Jefferson, Monroe, and Wapello, which shall constitute the Ottumwa division of said district. Terms of the district court for the eastern division shall be held at Keokuk on the second Tuesday in April and the third Tuesday in October; for the central division, at Des Moines on the second Tuesday in May and the third Tuesday in November; for the western division, at Council Bluffs on the second Tuesday in March and the third Tuesday in September; for the southern division, at Creston on the fourth Tuesday in March and the first Tuesday in November; for the Davenport division, at Davenport on the fourth Tuesday in April and the first Tuesday in October; and for the Ottumwa division, at Ottumwa on the first Monday after the fourth Tuesday in March, and the first Monday after the third Tuesday in October. The clerk of the court for said district shall maintain an office in charge of himself or a deputy at Davenport and at Ottumwa, for the transaction of the business of said divisions." [37 Stat. L. 734.]

See 1912 Supp. Fed. Stat. Annot. 168.

**An Act Restricting the issuance of interlocutory injunctions to suspend the enforcement of the statute of a State or of an order made by an administrative board or commission created by and acting under the statute of a State.**

[Act of March 4, 1913, ch. 160.]

[Judicial Code amended — interlocutory injunctions.] That section two hundred and sixty-six of the Act entitled "An Act to codify, revise, and amend



the laws relating to 'the judiciary,' approved March third, nineteen hundred and eleven, is hereby amended by inserting in line four, after the words "in the enforcement or execution of such statute," the words "or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State."

At the end of section two hundred and sixty-six, as so amended, add the following:

*"It is further provided,* That if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State to enforce such statute or order, accompanied by a stay in such State court, of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing and notice of ten days served upon the attorney general of the State that the suit in the State courts is not being prosecuted with diligence and good faith."

So that section two hundred and sixty-six as amended shall read as follows:

"SEC. 266. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: *Provided, however,* That one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: *Provided,* That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. It is further provided that if before the final hearing of such application a

suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the State, that the suit in the State courts is not being prosecuted with diligence and good faith." [37 Stat. L. 1013.]

For sec. 266 of the Judicial Code as originally enacted see 1912 Supp. Fed. Stat. Annot. 242.

**Scope of amendment.**—This amendment extends the procedure requiring three judges, to an application to enjoin an order made by an administrative board or commission, when such order is alleged in the application for the interlocutory injunction, to be violative of the Federal Constitution. *Louisville & N. R. Co. v. Railroad Commission of Alabama* (M. D. Ala. 1913) 208 Fed. 35, wherein the court said: "The suggestion of counsel is that the amendment left the statute still requiring that the application should be made upon the ground of the 'unconstitutionality of such statute' and does not in words make it apply to the unconstitutionality of an order made by a board or commission. The intention of Congress in enacting the statute must control in its interpretation if that intention can be ascertained by an examination of the amendment in connection with the section as it stood before the amendment. The section, before amendment, required a judge, when an application was made to him for an interlocutory injunction upon the ground of the 'unconstitutionality' of a statute, to call to his assistance two other judges to sit with him on the hearing of the application. The intention of the amendment was to extend the original statute so as to have it include 'an order made by an administrative board or commission' acting under and pursuant to the statute of a state."

**Effect of appeal on temporary restraining order.**—The three judges or a majority of them, may not, after refusing a temporary injunction and granting an appeal, continue a temporary restraining order theretofore issued until the appeal is decided. *Louisville & N. R. Co. v. Railroad Commission of Alabama* (M. D. Ala. 1913) 208 Fed. 35, wherein the court said: "The reasons which led

to the passage of the statutes now forming section 266 of the Judicial Code are well known, and are part of the judicial and political history of the country, and no comment on them is necessary. The legislation was intended to check and prevent a practice by which one judge, on ex parte hearings and affidavits, superseded acts of legislatures and commissions indefinitely, on the ground that they were unconstitutional. The purpose of the section should not be disregarded in construing it, or in the exercise of judicial discretion in deciding applications based on it. The purpose clearly is to restrict the issuance of interlocutory injunctions in a designated class of cases, and to prevent delays in the enforcement of certain statutes or orders of commissions. The section authorizes a single judge to receive the application for an interlocutory injunction, but not to grant it. He is required to call to his assistance two other judges 'to hear and determine the application.' The two other judges are called for no other purpose, and no other duty is imposed on them by the text of the section. The judge to whom the application is made may, to prevent irreparable loss or damage—and only for that purpose—grant a temporary restraining order; but such order is to remain in force 'only until the hearing and determination of the application for an interlocutory injunction.' When the two judges who are called to the assistance of the judge to whom the application is made sit with him, and hear and determine the case, and make an order granting or denying the interlocutory injunction, they have discharged the duty placed on them by the words of the statute. They have done what they were called to do, and what the statute authorizes them to be called for; that is, to the assistance of the judge to whom the application was made—to his assistance to hear and determine the application for an injunction."

An Act To amend section seventy-seven of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

[Act of March 4, 1913, ch. 167.]

[*Georgia northern judicial district.*] That section seventy-seven of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary—

ary," approved March third, nineteen hundred and eleven, be, and the same is hereby, amended as follows: After the following words in said section, to wit, "terms of the district court for northern division of said district shall be held at Atlanta on the second Monday in March and the first Monday in October," add the following:

and at Gainsville on the fourth Mondays in April and November, and it shall be the duty of the judge of said court to assign for trial at Gainsville such cases, both civil and criminal, as may in his judgment be most convenient to the parties to said cases and as may be in the interest of economical expenditures by the Government.

So that said sentence in said section seventy-seven when so amended will read as follows:

Terms of the district court for northern division of said district shall be held at Atlanta on the second Monday in March and the first Monday in October and at Gainsville on the fourth Mondays in April and November, and it shall be the duty of the judge to assign such cases, both civil and criminal, as may in his judgment be most convenient to the parties to said cases, and as may be in the interest of economical expenditures by the Government. [37 Stat. L. 1017.]

See 1912 Supp. Fed. Stat. Annot. 165.

**An Act To fix the times and places of holding district court for the district of Arizona.**

[Act of October 3, 1913, ch. 17.]

[SEC. 1.] [*Arizona judicial district.*] That the State of Arizona shall constitute one judicial district, to be known as the district of Arizona. [38 Stat. L. 203.]

SEC. 2. [*Terms.*] That terms of the district court shall be held in Tucson on the first Mondays in May and November; at Phoenix on the first Mondays in April and October; at Prescott on the first Mondays in March and September; and at Globe on the first Mondays in June and December. Causes, civil and criminal, may be transferred by the court or judge thereof from any of the aforesaid places where court shall be held in said district to any of the places hereinabove mentioned in said district when the convenience of the parties or the ends of justice would be promoted by the transfer; and any interlocutory order may be made by the court or judge thereof in any of the hereinabove mentioned places. [38 Stat. L. 203.]

**An Act To amend chapter one, section eighteen, of the Judicial Code.**

[Act of October 3, 1913, ch. 18.]

[*Judicial Code — service of district judge of another circuit in the second.*] That chapter one, section eighteen, of the Judicial Code be amended by adding thereto the following:

"Whenever it shall be certified by the senior circuit judge of the second circuit, or, in his absence, by the circuit justice of said circuit, that on account of the accumulation or urgency of business in any district court in said circuit it is impracticable to designate and appoint a sufficient number of district judges of other districts within said circuit to relieve such accumulation or

suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the State, that the suit in the State courts is not being prosecuted with diligence and good faith." [37 Stat. L. 1013.]

For sec. 266 of the Judicial Code as originally enacted see 1912 Supp. Fed. Stat. Annot. 242.

**Scope of amendment.**—This amendment extends the procedure requiring three judges, to an application to enjoin an order made by an administrative board or commission, when such order is alleged in the application for the interlocutory injunction, to be violative of the Federal Constitution. *Louisville & N. R. Co. v. Railroad Commission of Alabama* (M. D. Ala. 1913) 208 Fed. 35, wherein the court said: "The suggestion of counsel is that the amendment left the statute still requiring that the application should be made upon the ground of the 'unconstitutionality of such statute' and does not in words make it apply to the unconstitutionality of an order made by a board or commission. The intention of Congress in enacting the statute must control in its interpretation if that intention can be ascertained by an examination of the amendment in connection with the section as it stood before the amendment. The section, before amendment, required a judge, when an application was made to him for an interlocutory injunction upon the ground of the 'unconstitutionality' of a statute, to call to his assistance two other judges to sit with him on the hearing of the application. The intention of the amendment was to extend the original statute so as to have it include 'an order made by an administrative board or commission' acting under and pursuant to the statute of a state."

**Effect of appeal on temporary restraining order.**—The three judges or a majority of them, may not, after refusing a temporary injunction and granting an appeal, continue a temporary restraining order theretofore issued until the appeal is decided. *Louisville & N. R. Co. v. Railroad Commission of Alabama* (M. D. Ala. 1913) 208 Fed. 35, wherein the court said: "The reasons which led

to the passage of the statutes now forming section 266 of the Judicial Code are well known, and are part of the judicial and political history of the country, and no comment on them is necessary. The legislation was intended to check and prevent a practice by which one judge, on ex parte hearings and affidavits, superseded acts of legislatures and commissions indefinitely, on the ground that they were unconstitutional. The purpose of the section should not be disregarded in construing it, or in the exercise of judicial discretion in deciding applications based on it. The purpose clearly is to restrict the issuance of interlocutory injunctions in a designated class of cases, and to prevent delays in the enforcement of certain statutes or orders of commissions. The section authorizes a single judge to receive the application for an interlocutory injunction, but not to grant it. He is required to call to his assistance two other judges 'to hear and determine the application.' The two other judges are called for no other purpose, and no other duty is imposed on them by the text of the section. The judge to whom the application is made may, to prevent irreparable loss or damage—and only for that purpose—grant a temporary restraining order; but such order is to remain in force 'only until the hearing and determination of the application for an interlocutory injunction.' When the two judges who are called to the assistance of the judge to whom the application is made sit with him, and hear and determine the case, and make an order granting or denying the interlocutory injunction, they have discharged the duty placed on them by the words of the statute. They have done what they were called to do, and what the statute authorizes them to be called for; that is, to the assistance of the judge to whom the application was made—to his assistance to hear and determine the application' for an injunction."

An Act To amend section seventy-seven of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

[Act of March 4, 1913, ch. 167.]

[*Georgia northern judicial district.*] That section seventy-seven of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary—

ary," approved March third, nineteen hundred and eleven, be, and the same is hereby, amended as follows: After the following words in said section, to wit, "terms of the district court for northern division of said district shall be held at Atlanta on the second Monday in March and the first Monday in October," add the following:

and at Gainsville on the fourth Mondays in April and November, and it shall be the duty of the judge of said court to assign for trial at Gainsville such cases, both civil and criminal, as may in his judgment be most convenient to the parties to said cases and as may be in the interest of economical expenditures by the Government.

So that said sentence in said section seventy-seven when so amended will read as follows:

Terms of the district court for northern division of said district shall be held at Atlanta on the second Monday in March and the first Monday in October and at Gainsville on the fourth Mondays in April and November, and it shall be the duty of the judge to assign such cases, both civil and criminal, as may in his judgment be most convenient to the parties to said cases, and as may be in the interest of economical expenditures by the Government. [37 Stat. L. 1017.]

See 1912 Supp. Fed. Stat. Annot. 165.

**An Act To fix the times and places of holding district court for the district of Arizona.**

[Act of October 3, 1913, ch. 17.]

[SEC. 1.] [*Arizona judicial district.*] That the State of Arizona shall constitute one judicial district, to be known as the district of Arizona. [38 Stat. L. 203.]

SEC. 2. [*Terms.*] That terms of the district court shall be held in Tucson on the first Mondays in May and November; at Phoenix on the first Mondays in April and October; at Prescott on the first Mondays in March and September; and at Globe on the first Mondays in June and December. Causes, civil and criminal, may be transferred by the court or judge thereof from any of the aforesaid places where court shall be held in said district to any of the places hereinabove mentioned in said district when the convenience of the parties or the ends of justice would be promoted by the transfer; and any interlocutory order may be made by the court or judge thereof in any of the hereinabove mentioned places. [38 Stat. L. 203.]

**An Act To amend chapter one, section eighteen, of the Judicial Code.**

[Act of October 3, 1913, ch. 13.]

[*Judicial Code — service of district judge of another circuit in the second.*] That chapter one, section eighteen, of the Judicial Code be amended by adding thereto the following:

"Whenever it shall be certified by the senior circuit judge of the second circuit, or, in his absence, by the circuit justice of said circuit, that on account of the accumulation or urgency of business in any district court in said circuit it is impracticable to designate and appoint a sufficient number of district judges of other districts within said circuit to relieve such accumulation or

urgency of business, the Chief Justice may, if in his judgment the public interests so require, designate and appoint the judge of any district court in another circuit to hold a district court within the said second circuit, and to have and exercise within the district to which he is so assigned the same powers that are vested in the judge thereof: *Provided*, That such judge so designated and appointed shall have consented, in writing, to such designation and appointment: *And provided further*, That the senior circuit judge of the circuit within which such judge so designated and appointed resides shall certify, in writing, that the business of the district of such judge will not suffer thereby. Such appointment shall be filed in the clerk's office and entered on the minutes of the said district court, and a certified copy thereof, under the seal of the court, shall be transmitted by the clerk to the judge so designated and appointed. Each of the said district judges may, in the case of such appointment, hold separately, at the same time, a district court in such district, and discharge all of the judicial duties of the district judge therein." [38 Stat. L. 203.]

Sec. 18 of the Judicial Code as originally enacted is given in 1912 Supp. Fed. Stat. Annot. 137.

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[*Commerce Court abolished—jurisdiction to vest in district courts.*]  
 \* \* \* The Commerce Court, created and established by the Act entitled "An Act to create a Commerce Court and to amend the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, and for other purposes," approved June eighteenth, nineteen hundred and ten, is abolished from and after December thirty-first, nineteen hundred and thirteen, and the jurisdiction vested in said Commerce Court by said Act is transferred to and vested in the several district courts of the United States, and all Acts or parts of Acts in so far as they relate to the establishment of the Commerce Court are repealed. Nothing herein contained shall be deemed to affect the tenure of any of the judges now acting as circuit judges by appointment under the terms of said Act, but such judges shall continue to act under assignment, as in the said Act provided, as judges of the district courts and circuit courts of appeals; and in the event of and on the death, resignation, or removal from office of any of such judges, his office is hereby abolished and no successor to him shall be appointed.

The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term "destination" shall be construed as meaning final destination of such shipment.

The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this Act shall be the same as that heretofore prevailing in the Commerce Court. The orders, writs, and processes of the district

courts may in these cases run, be served, and be returnable anywhere in the United States; and the right of appeal from the district courts in such cases shall be the same as the right of appeal heretofore prevailing under existing law from the Commerce Court. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit: *Provided*, That in cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. A final judgment or decree of the district court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such case the notice required shall be served upon the defendants in the case and upon the attorney general of the State. All cases pending in the Commerce Court at the date of the passage of this Act shall be deemed pending in and be transferred forthwith to said district courts except cases which may previously have been submitted to that court for final decree and the latter to be transferred to the district courts if not decided by the Commerce Court before December first, nineteen hundred and thirteen, and all cases wherein injunctions or other orders or decrees, mandatory or otherwise, have been directed or entered prior to the

abolition of the said court shall be transferred forthwith to said district courts, which shall have jurisdiction to proceed therewith and to enforce said injunctions, orders, or decrees. Each of said cases and all the records, papers, and proceedings shall be transferred to the district court wherein it might have been filed at the time it was filed in the Commerce Court if this Act had then been in effect; and if it might have been filed in any one of two or more district courts it shall be transferred to that one of said district courts which may be designated by the petitioner or petitioners in said case, or, upon failure of said petitioners to act in the premises within thirty days after the passage of this Act, to such one of said district courts as may be designated by the judges of the Commerce Court. The judges of the Commerce Court shall have authority, and are hereby directed, to make any and all orders and to take any other action necessary to transfer as aforesaid the cases and all the records, papers, and proceedings then pending in the Commerce Court to said district courts. All administrative books, dockets, files, and all papers of the Commerce Court not transferred as part of the record of any particular case shall be lodged in the Department of Justice. All furniture, carpets, and other property of the Commerce Court is turned over to the Department of Justice and the Attorney General is authorized to supply such portion thereof as in his judgment may be proper and necessary to the United States Board of Mediation and Conciliation.

Any case hereafter remanded from the Supreme Court which, but for the passage of this Act, would have been remanded to the Commerce Court, shall be remanded to a district court, designated by the Supreme Court, wherein it might have been instituted at the time it was instituted in the Commerce Court if this Act had then been in effect, and thereafter such district court shall take all necessary and proper proceedings in such case in accordance with law and such mandate, order, or decree therein as may be made by said Supreme Court.

All laws or part of laws inconsistent with the foregoing provisions relating to the Commerce Court, are repealed. [*38 Stat. L. 219.*]

This is from the Deficiencies Appropriation  
Act of Oct. 22, 1913, ch. 32.  
For the Act of June 18, 1910, creating the

Commerce Court, which is hereby repealed,  
see 1912 Supp. Fed. Stat. Annot. 215.



## JURIES.

Act of May 27, 1908, Ch. 200, 233.

*Jurors and Witnesses — Fees and Mileage in Certain States — Double Fees Prohibited, 233.*

[*Jurors and witnesses — fees and mileage in certain states — double fees prohibited.*] \* \* \* Jurors and witnesses in the United States courts in the States of Wyoming, Montana, Washington, Oregon, California, Nevada, Idaho, Colorado, and Utah, and in the Territories of New Mexico and Arizona shall be entitled to receive for actual attendance at any court or courts and for the time necessarily occupied in going to and returning from the same, three dollars a day, and fifteen cents for each mile necessarily traveled over any stage line, or by private conveyance, and five cents for each mile by any railway or steamship in going to and returning from said courts: *Provided*, That no constructive or double mileage fees shall be allowed by reason of any person being summoned as both a witness and juror, or as a witness in two or more cases pending in the same court and triable at the same term thereof. [*35 Stat. L. 377.*]

This is from the Sundry Civil Appropriation Act of May 27, 1908, ch. 200.

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## JUSTICE, DEPARTMENT OF.

Act of August 23, 1912, Ch. 350, 233.

*Administrative Audit of Accounts, 233.*

[*Administrative audit of accounts.*] \* \* \* The administrative audit of all expenditures under the control of the Department of Justice shall hereafter be made in the Division of Accounts of that Department. [*37 Stat. L. 404.*]

This is from the Legislative, Executive, and Judicial Appropriation Act of Aug. 23, 1912, ch. 350.

## LABOR.

**Act of March 11, 1912, Ch. 57, 235.**

*Injuries to Government Employees — Provisions Extended to Bureau of Mines and Forest Service, 235.*

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*Sec. 1. Children's Bureau — Established in Department of Commerce and Labor, 235.*

*2. Chief — Appointment and Pay — Investigations — Restrictions — Publishing, 236.*

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*Sec. 1. Eight-hour Work Day — All Public Contracts to Provide for, by Laborers or Mechanics — Penalty to be Stipulated — Inspectors to Report Violations — Deduction from Contract — Appeals to Head of Department, etc. — Right of Action in Court of Claims, 236.*

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*5. Appropriation — Payments — Experts — Compensation Restricted, 240.*

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**Act of March 4, 1913, Ch. 141, 241.**

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*2. Assistant Secretary — Other Employees — Audit of Accounts, 242.*

*3. Bureaus, etc., Transferred, 242.*

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*9. Annual Report, etc. — Reports of Special Investigations, 244.*

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Sec. 1. *Arbitration of Controversies with Railway Employees, 244.*

2. *Board of Mediation and Conciliation, 245.*

3. *Boards of Arbitration Authorized, 245.*

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7. *Organization of Board—Proceedings, etc. 248.*

8. *Action in District Court—Disposition of Exceptions on Questions of Law—Appeals to Circuit Courts of Appeals—Restricted to Questions of Law—Finality of Judgment—Judgment by Agreement—No Compulsory Labor, 248.*

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10. *Pay, etc., of Members of Boards, 249.*

11. *Commissioner of Mediation and Conciliation—Other Members to Constitute Board of Mediation and Conciliation—Assistant Commissioner—Former Act Repealed—Pending Agreements, etc., Continued, 249.*

#### CROSS-REFERENCE.

*Injuries to Employees in Light House Service, see LIGHTS AND BUOYS.*

An Act To amend an Act entitled "An Act granting to certain employees of the United States the right to receive from it compensation for injuries sustained in the course of their employment," approved May thirtieth, nineteen hundred and eight.

[Act of March 11, 1912, ch. 57.]

[*Injuries to Government employees—provisions extended to Bureau of Mines and Forest Service.*] That the provisions of the Act approved May thirtieth, nineteen hundred and eight, entitled "An Act granting to certain employees of the United States the right to receive from it compensation for injuries sustained in the course of their employment," shall, in addition to the classes of persons therein designated, be held to apply to any artisan, laborer, or other employee engaged in any hazardous work under the Bureau of Mines or the Forestry Service of the United States: *Provided*, That this Act shall not be held to embrace any case arising prior to its passage. [37 Stat. L. 74.]

For the Act of May 30, 1908, see 1909 Supp. Fed. Stat. Annot. 330.

An Act To establish in the Department of Commerce and Labor a bureau to be known as the Children's Bureau.

[Act of April 9, 1912, ch. 73.]

[SEC. 1.] [*Children's Bureau—established in Department of Commerce and Labor.*] That there shall be established in the Department of Commerce and Labor a bureau to be known as the Children's Bureau. [37 Stat. L. 79.]

**SEC. 2.** [*Chief — appointment and pay — investigations — restrictions — publishing.*] That the said bureau shall be under the direction of a chief, to be appointed by the President, by and with the advice and consent of the Senate, and who shall receive an annual compensation of five thousand dollars. The said bureau shall investigate and report to said department upon all matters pertaining to the welfare of children and child life among all classes of our people, and shall especially investigate the questions of infant mortality, the birth rate, orphanage, juvenile courts, desertion, dangerous occupations, accidents and diseases of children, employment, legislation affecting children in the several States and Territories. But no official, or agent, or representative of said bureau shall, over the objection of the head of the family, enter any house used exclusively as a family residence. The chief of said bureau may from time to time publish the results of these investigations in such manner and to such extent as may be prescribed by the Secretary of Commerce and Labor. [37 Stat. L. 79.]

**SEC. 3.** [*Office force.*] That there shall be in said bureau, until otherwise provided for by law, an assistant chief, to be appointed by the Secretary of Commerce and Labor, who shall receive an annual compensation of two thousand four hundred dollars; one private secretary to the chief of the bureau, who shall receive an annual compensation of one thousand five hundred dollars; one statistical expert, at two thousand dollars; two clerks of class four; two clerks of class three; one clerk of class two; one clerk of class one; one clerk, at one thousand dollars; one copyist, at nine hundred dollars; one special agent, at one thousand four hundred dollars; one special agent, at one thousand two hundred dollars, and one messenger at eight hundred and forty dollars. [37 Stat. L. 80.]

**SEC. 4.** [*Rent of quarters.*] That the Secretary of Commerce and Labor is hereby directed to furnish sufficient quarters for the work of this bureau at an annual rental not to exceed two thousand dollars. [37 Stat. L. 80.]

**SEC. 5.** [*In effect.*] That this Act shall take effect and be in force from and after its passage. [37 Stat. L. 80.]

**An Act Limiting the hours of daily service of laborers and mechanics employed upon work done for the United States, or for any Territory, or for the District of Columbia, and for other purposes.**

[Act of June 19, 1912, ch. 174.]

[**SEC. 1.**] [*Eight-hour work day — all public contracts to provide for, by laborers or mechanics — penalty to be stipulated — inspectors to report violations — deduction from contract — appeals to head of department, etc. — right of action in Court of Claims.*] That every contract hereafter made to which the United States, any Territory, or the District of Columbia is a party, and every such contract made for or on behalf of the United States, or any Territory, or said District, which may require or involve the employment of laborers or mechanics shall contain a provision that no laborer or mechanic doing any part of the work contemplated by the contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work; and every such contract shall stipulate a penalty for each violation of such provision in such contract of five dollars for

each laborer or mechanic for every calendar day in which he shall be required or permitted to labor more than eight hours upon said work; and any officer or person designated as inspector of the work to be performed under any such contract, or to aid in enforcing the fulfillment thereof, shall, upon observation or investigation, forthwith report to the proper officer of the United States, or of any Territory, or of the District of Columbia, all violations of the provisions of this Act directed to be made in every such contract, together with the name of each laborer or mechanic who has been required or permitted to labor in violation of such stipulation and the day of such violation, and the amount of the penalties imposed according to the stipulation in any such contract shall be directed to be withheld for the use and benefit of the United States, the District of Columbia, or the Territory contracting by the officer or person whose duty it shall be to approve the payment of the moneys due under such contract, whether the violation of the provisions of such contract is by the contractor or any subcontractor. Any contractor or subcontractor aggrieved by the withholding of any penalty as hereinbefore provided shall have the right within six months thereafter to appeal to the head of the department making the contract on behalf of the United States or the Territory, and in the case of a contract made by the District of Columbia to the Commissioners thereof, who shall have power to review the action imposing the penalty, and in all such appeals from such final order whereby a contractor or subcontractor may be aggrieved by the imposition of the penalty hereinbefore provided such contractor or subcontractor may within six months after decision by such head of a department or the Commissioners of the District of Columbia file a claim in the Court of Claims, which shall have jurisdiction to hear and decide the matter in like manner as in other cases before said court. [37 Stat. L. 137.]

SEC. 2. [*Contracts excepted — all classes of contract work included — waiver in time of war — Isthmian Canal exceptions — emergencies, etc. — eight-hour law not affected.*] That nothing in this Act shall apply to contracts for transportation by land or water, or for the transmission of intelligence, or for the purchase of supplies by the Government, whether manufactured to conform to particular specifications or not, or for such materials or articles as may usually be bought in open market, except armor and armor plate, whether made to conform to particular specifications or not, or to the construction or repair of levees or revetments necessary for protection against floods or overflows on the navigable waters of the United States: *Provided*, That all classes of work which have been, are now, or may hereafter be performed by the Government shall, when done by contract, by individuals, firms, or corporations for or on behalf of the United States or any of the Territories or the District of Columbia, be performed in accordance with the terms and provisions of section one of this Act. The President, by Executive order, may waive the provisions and stipulations in this Act as to any specific contract or contracts during time of war or a time when war is imminent, and until January first, nineteen hundred and fifteen, as to any contract or contracts entered into in connection with the construction of the Isthmian Canal. No penalties shall be imposed for any violation of such provision in such contract due to any extraordinary events or conditions of manufacture, or to any emergency caused by fire, famine, or flood, by danger to life or to property, or by other extraordinary event or condition on account of which the President shall subsequently declare the violation to have been excusable. Nothing in this Act shall be construed to repeal or modify the Act entitled "An Act relating to the limitation of the hours of daily service

of laborers and mechanics employed upon the public works of the United States and of the District of Columbia" being chapter three hundred and fifty-two of the laws of the Fifty-second Congress, approved August first, eighteen hundred and ninety-two, as modified by the Acts of Congress approved February twenty-seventh, nineteen hundred and six, and June thirtieth, nineteen hundred and six, or apply to contracts which have been or may be entered into under the provisions of appropriation Acts approved prior to the passage of this Act. [37 Stat. L. 138.]

For the Act of Aug. 1, 1892, see 4 Fed. Stat. Annot. 779. For the provisions from the Acts of June 30, 1906, and Feb. 27, 1906, above referred to, see 1909 Supp. Fed. Stat. Annot. 614.

SEC. 3. [In effect January 1, 1913.] That this Act shall become effective and be in force on and after January first, nineteen hundred and thirteen. [37 Stat. L. 138.]

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[Investigating abroad cost of production of dutiable articles, etc., transferred from Labor Bureau.] \* \* \* Those certain duties of the Department of Labor, or Bureau of Labor, contained in section seven of the Act approved June thirteenth, eighteen hundred and eighty-eight, that established the same, which especially charged it "to ascertain, at as early a date as possible, and whenever industrial changes shall make it essential, the cost of producing articles at the time dutiable in the United States, in leading countries where such articles are produced, by fully specified units of production, and under a classification showing the different elements of cost, or approximate cost, of such articles of production, including the wages paid in such industries per day, week, month, or year, or by the piece; and hours employed per day; and the profits of manufacturers and producers of such articles; and the comparative cost of living, and the kind of living; what articles are controlled by trusts or other combinations of capital, business operations, or labor, and what effect said trusts, or other combinations of capital, business operations, or labor have on production and prices," are hereby transferred to and shall hereafter be discharged by the Bureau of Foreign and Domestic Commerce, and it shall be also the duty of said Bureau of Foreign and Domestic Commerce to make such special investigation and report on particular subjects when required to do so by the President or either House of Congress. [37 Stat. L. 407.]

This is from the Legislative, Executive, and Judicial Appropriation Act of Aug. 23, 1912, ch. 350. For sec. 7 of the Act of June 13, 1888, see 4 Fed. Stat. Annot. 782.

#### **An Act To create a Commission on Industrial Relations.**

[Act of August 23, 1912, ch. 351.]

[SEC. 1.] [Commission on Industrial Relations — composition.] That a commission is hereby created to be called the Commission on Industrial Relations. Said commission shall be composed of nine persons, to be appointed by the President of the United States, by and with the advice and consent of the Senate, not less than three of whom shall be employers of labor and not less than three of whom shall be representatives of organized labor. The Department of Commerce and Labor is authorized to cooperate with said com-

mission in any manner and to whatever extent the Secretary of Commerce and Labor may approve. [37 Stat. L. 415.]

SEC. 2. [*Compensation, etc. — general authority.*] That the members of this commission shall be paid actual traveling and other necessary expenses and in addition a compensation of ten dollars per diem while actually engaged on the work of the commission and while going to or returning from such work. The commission is authorized as a whole, or by subcommittees of the commission, duly appointed, to hold sittings and public hearings anywhere in the United States, to send for persons and papers, to administer oaths, to summon and compel the attendance of witnesses and to compel testimony, and to employ such secretaries, experts, stenographers, and other assistants as shall be necessary to carry out the purposes for which such commission is created, and to rent such offices, to purchase such books, stationery, and other supplies, and to have such printing and binding done, as may be necessary to carry out the purposes for which such commission is created, and to authorize its members or its employees to travel in or outside the United States on the business of the commission. [37 Stat. L. 415.]

SEC. 3. [*Reports and recommendations to Congress.*] That said commission may report to the Congress its findings and recommendations and submit the testimony taken from time to time, and shall make a final report accompanied by the testimony not previously submitted not later than three years after the date of the approval of this Act, at which time the term of this commission shall expire, unless it shall previously have made final report, and in the latter case the term of the commission shall expire with the making of its final report; and the commission shall make at least one report to the Congress within the first year of its appointment and a second report within the second year of its appointment. [37 Stat. L. 415.]

SEC. 4. [*Inquiries into labor conditions of principal industries, etc. — associations, etc. — labor disputes — Asiatic entry — causes of industrial dissatisfaction.*] That the commission shall inquire into the general condition of labor in the principal industries of the United States including agriculture, and especially in those which are carried on in corporate forms; into existing relations between employers and employees; into the effect of industrial conditions on public welfare and into the rights and powers of the community to deal therewith; into the conditions of sanitation and safety of employees and the provisions for protecting the life, limb, and health of the employees; into the growth of associations of employers and of wage earners and the effect of such associations upon the relations between employers and employees; into the extent and results of methods of collective bargaining; into any methods which have been tried in any State or in foreign countries for maintaining mutually satisfactory relations between employees and employers; into methods for avoiding or adjusting labor disputes through peaceful and conciliatory mediation and negotiations; into the scope, methods, and resources of existing bureaus of labor and into possible ways of increasing their usefulness; into the question of smuggling or other illegal entry of Asiatics into the United States or its insular possessions, and of the methods by which such Asiatics have gained and are gaining such admission, and shall report to Congress as speedily as possible with such recommendation as said commission may think proper to prevent such smuggling and illegal entry. The commission shall seek to discover the

underlying causes of dissatisfaction in the industrial situation and report its conclusions thereon. [37 Stat. L. 416.]

SEC. 5. [*Appropriation — payments — experts — compensation restricted.*] That the sum of one hundred thousand dollars is hereby appropriated out of any money in the Treasury of the United States not otherwise appropriated for the use of the commission for the fiscal year ending June thirtieth, nineteen hundred and thirteen: *Provided*, That no portion of this money shall be paid except upon the order of said commission, signed by the chairman thereof: *Provided*, That the commission may expend not to exceed five thousand dollars per annum for the employment of experts at such rate of compensation as may be fixed by the commission but no other person employed hereunder by the commission, except stenographers temporarily employed for the purpose of taking testimony, shall be paid compensation at a rate in excess of three thousand dollars per annum. [37 Stat. L. 416.]

An Act Relating to the limitation of the hours of daily service of laborers and mechanics employed upon a public work of the United States and of the District of Columbia, and of all persons employed in constructing, maintaining, or improving a river or harbor of the United States and of the District of Columbia.

[Act of March 3, 1913, ch. 106.]

[*Hours of labor on public work.*] That sections one, two, and three of an Act entitled "An Act relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia" be amended to read as follows:

"SECTION 1. That the service and employment of all laborers and mechanics who are now, or may hereafter, be employed by the Government of the United States or the District of Columbia, or by any contractor or subcontractor, upon a public work of the United States or of the District of Columbia, and of all persons who are now, or may hereafter be, employed by the Government of the United States or the District of Columbia, or any contractor or subcontractor, to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, is hereby limited and restricted to eight hours in any one calendar day; and it shall be unlawful for any officer of the United States Government or of the District of Columbia, or any such contractor or subcontractor whose duty it shall be to employ, direct, or control the services of such laborers or mechanics or of such persons employed to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, to require or permit any such laborer or mechanic or any such person employed to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, to work more than eight hours in any calendar day, except in case of extraordinary emergency: *Provided*, That nothing in this Act shall apply or be construed to apply to persons employed in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia while not directly operating dredging or rock excavating machinery or tools, nor to persons engaged in construction or repair of levees or revetments necessary for protection against floods or overflows on the navigable rivers of the United States.



**"VIOLATION OF ACT BY OFFICER OR CONTRACTOR PUNISHABLE.**

"SEC. 2. That any officer or agent of the Government of the United States or of the District of Columbia, or any contractor or subcontractor whose duty it shall be to employ, direct, or control any laborer or mechanic employed upon a public work of the United States or of the District of Columbia, or any person employed to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, who shall intentionally violate any provision of this Act, shall be deemed guilty of a misdemeanor, and for each and every such offense shall, upon conviction, be punished by a fine not to exceed one thousand dollars, or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court having jurisdiction thereof.

**"EXISTING CONTRACTS NOT AFFECTED BY ACT.**

"SEC. 3. That the provisions of this Act shall not be so construed as to in any manner apply to or affect contractors or subcontractors, or to limit the hours of daily service of laborers or mechanics engaged upon a public work of the United States or of the District of Columbia, or persons employed to perform services similar to those of laborers and mechanics in connection with dredging or rock excavation in any river or harbor of the United States or of the District of Columbia, for which contracts have been entered into prior to the passing of this Act or may be entered into under the provisions of appropriation Acts approved prior to the passage of this Act."

SEC. 4. That this Act shall become effective and be in force on and after March first, nineteen hundred and thirteen. [*37 Stat. L. 726.*]

For the Act here amended see 4 Fed. Stat. Annot. 779.

**An Act To create a Department of Labor.**

[*Act of March 4, 1913, ch. 141.*]

[SEC. 1.] [*Department of Labor created.*] That there is hereby created an executive department in the Government to be called the Department of Labor, with a Secretary of Labor, who shall be the head thereof, to be appointed by the President, by and with the advice and consent of the Senate; and who shall receive a salary of twelve thousand dollars per annum, and whose tenure of office shall be like that of the heads of the other executive departments; and section one hundred and fifty-eight of the Revised Statutes is hereby amended to include such department, and the provisions of title four of the Revised Statutes, including all amendments thereto, are hereby made applicable to said department; and the Department of Commerce and Labor shall hereafter be called the Department of Commerce, and the Secretary thereof shall be called the Secretary of Commerce, and the Act creating the said Department of Commerce and Labor is hereby amended accordingly. The purpose of the Department of Labor shall be to foster, promote, and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment. The said Secretary shall cause a seal of office to be made for the said department of such device as the

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President shall approve and judicial notice shall be taken of the said seal. [37 Stat. L. 736.]

SEC. 2. [*Assistant Secretary — other employees — audit of accounts.*] That there shall be in said department an Assistant Secretary of Labor, to be appointed by the President, who shall receive a salary of five thousand dollars a year. He shall perform such duties as shall be prescribed by the Secretary or required by law. There shall also be one chief clerk and a disbursing clerk, and such other clerical assistants, inspectors, and special agents as may from time to time be provided for by Congress. The Auditor for the State and Other Departments shall receive and examine all accounts of salaries and incidental expenses of the office of the Secretary of Labor and of all bureaus and offices under his direction, and all accounts relating to all other business within the jurisdiction of the Department of Labor, and certify the balances arising thereon to the division of bookkeeping and warrants and send forthwith a copy of each certificate to the Secretary of Labor. [37 Stat. L. 736.]

SEC. 3. [*Bureaus, etc., transferred.*] That the following-named officers, bureaus, divisions, and branches of the public service now and heretofore under the jurisdiction of the Department of Commerce and Labor, and all that pertains to the same, known as the Commissioner General of Immigration, the Commissioners of Immigration, the Bureau of Immigration and Naturalization, the Division of Information, the Division of Naturalization, and the Immigration Service at Large, the Bureau of Labor, the Children's Bureau, and the Commissioner of Labor, be, and the same hereby are, transferred from the Department of Commerce and Labor to the Department of Labor, and the same shall hereafter remain under the jurisdiction and supervision of the last-named department. The Bureau of Immigration and Naturalization is hereby divided into two bureaus, to be known hereafter as the Bureau of Immigration and the Bureau of Naturalization, and the titles Chief Division of Naturalization and Assistant Chief shall be Commissioner of Naturalization and Deputy Commissioner of Naturalization. The Commissioner of Naturalization or, in his absence, the Deputy Commissioner of Naturalization, shall be the administrative officer in charge of the Bureau of Naturalization and of the administration of the naturalization laws under the immediate direction of the Secretary of Labor, to whom he shall report directly upon all naturalization matters annually and as otherwise required, and the appointments of these two officers shall be made in the same manner as appointments to competitive classified civil-service positions. The Bureau of Labor shall hereafter be known as the Bureau of Labor Statistics, and the Commissioner of the Bureau of Labor shall hereafter be known as the Commissioner of Labor Statistics; and all the powers and duties heretofore possessed by the Commissioner of Labor shall be retained and exercised by the Commissioner of Labor Statistics; and the administration of the Act of May thirtieth, nineteen hundred and eight, granting to certain employees of the United States the right to receive from it compensation for injuries sustained in the course of their employment. [37 Stat. L. 737.]

SEC. 4. [*Collation, etc., of labor conditions, products, etc.*] That the Bureau of Labor Statistics, under the direction of the Secretary of Labor, shall collect, collate, and report at least once each year, or oftener if necessary, full and complete statistics of the conditions of labor and the products and distribution of

the products of the same, and to this end said Secretary shall have power to employ any or either of the bureaus provided for his department and to rearrange such statistical work and to distribute or consolidate the same as may be deemed desirable in the public interest; and said Secretary shall also have authority to call upon other departments of the Government for statistical data and results obtained by them; and said Secretary of Labor may collate, arrange, and publish such statistical information so obtained in such manner as to him may seem wise. [37 Stat. L. 737.]

SEC. 5. [*Records, furniture, etc., to be transferred with bureaus.*] That the official records and papers now on file in and pertaining exclusively to the business of any bureau, office, department, or branch of the public service in this Act transferred to the Department of Labor, together with the furniture now in use in such bureau, office, department, or branch of the public service, shall be, and hereby are, transferred to the Department of Labor. [37 Stat. L. 737.]

SEC. 6. [*Secretary to have charge of buildings, property, etc. — officers, clerks, etc., transferred — duties, etc., transferred.*] That the Secretary of Labor shall have charge in the buildings or premises occupied by or appropriated to the Department of Labor, of the library, furniture, fixtures, records, and other property pertaining to it or hereafter acquired for use in its business; he shall be allowed to expend for periodicals and the purposes of the library and for rental of appropriate quarters for the accommodation of the Department of Labor within the District of Columbia, and for all other incidental expenses, such sums as Congress may provide from time to time: *Provided, however,* That where any office, bureau, or branch of the public service transferred to the Department of Labor by this Act is occupying rented buildings or premises, it may still continue to do so until other suitable quarters are provided for its use: *And provided further,* That all officers, clerks, and employees now employed in any of the bureaus, offices, departments, or branches of the public service in this Act transferred to the Department of Labor are each and all hereby transferred to said department at their present grades and salaries, except where otherwise provided in this Act: *And provided further,* That all laws prescribing the work and defining the duties of the several bureaus, offices, departments, or branches of the public service by this Act transferred to and made a part of the Department of Labor shall, so far as the same are not in conflict with the provisions of this Act, remain in full force and effect, to be executed under the direction of the Secretary of Labor. [37 Stat. L. 738.]

SEC. 7. [*Solicitor authorized.*] That there shall be a solicitor of the Department of Justice for the Department of Labor, whose salary shall be five thousand dollars per annum. [37 Stat. L. 738.]

SEC. 8. [*Conciliation of labor disputes.*] That the Secretary of Labor shall have power to act as mediator and to appoint commissioners of conciliation in labor disputes whenever in his judgment the interests of industrial peace may require it to be done; and all duties performed and all power and authority now possessed or exercised by the head of any executive department in and over any bureau, office, officer, board, branch, or division of the public service by this Act transferred to the Department of Labor, or any business arising therefrom or pertaining thereto, or in relation to the duties performed by and authority conferred by law upon such bureau, officer, office board, branch, or division

of the public service, whether of an appellate or revisory character or otherwise, shall hereafter be vested in and exercised by the head of the said Department of Labor. [37 Stat. L. 738.]

SEC. 9. [*Annual report, etc. — reports of special investigations.*] That the Secretary of Labor shall annually, at the close of each fiscal year, make a report in writing to Congress, giving an account of all moneys received and disbursed by him and his department and describing the work done by the department. He shall also, from time to time, make such special investigations and reports as he may be required to do by the President, or by Congress, or which he himself may deem necessary. [37 Stat. L. 738.]

SEC. 10. [*Report on coördination of duties, etc., with present bureaus, etc.*] That the Secretary of Labor shall investigate and report to Congress a plan of coordination of the activities, duties, and powers of the office of the Secretary of Labor with the activities, duties, and powers of the present bureaus, commissions, and departments, so far as they relate to labor and its conditions, in order to harmonize and unify such activities, duties, and powers, with a view to further legislation to further define the duties and powers of such Department of Labor. [37 Stat. L. 738.]

SEC. 11. [*In effect.*] That this Act shall take effect March fourth, nineteen hundred and thirteen, and all Acts or parts of Acts inconsistent with this Act are hereby repealed. [37 Stat. L. 738.]

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[*Annual estimates to be submitted.*] \* \* \* The Secretary of Labor shall submit to Congress, for the fiscal year nineteen hundred and fifteen, and annually thereafter, estimates in detail for all personal services and for all general and miscellaneous expenses for the Department of Labor. [38 Stat. L. 2.]

This is from the Legislative, Executive, and Judicial Appropriation Act of May 1, 1913, ch. 1.

**An Act Providing for mediation, conciliation, and arbitration in controversies between certain employers and their employees.**

[Act of July 15, 1913, ch. 6.]

[SEC. 1.] [*Arbitration of controversies with railway employees.*] That the provisions of this Act shall apply to any common carrier or carriers and their officers, agents, and employees, except masters of vessels and seamen, as defined in section forty-six hundred and twelve, Revised Statutes of the United States, engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, for a continuous carriage or shipment from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States.

The term "railroad" as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a

contract, agreement, or lease; and the term "transportation" shall include all instrumentalities of shipment or carriage.

The term "employees" as used in this Act shall include all persons actually engaged in any capacity in train operation or train service of any description, and notwithstanding that the cars upon or in which they are employed may be held and operated by the carrier under lease or other contract: *Provided, however,* That this Act shall not be held to apply to employees of street railroads and shall apply only to employees engaged in railroad train service. In every such case the carrier shall be responsible for the acts and defaults of such employees in the same manner and to the same extent as if said cars were owned by it and said employees directly employed by it, and any provisions to the contrary of any such lease or other contract shall be binding only as between the parties thereto and shall not affect the obligations of said carrier either to the public or to the private parties concerned.

A common carrier subject to the provisions of this Act is hereinafter referred to as an "employer," and the employees of one or more of such carriers are hereinafter referred to as "employees." [38 Stat. L. 103.]

For R. S. sec. 4612, see 6 Fed. Stat. Annot. 930.

SEC. 2. [*Board of Mediation and Conciliation.*] That whenever a controversy concerning wages, hours of labor, or conditions of employment shall arise between an employer or employers and employees subject to this Act interrupting or threatening to interrupt the business of said employer or employers to the serious detriment of the public interest, either party to such controversy may apply to the Board of Mediation and Conciliation created by this Act and invoke its services for the purpose of bringing about an amicable adjustment of the controversy; and upon the request of either party the said board shall with all practicable expedition put itself in communication with the parties to such controversy and shall use its best efforts, by mediation and conciliation, to bring them to an agreement; and if such efforts to bring about an amicable adjustment through mediation and conciliation shall be unsuccessful, the said board shall at once endeavor to induce the parties to submit their controversy to arbitration in accordance with the provisions of this Act.

In any case in which an interruption of traffic is imminent and fraught with serious detriment to the public interest, the Board of Mediation and Conciliation may, if in its judgment such action seem desirable, proffer its services to the respective parties to the controversy.

In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this Act either party to the said agreement may apply to the Board of Mediation and Conciliation for an expression of opinion from such board as to the meaning or application of such agreement and the said board shall upon receipt of such request give its opinion as soon as may be practicable. [38 Stat. L. 104.]

SEC. 3. [*Boards of arbitration authorized.*] That whenever a controversy shall arise between an employer or employers and employees subject to this Act, which can not be settled through mediation and conciliation in the manner provided in the preceding section, such controversy may be submitted to the arbitration of a board of six, or, if the parties to the controversy prefer so to stipulate, to a board of three persons, which board shall be chosen in the following manner: In the case of a board of three, the employer or employers and the employees, parties respectively to the agreement to arbitrate, shall

each name one arbitrator; and the two arbitrators thus chosen shall select the third arbitrator; but in the event of their failure to name the third arbitrator within five days after their first meeting, such third arbitrator shall be named by the Board of Mediation and Conciliation. In the case of a board of six, the employer or employers and the employees, parties respectively to the agreement to arbitrate, shall each name two arbitrators, and the four arbitrators thus chosen shall, by a majority vote, select the remaining two arbitrators; but in the event of their failure to name the two arbitrators within fifteen days after their first meeting the said two arbitrators, or as many of them as have not been named, shall be named by the Board of Mediation and Conciliation.

In the event that the employees engaged in any given controversy are not members of a labor organization, such employees may select a committee which shall have the right to name the arbitrator, or the arbitrators, who are to be named by the employees as provided above in this section. [38 Stat. L. 104.]

SEC. 4. [*Requirements of agreement to arbitrate.*] That the agreement to arbitrate—

First. Shall be in writing;

Second. Shall stipulate that the arbitration is had under the provisions of this Act;

Third. Shall state whether the board of arbitration is to consist of three or six members;

Fourth. Shall be signed by duly accredited representatives of the employer or employers and of the employees;

Fifth. Shall state specifically the questions to be submitted to the said board for decision;

Sixth. Shall stipulate that a majority of said board shall be competent to make a valid and binding award;

Seventh. Shall fix a period from the date of the appointment of the arbitrator or arbitrators necessary to complete the board, as provided for in the agreement, within which the said board shall commence its hearings;

Eighth. Shall fix a period from the beginning of the hearings within which the said board shall make and file its award: *Provided*, That this period shall be thirty days unless a different period be agreed to;

Ninth. Shall provide for the date from which the award shall become effective and shall fix the period during which the said award shall continue in force;

Tenth. Shall provide that the respective parties to the award will each faithfully execute the same;

Eleventh. Shall provide that the award and the papers and proceedings, including the testimony relating thereto, certified under the hands of the arbitrators, and which shall have the force and effect of a bill of exceptions, shall be filed in the clerk's office of the district court of the United States for the district wherein the controversy arises or the arbitration is entered into, and shall be final and conclusive upon the parties to the agreement unless set aside for error of law apparent on the record;

Twelfth. May also provide that any difference arising as to the meaning or the application of the provisions of an award made by a board of arbitration shall be referred back to the same board or to a subcommittee of such board for a ruling, which ruling shall have the same force and effect as the original award; and if any member of the original board is unable or unwilling to serve another arbitrator shall be named in the same manner as such original member was named. [38 Stat. L. 105.]

1 SEC. 5. [*Authority of arbitrators to secure testimony, etc.*] That for the purposes of this Act the arbitrators herein provided for, or either of them, shall have power to administer oaths and affirmations, sign subpoenas, require the attendance and testimony of witnesses, and the production of such books, papers, contracts, agreements, and documents material to a just determination of the matters under investigation as may be ordered by the court; and may invoke the aid of the United States courts to compel witnesses to attend and testify and to produce such books, papers, contracts, agreements, and documents to the same extent and under the same conditions and penalties as is provided for in the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, and the amendments thereto. [38 Stat. L. 106.]

See the title INTERSTATE COMMERCE, vol. 3 Fed. Stat. Annot. and in the various supplements.

SEC. 6. [*Acknowledgment and filing of agreement — notification to arbitrators — selection to complete board — reconvening of board.*] That every agreement of arbitration under this Act shall be acknowledged by the parties thereto before a notary public or a clerk of the district or the circuit court of appeals of the United States, or before a member of the Board of Mediation and Conciliation, the members of which are hereby authorized to take such acknowledgments; and when so acknowledged shall be delivered to a member of said board or transmitted to said board to be filed in its office.

When such agreement of arbitration has been filed with the said board, or one of its members, and when the said board, or a member thereof, has been furnished the names of the arbitrators chosen by the respective parties to the controversy, the board, or a member thereof, shall cause a notice in writing to be served upon the said arbitrators, notifying them of their appointment, requesting them to meet promptly to name the remaining arbitrator or arbitrators necessary to complete the board, and advising them of the period within which, as provided in the agreement of arbitration, they are empowered to name such arbitrator or arbitrators.

When the arbitrators selected by the respective parties have agreed upon the remaining arbitrator or arbitrators, they shall notify the Board of Mediation and Conciliation; and in the event of their failure to agree upon any or upon all of the necessary arbitrators within the period fixed by this Act they shall, at the expiration of such period, notify the Board of Mediation and Conciliation of the arbitrators selected, if any, or of their failure to make or to complete such selection.

If the parties to an arbitration desire the reconvening of a board to pass upon any controversy arising over the meaning or application of an award, they shall jointly so notify the Board of Mediation and Conciliation, and shall state in such written notice the question or questions to be submitted to such reconvened board. The Board of Mediation and Conciliation shall thereupon promptly communicate with the members of the board of arbitration or a subcommittee of such board appointed for such purpose pursuant to the provisions of the agreement of arbitration, and arrange for the reconvening of said board or subcommittee, and shall notify the respective parties to the controversy of the time and place at which the board will meet for hearings upon the matters in controversy to be submitted to it. [38 Stat. L. 106.]

SEC. 7. [*Organization of board — proceedings, etc.*] That the board of arbitration shall organize and select its own chairman and make all necessary rules for conducting its hearings; but in its award or awards the said board shall confine itself to findings or recommendations as to the questions specifically submitted to it or matters directly bearing thereon. All testimony before said board shall be given under oath or affirmation, and any member of the board of arbitration shall have the power to administer oaths or affirmations. It may employ such assistants as may be necessary in carrying on its work. It shall, whenever practicable, be supplied with suitable quarters in any Federal building located at its place of meeting or at any place where the board may adjourn for its deliberations. The board of arbitration shall furnish a certified copy of its awards to the respective parties to the controversy, and shall transmit the original, together with the papers and proceedings and a transcript of the testimony taken at the hearings, certified under the hands of the arbitrators, to the clerk of the district court of the United States for the district wherein the controversy arose or the arbitration is entered into, to be filed in said clerk's office as provided in paragraph eleven of section four of this Act. And said board shall also furnish a certified copy of its award, and the papers and proceedings, including the testimony relating thereto, to the Board of Mediation and Conciliation, to be filed in its office.

The United States Commerce Court, the Interstate Commerce Commission, and the Bureau of Labor Statistics are hereby authorized to turn over to the Board of Mediation and Conciliation upon its request any papers and documents heretofore filed with them and bearing upon mediation or arbitration proceedings held under the provisions of the Act approved June first, eighteen hundred and ninety-eight, providing for mediation and arbitration. [38 Stat. L. 106.]

SEC. 8. [*Action in district court — disposition of exceptions on questions of law — appeals to circuit court of appeals — restricted to questions of law — finality of judgment — judgment by agreement — no compulsory labor.*] That the award, being filed in the clerk's office of a district court of the United States as hereinbefore provided, shall go into practical operation, and judgment shall be entered thereon accordingly at the expiration of ten days from such filing, unless within such ten days either party shall file exceptions thereto for matter of law apparent upon the record, in which case said award shall go into practical operation, and judgment be entered accordingly, when such exceptions shall have been finally disposed of either by said district court or on appeal therefrom.

At the expiration of ten days from the decision of the district court upon exceptions taken to said award as aforesaid judgment shall be entered in accordance with said decision, unless during said ten days either party shall appeal therefrom to the circuit court of appeals. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said exceptions and to be decided.

The determination of said circuit court of appeals upon said questions shall be final, and, being certified by the clerk thereof to said district court, judgment pursuant thereto shall thereupon be entered by said district court.

If exceptions to an award are finally sustained, judgment shall be entered setting aside the award in whole or in part; but in such case the parties may agree upon a judgment to be entered disposing of the subject matter of the



controversy, which judgment when entered shall have the same force and effect as judgment entered upon an award.

Nothing in this Act contained shall be construed to require an employee to render personal service without his consent, and no injunction or other legal process shall be issued which shall compel the performance by any employee against his will of a contract for personal labor or service. [38 Stat. L. 107.]

SEC. 9. [*Rights of employees under Federal court receivers — restriction on reducing wages.*] That whenever receivers appointed by a Federal court are in the possession and control of the business of employers covered by this Act the employees of such employers shall have the right to be heard through their representatives in such court upon all questions affecting the terms and conditions of their employment; and no reduction of wages shall be made by such receivers without the authority of the court therefor, after notice to such employees, said notice to be given not less than twenty days before the hearing upon the receivers' petition or application, and to be posted upon all customary bulletin boards along or upon the railway or in the customary places on the premises of other employers covered by this Act. [38 Stat. L. 107.]

SEC. 10. [*Pay, etc., of members of boards.*] That each member of the board of arbitration created under the provisions of this Act shall receive such compensation as may be fixed by the Board of Mediation and Conciliation, together with his traveling and other necessary expenses. The sum of \$25,000, or so much thereof as may be necessary, is hereby appropriated, to be immediately available and to continue available until the close of the fiscal year ending June thirtieth, nineteen hundred and fourteen, for the necessary and proper expenses incurred in connection with any arbitration or with the carrying on of the work of mediation and conciliation, including per diem, traveling, and other necessary expenses of members or employees of boards of arbitration and rent in the District of Columbia, furniture, office fixtures and supplies, books, salaries, traveling expenses, and other necessary expenses of members or employees of the Board of Mediation and Conciliation, to be approved by the chairman of said board and audited by the proper accounting officers of the Treasury. [38 Stat. L. 108.]

SEC. 11. [*Commissioner of mediation and conciliation — other members to constitute board of mediation and conciliation — assistant commissioner — former act repealed — pending agreements, etc., continued.*] There shall be a Commissioner of Mediation and Conciliation, who shall be appointed by the President, by and with the advice and consent of the Senate, and whose salary shall be \$7,500 per annum, who shall hold his office for a term of seven years and until a successor qualifies, and who shall be removable by the President only for misconduct in office. The President shall also designate not more than two other officials of the Government who have been appointed by and with the advice and consent of the Senate, and the officials thus designated, together with the Commissioner of Mediation and Conciliation, shall constitute a board to be known as the United States Board of Mediation and Conciliation.

There shall also be an Assistant Commissioner of Mediation and Conciliation, who shall be appointed by the President, by and with the advice and consent of the Senate, and whose salary shall be \$5,000 per annum. In the absence of the Commissioner of Mediation and Conciliation, or when that office

shall become vacant, the assistant commissioner shall exercise the functions and perform the duties of that office. Under the direction of the Commissioner of Mediation and Conciliation, the assistant commissioner shall assist in the work of mediation and conciliation and when acting alone in any case he shall have the right to take acknowledgments, receive agreements of arbitration, and cause the notices in writing to be served upon the arbitrators chosen by the respective parties to the controversy, as provided for in section five of this Act.

The Act of June first, eighteen hundred and ninety-eight, relating to the mediation and arbitration of controversies between railway companies and certain classes of their employees is hereby repealed: *Provided*, That any agreement of arbitration which, at the time of the passage of this Act, shall have been executed in accordance with the provisions of said Act of June first, eighteen hundred and ninety-eight, shall be governed by the provisions of said Act of June first, eighteen hundred and ninety-eight, and the proceedings thereunder shall be conducted in accordance with the provisions of said Act. [38 Stat. L. 108.]

For the Act of June 1, 1898, see 4 Fed. Stat. Annot. 784.

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## LAND ENTRIES.

See *PUBLIC LANDS*.

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## LIBRARIES.

See *PUBLIC DOCUMENTS*.

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## LICENSES.

*Trade in Viruses, Serums and Toxins*, see *HEALTH AND QUARANTINE*.  
See also *RADIO COMMUNICATION*.

## LIFE SAVING.

Act of August 24, 1912, Ch. 385, 251.

*Sec. 1. Life-saving Stations Established, 251.*

*2. Portland, Me. — Quarantine Facilities to be Increased, 251.*

**An Act To provide for the establishment of one life-saving station on the larger of the two Libby Islands, situated at the entrance to Machias Bay, Maine; one life-saving station at Half Moon Bay, south of Point Montara and near Montara Reef, California; one life-saving station at Mackinac Island, Michigan; and one life-saving station at or near Sea Gate, New York Harbor, New York, and to provide increased quarantine facilities at the port of Portland, Maine.**

[Act of August 24, 1912, ch. 385.]

[SEC. 1.] [*Life-saving stations established.*] That the Secretary of the Treasury be, and he is hereby, authorized to establish additional life-saving stations on the sea and lake coasts of the United States, as follows, namely: One on the larger of the two Libby Islands, situated at the entrance to Machias Bay, in the State of Maine; one at Half Moon Bay, south of Point Montara and near Montara Reef, in the State of California; one at Mackinac Island, in the State of Michigan; and one at or near Sea Gate, New York Harbor, New York, at such points as the General Superintendent of the Life-Saving Service may recommend. [37 Stat. L. 511.]

SEC. 2. [*Portland, Me. — quarantine facilities to be increased.*] That the Secretary of the Treasury be, and he is hereby, authorized and directed to provide increased quarantine facilities at the port of Portland, Maine, to cost not exceeding forty-three thousand eight hundred and eighty dollars. [37 Stat. L. 512.]

## LIGHTS AND BUOYS.

Act of July 27, 1912, Ch. 255, 252.

*Sec. 2. Acting Commissioner Authorized in Bureau of Lighthouses — Injuries to Employees — Compensation Allowed — Sale of Clothing to Employees — Supplies to Shipwrecked Persons — Repayment to Keepers, etc., for, 252.*

Act of March 4, 1913, Ch. 168, 252.

*Lighthouse Service Supplies to be Furnished from General Stock — Sale of Condemned Supplies, etc. — Deposit of Net Proceeds, 252.*

SEC. 2. [Acting Commissioner authorized in Bureau of Lighthouses — injuries to employees — compensation allowed — sale of clothing to employees — supplies to shipwrecked persons — repayment to keepers, etc., for.] That hereafter, in case of the absence of the Commissioner and Deputy Commissioner of the Bureau of Lighthouses, the Secretary of Commerce and Labor may designate some officer of said bureau to perform the duties of the commissioner during his absence.

And hereafter the benefits of the Act of May thirtieth, nineteen hundred and eight (Thirty-fifth Statutes, page five hundred and fifty-six), entitled "An Act granting to certain employees of the United States the right to receive from it compensation for injuries sustained in the course of their employment," shall be extended to persons employed by the United States in any hazardous employment in the Lighthouse Service; and hereafter the Secretary of Commerce and Labor is authorized to purchase, from the appropriations for the Lighthouse Service, clothing for the crews of vessels, to be sold to the employees of said service and the appropriations reimbursed; and hereafter reimbursement, under rules prescribed by the Secretary of Commerce and Labor, is authorized to keepers of light stations and masters of light vessels and of lighthouse tenders for rations and provisions and clothing furnished shipwrecked persons who may be temporarily provided for by them, not exceeding in all five thousand dollars in any fiscal year. [37 Stat. L. 239.]

This is from An Act To authorize additional aids to navigation in the Lighthouse Service, and for other purposes, of July 27, 1912, ch. 255.

For the Act of May 30, 1908, above referred to, see 1909 Supp. Fed. Stat. Annot. 330.

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[Lighthouse service — supplies to be furnished from general stock — sale of condemned supplies, etc. — deposit of net proceeds.] Hereafter supplies and equipment for special works of the Lighthouse Service may be furnished from general stock and the appropriation "General expenses, Lighthouse Service," reimbursed therefor from the respective appropriations for special works.

Hereafter when any condemned supplies, materials, equipment, or land can not be profitably used in the work of the Lighthouse Service the same shall be appraised and sold, either by sealed proposals for the purchase of the same or by public auction after advertisement of the sale for such time as in the judgment of the Secretary of Commerce and Labor the public interests require, the proceeds of such sales, after the payment therefrom of the expenses of making the sales, to be deposited and covered into the Treasury as miscellaneous receipts as now provided for by law in like cases. [37 Stat. L. 1018.]

This is from An Act To authorize aids to navigation and other works in the Lighthouse Service, and for other purposes, of March 4, 1913, ch. 168.

## **LIVE STOCK.**

*See ANIMALS.*

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## **MAIL.**

*See POSTAL SERVICE.*

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## **MANUFACTURING WAREHOUSES.**

*See CUSTOMS DUTIES.*

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## **MARINE CORPS.**

*See NAVY.*

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## **MARINE HOSPITAL SERVICE.**

*See HEALTH AND QUARANTINE.*

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## **MARSHALS.**

*See JUDICIAL OFFICERS.*

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## **MASTER AND SERVANT.**

*See LABOR.*

## **MATCHES.**

*See INTERNAL REVENUE.*

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## **MEDIATION.**

*See LABOR.*

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## **MERCHANT VESSELS.**

*See SHIPPING AND NAVIGATION.*

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## **MIDSHIPMEN.**

*See NAVAL ACADEMY.*

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## **MIGRATORY BIRDS.**

*See GAME ANIMALS AND BIRDS.*

## MILITARY ACADEMY.

Act of August 9, 1912, Ch. 275, 255.

*Cadets—Additional Cadet from District of Columbia—Time of Physical Examination—Graduates Allowed Mileage from Home to Post, 255.*

*Engineer Detachment to be Maintained—Pay—Rating—No Increase of Army, 255.*

*Board of Visitors—Composed of Members of Military Affairs Committees of Both Houses—Visits—Expenses Limited—Appointments, 256.*

*Sale of Unserviceable Material, etc.—Use of Proceeds, 256.*

*Superintendent—Leave of Absence Allowed, 256.*

*Promotion of Professor, 256.*

[*Cadets—additional cadet from District of Columbia—time of physical examination—graduates allowed mileage from home to post.*] \* \* \* That section thirteen hundred and fifteen of the Revised Statutes of the United States, fixing the membership of the Corps of Cadets at the United States Military Academy, is hereby amended by changing the clause "one from the District of Columbia" so as to read "two from the District of Columbia": *Provided further*, That hereafter any candidate designated as principal or alternate for appointment as cadet may present himself at any time for physical examination at West Point, New York, or other prescribed places, as may be designated by the Secretary of War: *Provided further*, That hereafter a graduate of the Military Academy shall receive mileage as authorized by law for officers of the Army from his home to the station which he first joins for duty. [37 Stat. L. 252.]

This and the following paragraphs under this title are from the Military Academy Appropriation Act of Aug. 9, 1912, ch. 275.

For sec. 1315 R. S. as it read prior to this amendment see 4 Fed. Stat. Annot. 880.

[*Engineer detachment to be maintained—pay—rating—no increase of army.*] \* \* \* Hereafter there shall be maintained at the United States Military Academy an engineer detachment, which shall consist of one first sergeant, one quartermaster sergeant, eight sergeants, ten corporals, two cooks, two musicians, thirty-eight first-class privates, and thirty-eight second-class privates;

For pay of such engineer detachment, twenty-four thousand dollars; additional pay for length of service, six thousand four hundred and eight dollars: *Provided*, That the enlisted men of said detachment shall receive the same pay and allowances as are now or may be hereafter authorized for corresponding grades in the battalions of engineers: *Provided further*, That nothing herein shall be so construed as to authorize an increase in the total number of enlisted men of the Army now authorized by law. [37 Stat. L. 254.]

[*Board of visitors — composed of members of Military Affairs Committees of both Houses — visits — expenses limited — appointments.*] \* \* \* That the Act approved May twenty-eighth, nineteen hundred and eight, be amended and reenacted so as to read as follows:

That hereafter the Board of Visitors to the Military Academy shall consist of five members of the Committee on Military Affairs of the Senate and seven members of the Committee on Military Affairs of the House of Representatives, to be appointed by the respective chairmen thereof; the members so appointed shall visit the Military Academy annually at such time as the chairmen of said committees shall appoint, and the members from each of said committees may visit said academy together or separately as the said committees may elect during the session of Congress; and the superintendent of the academy and the members of the Board of Visitors shall be notified of such date by the chairmen of the said committees. The expenses of the members of the board shall be their actual expenses while engaged upon their duties as members of said board not to exceed five dollars per day and their actual expenses of travel by the shortest mail routes: *Provided further*, That so much of sections thirteen hundred and twenty-seven, thirteen hundred and twenty-eight, and thirteen hundred and twenty-nine, Revised Statutes of the United States, as is inconsistent with the provisions of this Act are hereby repealed. [37 Stat. L. 257.]

For the Act of May 28, 1908, see 1909 Supp. Fed. Stat. Annot. 340.

[*Sale of unserviceable material, etc. — use of proceeds.*] \* \* \* That when any instrument, apparatus, implements, or materials which have been heretofore or may hereafter be purchased or acquired for the use of any department of instruction or for the maintenance and operation of the waterworks are no longer needed or are no longer serviceable they may be sold in such manner as the superintendent may direct and the proceeds credited to the appropriation for the department or the waterworks for which they were purchased or acquired. [37 Stat. L. 260.]

[*Superintendent — leave of absence allowed.*] \* \* \* Hereafter the Secretary of War may grant the superintendent of the academy leave of absence without deduction from pay or allowances for the same period that the superintendent may grant leave of absence to other officers of the academy under the provisions of section thirteen hundred and thirty of the Revised Statutes. [37 Stat. L. 263.]

For R. S. sec. 1330, see 4 Fed. Stat. Annot. 384.

[*Promotion of professor.*] \* \* \* That any officer of the United States Army now holding the position of permanent professor at the United States Military Academy who on July first, nineteen hundred and fourteen, should have served not less than thirty-three years in the Army, one-third of which service shall have been as professor and instructor at the Military Academy, shall on that date have the rank, pay, and allowances of a colonel in the Army. [37 Stat. L. 264.]

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## MILITARY LAW.

See ARTICLES OF WAR.



## MINERAL LANDS, MINES, AND MINING.

Act of February 25, 1913, Ch. 72, 257.  
*Bureau of Mines, 257.*

### CROSS-REFERENCES.

*Mining Laws for Alaska, see ALASKA.*

*Indian Lands, see INDIANS.*

*Bureau of Mines, Injury to Employees, see LABOR.*

See also *PUBLIC LANDS; TIMBER LANDS AND FOREST RESERVES.*

An Act To amend an Act entitled "An Act to establish in the Department of the Interior a Bureau of Mines," approved May sixteenth, nineteen hundred and ten.

[*Act of February 25, 1913, ch. 72.*]

[*Bureau of Mines.*] That the Act to establish in the Department of the Interior a Bureau of Mines, approved May sixteenth, nineteen hundred and ten, be, and the same is hereby, amended to read as follows:

"That there is hereby established in the Department of the Interior a bureau of mining, metallurgy, and mineral technology, to be designated the Bureau of Mines, and there shall be a director of said bureau, who shall be thoroughly equipped for the duties of said office by technical education and experience and who shall be appointed by the President, by and with the advice and consent of the Senate, and who shall receive a salary of six thousand dollars per annum; and there shall also be in the said bureau such experts and other employees, to be appointed by the Secretary of the Interior, as may be required to carry out the purposes of this Act in accordance with the appropriations made from time to time by Congress for such purposes.

"SEC. 2. That it shall be the province and duty of the Bureau of Mines, subject to the approval of the Secretary of the Interior, to conduct inquiries and scientific and technologic investigations concerning mining, and the preparation, treatment, and utilization of mineral substances with a view to improving health conditions, and increasing safety, efficiency, economic development, and conserving resources through the prevention of waste in the mining, quarrying, metallurgical, and other mineral industries; to inquire into the economic conditions affecting these industries; to investigate explosives and peat; and on behalf of the Government to investigate the mineral fuels and unfinished mineral products belonging to, or for the use of, the United States, with a view to their most efficient mining, preparation, treatment and use; and to disseminate information concerning these subjects in such manner as will best carry out the purposes of this Act.

"SEC. 3. That the director of said bureau shall prepare and publish, subject to the direction of the Secretary of the Interior, under the appropriations made from time to time by Congress, reports of inquiries and investigations,

with appropriate recommendations of the bureau, concerning the nature, causes, and prevention of accidents, and the improvement of conditions, methods, and equipment, with special reference to health, safety, and prevention of waste in the mining, quarrying, metallurgical, and other mineral industries; the use of explosives and electricity, safety methods and appliances, and rescue and first-aid work in said industries; the causes and prevention of mine fires; and other subjects included under the provisions of this Act.

"SEC. 4. In conducting inquiries and investigations authorized by this Act neither the director nor any member of the Bureau of Mines shall have any personal or private interest in any mine or the products of any mine under investigation, or shall accept employment from any private party for services in the examination of any mine or private mineral property, or issue any report as to the valuation or the management of any mine or other private mineral property: *Provided*, That nothing herein shall be construed as preventing the temporary employment by the Bureau of Mines, at a compensation not to exceed ten dollars per day, in a consulting capacity or in the investigation of special subjects, of any engineer or other expert whose principal professional practice is outside of such employment by said bureau.

"SEC. 5. That for tests or investigations authorized by the Secretary of the Interior under the provisions of this Act, other than those performed for the Government of the United States or State governments within the United States, a reasonable fee covering the necessary expenses shall be charged, according to a schedule prepared by the Director of the Bureau of Mines and approved by the Secretary of the Interior, who shall prescribe rules and regulations under which such tests and investigations may be made. All moneys received from such sources shall be paid into the Treasury to the credit of miscellaneous receipts.

"SEC. 6. That this Act shall take effect and be in force on and after its passage." [37 Stat. L. 681.]

The original Act of May 16, 1910, is set forth in 1912 Supp. Fed. Stat. Annot. 270.

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## MINISTERS.

See *DIPLOMATIC AND CONSULAR OFFICES*.

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## MINTS.

See *COINAGE, MINTS, AND ASSAY OFFICES*.

## **MISBRANDING.**

*See FOOD AND DRUGS.*

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## **MONEY.**

*See CURRENCY; NATIONAL BANKS.*

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## **MONOPOLIES.**

*See TRADE UNIONS AND COMBINATIONS AND TRUSTS.*

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## **MOVING PICTURES.**

*Prize Fight Films, see PRIZE FIGHTING.*

## NATIONAL BANKS.

Act of December 23, 1913, 260.

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An Act To provide for the establishment of Federal reserve banks, to furnish an elastic currency, to afford means of rediscounting commercial paper, to establish a more effective supervision of banking in the United States, and for other purposes.

[Act of Dec. 23, 1913, ch. —.]

[SEC. 1.] [Short title — definitions.] That the short title of this Act shall be the "Federal Reserve Act." Wherever the word "bank" is used in this Act, the word shall be held to include State bank, banking association, and trust company, except where national banks or Federal reserve banks are specifically referred to. The terms "national bank" and "national banking association" used in this Act shall be held to be synonymous and interchangeable. The term "member bank" shall be held to mean any national bank, State bank, or bank

or trust company which has become a member of one of the reserve banks created by this Act. The term "board" shall be held to mean Federal Reserve Board; the term "district" shall be held to mean Federal reserve district; the term "reserve bank" shall be held to mean Federal reserve bank.

SEC. 2. *Federal reserve districts.* As soon as practicable, the Secretary of the Treasury, the Secretary of Agriculture and the Comptroller of the Currency, acting as "The Reserve Bank Organization Committee," shall designate not less than eight nor more than twelve cities to be known as Federal reserve cities, and shall divide the continental United States, excluding Alaska, into districts, each district to contain only one of such Federal reserve cities. The determination of said organization committee shall not be subject to review except by the Federal Reserve Board when organized: *Provided*, That the districts shall be apportioned with due regard to the convenience and customary course of business and shall not necessarily be coterminous with any State or States. The districts thus created may be readjusted and new districts may from time to time be created by the Federal Reserve Board, not to exceed twelve in all. Such districts shall be known as Federal reserve districts and may be designated by number. A majority of the organization committee shall constitute a quorum with authority to act.

Said organization committee shall be authorized to employ counsel and expert aid, to take testimony, to send for persons and papers, to administer oaths, and to make such investigation as may be deemed necessary by the said committee in determining the reserve districts and in designating the cities within such districts where such Federal reserve banks shall be severally located. The said committee shall supervise the organization in each of the cities designated of a Federal reserve bank, which shall include in its title the name of the city in which it is situated, as "Federal Reserve Bank of Chicago."

Under regulations to be prescribed by the organization committee, every national banking association in the United States is hereby required, and every eligible bank in the United States and every trust company within the District of Columbia, is hereby authorized to signify in writing, within sixty days after the passage of this Act, its acceptance of the terms and provisions hereof. When the organization committee shall have designated the cities in which Federal reserve banks are to be organized, and fixed the geographical limits of the Federal reserve districts, every national banking association within that district shall be required within thirty days after notice from the organization committee, to subscribe to the capital stock of such Federal reserve bank in a sum equal to six per centum of the paid-up capital stock and surplus of such bank, one-sixth of the subscription to be payable on call of the organization committee or of the Federal Reserve Board, one-sixth within three months and one-sixth within six months thereafter, and the remainder of the subscription, or any part thereof, shall be subject to call when deemed necessary by the Federal Reserve Board, said payments to be in gold or gold certificates.

The shareholders of every Federal reserve bank shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such bank to the extent of the amount of their subscriptions to such stock at the par value thereof in addition to the amount subscribed, whether such subscriptions have been paid up in whole or in part, under the provisions of this Act.

Any national bank failing to signify its acceptance of the terms of this Act within the sixty days aforesaid, shall cease to act as a reserve agent, upon thirty

days' notice, to be given within the discretion of the said organization committee or of the Federal Reserve Board.

Should any national banking association in the United States now organized fail within one year after the passage of this Act to become a member bank or fail to comply with any of the provisions of this Act applicable thereto, all of the rights, privileges, and franchises of such association granted to it under the national-bank Act, or under the provisions of this Act, shall be thereby forfeited. Any noncompliance with or violation of this Act shall, however, be determined and adjudged by any court of the United States of competent jurisdiction in a suit brought for that purpose in the district or territory in which such bank is located, under direction of the Federal Reserve Board, by the Comptroller of the Currency in his own name before the association shall be declared dissolved. In cases of such noncompliance or violation, other than the failure to become a member bank under the provisions of this Act, every director who participated in or assented to the same shall be held liable in his personal or individual capacity for all damages which said bank, its shareholders, or any other person shall have sustained in consequence of such violation.

Such dissolution shall not take away or impair any remedy against such corporation, its stockholders or officers, for any liability or penalty which shall have been previously incurred.

Should the subscriptions by banks to the stock of said Federal reserve banks or any one or more of them be, in the judgment of the organization committee, insufficient to provide the amount of capital required therefor, then and in that event the said organization committee may, under conditions and regulations to be prescribed by it, offer to public subscription at par such an amount of stock in said Federal reserve banks, or any one or more of them, as said committee shall determine, subject to the same conditions as to payment and stock liability as provided for member banks.

No individual, copartnership, or corporation other than a member bank of its district shall be permitted to subscribe for or to hold at any time more than \$25,000 par value of stock in any Federal reserve bank. Such stock shall be known as public stock and may be transferred on the books of the Federal reserve bank by the chairman of the board of directors of such bank.

Should the total subscriptions by banks and the public to the stock of said Federal reserve banks, or any one or more of them, be, in the judgment of the organization committee, insufficient to provide the amount of capital required therefor, then and in that event the said organization committee shall allot to the United States such an amount of said stock as said committee shall determine. Said United States stock shall be paid for at par out of any money in the Treasury not otherwise appropriated, and shall be held by the Secretary of the Treasury and disposed of for the benefit of the United States in such manner, at such times, and at such price, not less than par, as the Secretary of the Treasury shall determine.

Stock not held by member banks shall not be entitled to voting power.

The Federal Reserve Board is hereby empowered to adopt and promulgate rules and regulations governing the transfers of said stock.

No Federal reserve bank shall commence business with a subscribed capital less than \$4,000,000. The organization of reserve districts and Federal reserve cities shall not be construed as changing the present status of reserve cities and central reserve cities, except in so far as this Act changes the amount of reserves that may be carried with approved reserve agents located therein. The organization committee shall have power to appoint such assistants and incur such

expenses in carrying out the provisions of this Act as it shall deem necessary, and such expenses shall be payable by the Treasurer of the United States upon voucher approved by the Secretary of the Treasury, and the sum of \$100,000, or so much thereof as may be necessary, is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, for the payment of such expenses.

**SEC. 3. *Branch offices.*** Each Federal reserve bank shall establish branch banks within the Federal reserve district in which it is located and may do so in the district of any Federal reserve bank which may have been suspended. Such branches shall be operated by a board of directors under rules and regulations approved by the Federal Reserve Board. Directors of branch banks shall possess the same qualifications as directors of the Federal reserve banks. Four of said directors shall be selected by the reserve bank and three by the Federal Reserve Board, and they shall hold office during the pleasure, respectively, of the parent bank and the Federal Reserve Board. The reserve bank shall designate one of the directors as manager.

**SEC. 4. *Federal reserve banks.*** When the organization committee shall have established Federal reserve districts as provided in section two of this Act, a certificate shall be filed with the Comptroller of the Currency showing the geographical limits of such districts and the Federal reserve city designated in each of such districts. The Comptroller of the Currency shall thereupon cause to be forwarded to each national bank located in each district, and to such other banks declared to be eligible by the organization committee which may apply therefor, an application blank in form to be approved by the organization committee, which blank shall contain a resolution to be adopted by the board of directors of each bank executing such application, authorizing a subscription to the capital stock of the Federal reserve bank organizing in that district in accordance with the provisions of this Act.

When the minimum amount of capital stock prescribed by this Act for the organization of any Federal reserve bank shall have been subscribed and allotted, the organization committee shall designate any five banks of those whose applications have been received, to execute a certificate of organization, and thereupon the banks so designated shall, under their seals, make an organization certificate which shall specifically state the name of such Federal reserve bank, the territorial extent of the district over which the operations of such Federal reserve bank are to be carried on, the city and State in which said bank is to be located, the amount of capital stock and the number of shares into which the same is divided, the name and place of doing business of each bank executing such certificate, and of all banks which have subscribed to the capital stock of such Federal reserve bank and the number of shares subscribed by each, and the fact that the certificate is made to enable those banks executing same, and all banks which have subscribed or may thereafter subscribe to the capital stock of such Federal reserve bank, to avail themselves of the advantages of this Act.

The said organization certificate shall be acknowledged before a judge of some court of record or notary public; and shall be, together with the acknowledgment thereof, authenticated by the seal of such court, or notary, transmitted to the Comptroller of the Currency, who shall file, record and carefully preserve the same in his office.

Upon the filing of such certificate with the Comptroller of the Currency as

aforesaid, the said Federal reserve bank shall become a body corporate and as such, and in the name designated in such organization certificate, shall have power—

First. To adopt and use a corporate seal.

Second. To have succession for a period of twenty years from its organization unless it is sooner dissolved by an Act of Congress, or unless its franchise becomes forfeited by some violation of law.

Third. To make contracts.

Fourth. To sue and be sued, complain and defend, in any court of law or equity.

Fifth. To appoint by its board of directors, such officers and employees as are not otherwise provided for in this Act, to define their duties, require bonds of them and fix the penalty thereof, and to dismiss at pleasure such officers or employees.

Sixth. To prescribe by its board of directors, by-laws not inconsistent with law, regulating the manner in which its general business may be conducted, and the privileges granted to it by law may be exercised and enjoyed.

Seventh. To exercise by its board of directors, or duly authorized officers or agents, all powers specifically granted by the provisions of this Act and such incidental powers as shall be necessary to carry on the business of banking within the limitations prescribed by this Act.

Eighth. Upon deposit with the Treasurer of the United States of any bonds of the United States in the manner provided by existing law relating to national banks, to receive from the Comptroller of the Currency circulating notes in blank, registered and countersigned as provided by law, equal in amount to the par value of the bonds so deposited, such notes to be issued under the same conditions and provisions of law as relate to the issue of circulating notes of national banks secured by bonds of the United States bearing the circulating privilege, except that the issue of such notes shall not be limited to the capital stock of such Federal reserve bank.

But no Federal reserve bank shall transact any business except such as is incidental and necessarily preliminary to its organization until it has been authorized by the Comptroller of the Currency to commence business under the provisions of this Act.

Every Federal reserve bank shall be conducted under the supervision and control of a board of directors.

The board of directors shall perform the duties usually appertaining to the office of directors of banking associations and all such duties as are prescribed by law.

Said board shall administer the affairs of said bank fairly and impartially and without discrimination in favor of or against any member bank or banks and shall, subject to the provisions of law and the orders of the Federal Reserve Board, extend to each member bank such discounts, advancements and accommodations as may be safely and reasonably made with due regard for the claims and demands of other member banks.

Such board of directors shall be selected as hereinafter specified and shall consist of nine members, holding office for three years, and divided into three classes, designated as classes A, B, and C.

Class A shall consist of three members, who shall be chosen by and be representative of the stock-holding banks.

Class B shall consist of three members, who at the time of their election



shall be actively engaged in their district in commerce, agriculture or some other industrial pursuit.

Class C shall consist of three members who shall be designated by the Federal Reserve Board. When the necessary subscriptions to the capital stock have been obtained for the organization of any Federal reserve bank, the Federal Reserve Board shall appoint the class C directors and shall designate one of such directors as chairman of the board to be selected. Pending the designation of such chairman, the organization committee shall exercise the powers and duties appertaining to the office of chairman in the organization of such Federal reserve bank.

No Senator or Representative in Congress shall be a member of the Federal Reserve Board or an officer or a director of a Federal reserve bank.

No director of class B shall be an officer, director, or employee of any bank.

No director of class C shall be an officer, director, employee, or stockholder of any bank.

Directors of class A and class B shall be chosen in the following manner:

The chairman of the board of directors of the Federal reserve bank of the district in which the bank is situated or, pending the appointment of such chairman, the organization committee shall classify the member banks of the district into three general groups or divisions. Each group shall contain as nearly as may be one-third of the aggregate number of the member banks of the district and shall consist, as nearly as may be, of banks of similar capitalization. The groups shall be designated by number by the chairman.

At a regularly called meeting of the board of directors of each member bank in the district it shall elect by ballot a district reserve elector and shall certify his name to the chairman of the board of directors of the Federal reserve bank of the district. The chairman shall make lists of the district reserve electors thus named by banks in each of the aforesaid three groups and shall transmit one list to each elector in each group.

Each member bank shall be permitted to nominate to the chairman one candidate for director of class A and one candidate for director of class B. The candidates so nominated shall be listed by the chairman, indicating by whom nominated, and a copy of said list shall, within fifteen days after its completion, be furnished by the chairman to each elector.

Every elector shall, with[in] fifteen days after the receipt of the said list, certify to the chairman his first, second, and other choices of a director of class A and class B, respectively, upon a preferential ballot, on a form furnished by the chairman of the board of directors of the Federal reserve bank of the district. Each elector shall make a cross opposite the name of the first, second, and other choices for a director of class A and for a director of class B, but shall not vote more than one choice for any one candidate.

Any candidate having a majority of all votes cast in the column of first choice shall be declared elected. If no candidate have a majority of all the votes in the first column, then there shall be added together the votes cast by the electors for such candidates in the second column and the votes cast for the several candidates in the first column. If any candidate then have a majority of the electors voting, by adding together the first and second choices, he shall be declared elected. If no candidate have a majority of electors voting when the first and second choices shall have been added, then the votes cast in the third column for other choices shall be added together in like manner, and the candidate then having the highest number of votes shall be declared elected. An immediate report of election shall be declared.

Class C directors shall be appointed by the Federal Reserve Board. They shall have been for at least two years residents of the district for which they are appointed, one of whom shall be designated by said board as chairman of the board of directors of the Federal reserve bank and as "Federal reserve agent." He shall be a person of tested banking experience; and in addition to his duties as chairman of the board of directors of the Federal reserve bank he shall be required to maintain under regulations to be established by the Federal Reserve Board a local office of said board on the premises of the Federal reserve bank. He shall make regular reports to the Federal Reserve Board, and shall act as its official representative for the performance of the functions conferred upon it by this Act. He shall receive an annual compensation to be fixed by the Federal Reserve Board and paid monthly by the Federal reserve bank to which he is designated. One of the directors of class C, who shall be a person of tested banking experience, shall be appointed by the Federal Reserve Board as deputy chairman and deputy Federal reserve agent to exercise the powers of the chairman of the board and Federal reserve agent in case of absence or disability of his principal.

Directors of Federal reserve banks shall receive, in addition to any compensation otherwise provided, a reasonable allowance for necessary expenses in attending meetings of their respective boards, which amount shall be paid by the respective Federal reserve banks. Any compensation that may be provided by boards of directors of Federal reserve banks for directors, officers or employees shall be subject to the approval of the Federal Reserve Board.

The Reserve Bank Organization Committee may, in organizing Federal reserve banks, call such meetings of bank directors in the several districts as may be necessary to carry out the purposes of this Act, and may exercise the functions herein conferred upon the chairman of the board of directors of each Federal reserve bank pending the complete organization of such bank.

At the first meeting of the full board of directors of each Federal reserve bank, it shall be the duty of the directors of classes A, B and C, respectively, to designate one of the members of each class whose term of office shall expire in one year from the first of January nearest to date of such meeting, one whose term of office shall expire at the end of two years from said date, and one whose term of office shall expire at the end of three years from said date. Thereafter every director of a Federal reserve bank chosen as hereinbefore provided shall hold office for a term of three years. Vacancies that may occur in the several classes of directors of Federal reserve banks may be filled in the manner provided for the original selection of such directors, such appointees to hold office for the unexpired terms of their predecessors.

SEC. 5. *Stock issues; increase and decrease of capital.* The capital stock of each Federal reserve bank shall be divided into shares of \$100 each. The outstanding capital stock shall be increased from time to time as member banks increase their capital stock and surplus or as additional banks become members, and may be decreased as member banks reduce their capital stock or surplus or cease to be members. Shares of the capital stock of Federal reserve banks owned by member banks shall not be transferred or hypothecated. When a member bank increases its capital stock or surplus, it shall thereupon subscribe for an additional amount of capital stock of the Federal reserve bank of its district equal to six per centum of the said increase, one-half of said subscription to be paid in the manner hereinbefore provided for original subscription, and one-half subject to call of the Federal Reserve Board. A bank apply-

ing for stock in a Federal reserve bank at any time after the organization thereof must subscribe for an amount of the capital stock of the Federal reserve bank equal to six per centum of the paid-up capital stock and surplus of said applicant bank, paying therefor its par value plus one-half of one per centum a month from the period of the last dividend. When the capital stock of any Federal reserve bank shall have been increased either on account of the increase of capital stock of member banks or on account of the increase in the number of member banks, the board of directors shall cause to be executed a certificate to the Comptroller of the Currency showing the increase in capital stock, the amount paid in, and by whom paid. When a member bank reduces its capital stock it shall surrender a proportionate amount of its holdings in the capital of said Federal reserve bank, and when a member bank voluntarily liquidates it shall surrender all of its holdings of the capital stock of said Federal reserve bank and be released from its stock subscription not previously called. In either case the shares surrendered shall be canceled and the member bank shall receive in payment therefor, under regulations to be prescribed by the Federal Reserve Board, a sum equal to its cash-paid subscriptions on the shares surrendered and one-half of one per centum a month from the period of the last dividend, not to exceed the book value thereof, less any liability of such member bank to the Federal reserve bank.

SEC. 6. If any member bank shall be declared insolvent and a receiver appointed therefor, the stock held by it in said Federal reserve bank shall be canceled, without impairment of its liability, and all cash-paid subscriptions on said stock, with one-half of one per centum per month from the period of last dividend, not to exceed the book value thereof, shall be first applied to all debts of the insolvent member bank to the Federal reserve bank, and the balance, if any, shall be paid to the receiver of the insolvent bank. Whenever the capital stock of a Federal reserve bank is reduced, either on account of a reduction in capital stock of any member bank or of the liquidation or insolvency of such bank, the board of directors shall cause to be executed a certificate to the Comptroller of the Currency showing such reduction of capital stock and the amount repaid to such bank.

SEC. 7. *Division of earnings.* After all necessary expenses of a Federal reserve bank have been paid or provided for, the stockholders shall be entitled to receive an annual dividend of six per centum on the paid-in capital stock, which dividend shall be cumulative. After the aforesaid dividend claims have been fully met, all the net earnings shall be paid to the United States as a franchise tax, except that one-half of such net earnings shall be paid into a surplus fund until it shall amount to forty per centum of the paid-in capital stock of such bank.

The net earnings derived by the United States from Federal reserve banks shall, in the discretion of the Secretary, be used to supplement the gold reserve held against outstanding United States notes, or shall be applied to the reduction of the outstanding bonded indebtedness of the United States under regulations to be prescribed by the Secretary of the Treasury. Should a Federal reserve bank be dissolved or go into liquidation, any surplus remaining, after the payment of all debts, dividend requirements as hereinbefore provided, and the par value of the stock, shall be paid to and become the property of the United States and shall be similarly applied.

Federal reserve banks, including the capital stock and surplus therein, and

the income derived therefrom shall be exempt from Federal, State, and local taxation, except taxes upon real estate.

SEC. 8. Section fifty-one hundred and fifty-four, United States Revised Statutes, is hereby amended to read as follows:

Any bank incorporated by special law of any State or of the United States or organized under the general laws of any State or of the United States and having an unimpaired capital sufficient to entitle it to become a national banking association under the provisions of the existing laws may, by the vote of the shareholders owning not less than fifty-one per centum of the capital stock of such bank or banking association, with the approval of the Comptroller of the Currency be converted into a national banking association, with any name approved by the Comptroller of the Currency:

*Provided, however,* That said conversion shall not be in contravention of the State law. In such case the articles of association and organization certificate may be executed by a majority of the directors of the bank or banking institution, and the certificate shall declare that the owners of fifty-one per centum of the capital stock have authorized the directors to make such certificate and to change or convert the bank or banking institution into a national association. A majority of the directors, after executing the articles of association and the organization certificate, shall have power to execute all other papers and to do whatever may be required to make its organization perfect and complete as a national association. The shares of any such bank may continue to be for the same amount each as they were before the conversion, and the directors may continue to be directors of the association until others are elected or appointed in accordance with the provisions of the statutes of the United States. When the Comptroller has given to such bank or banking association a certificate that the provisions of this Act have been complied with, such bank or banking association, and all its stockholders, officers, and employees, shall have the same powers and privileges, and shall be subject to the same duties, liabilities, and regulations, in all respects, as shall have been prescribed by the Federal Reserve Act and by the national banking Act for associations originally organized as national banking associations.

SEC. 9. *State banks as members.* Any bank incorporated by special law of any State, or organized under the general laws of any State or of the United States, may make application to the reserve bank organization committee, pending organization, and thereafter to the Federal Reserve Board for the right to subscribe to the stock of the Federal reserve bank organized or to be organized within the Federal reserve district where the applicant is located. The organization committee or the Federal Reserve Board, under such rules and regulations as it may prescribe, subject to the provisions of this section, may permit the applying bank to become a stockholder in the Federal reserve bank of the district in which the applying bank is located. Whenever the organization committee or the Federal Reserve Board shall permit the applying bank to become a stockholder in the Federal reserve bank of the district, stock shall be issued and paid for under the rules and regulations in this Act provided for national banks which become stockholders in Federal reserve banks.

The organization committee or the Federal Reserve Board shall establish by-laws for the general government of its conduct in acting upon applications made by the State banks and banking associations and trust companies for stock ownership in Federal reserve banks. Such by-laws shall require apply-

ing banks not organized under Federal law to comply with the reserve and capital requirements and to submit to the examination and regulations prescribed by the organization committee or by the Federal Reserve Board. No applying bank shall be admitted to membership in a Federal reserve bank unless it possesses a paid-up unimpaired capital sufficient to entitle it to become a national banking association in the place where it is situated, under the provisions of the national banking Act.

Any bank becoming a member of a Federal reserve bank under the provisions of this section shall, in addition to the regulations and restrictions hereinbefore provided, be required to conform to the provisions of law imposed on the national banks respecting the limitation of liability which may be incurred by any person, firm, or corporation to such banks, the prohibition against making purchase of or loans on stock of such banks, and the withdrawal or impairment of capital, or the payment of unearned dividends, and to such rules and regulations as the Federal Reserve Board may, in pursuance thereof, prescribe.

Such banks, and the officers, agents, and employees thereof, shall also be subject to the provisions of and to the penalties prescribed by sections fifty-one hundred and ninety-eight, fifty-two hundred, fifty-two hundred and one, and fifty-two hundred and eight, and fifty-two hundred and nine of the Revised Statutes. The member banks shall also be required to make reports of the conditions and of the payments of dividends to the comptroller, as provided in sections fifty-two hundred and eleven and fifty-two hundred and twelve of the Revised Statutes, and shall be subject to the penalties prescribed by section fifty-two hundred and thirteen for the failure to make such report.

If at any time it shall appear to the Federal Reserve Board that a member bank has failed to comply with the provisions of this section or the regulations of the Federal Reserve Board, it shall be within the power of the said board, after hearing, to require such bank to surrender its stock in the Federal reserve bank; upon such surrender the Federal reserve bank shall pay the cash-paid subscriptions to the said stock with interest at the rate of one-half of one per centum per month, computed from the last dividend, if earned, not to exceed the book value thereof, less any liability to said Federal reserve bank, except the subscription liability not previously called, which shall be canceled, and said Federal reserve bank shall, upon notice from the Federal Reserve Board, be required to suspend said bank from further privileges of membership, and shall within thirty days of such notice cancel and retire its stock and make payment therefor in the manner herein provided. The Federal Reserve Board may restore membership upon due proof of compliance with the conditions imposed by this section.

**SEC. 10. Federal Reserve Board.** A Federal Reserve Board is hereby created which shall consist of seven members, including the Secretary of the Treasury and the Comptroller of the Currency, who shall be members ex officio, and five members appointed by the President of the United States, by and with the advice and consent of the Senate. In selecting the five appointive members of the Federal Reserve Board, not more than one of whom shall be selected from any one Federal reserve district, the President shall have due regard to a fair representation of the different commercial, industrial and geographical divisions of the country. The five members of the Federal Reserve Board appointed by the President and confirmed as aforesaid shall devote their entire time to the business of the Federal Reserve Board and shall each receive an annual salary

of \$12,000, payable monthly together with actual necessary traveling expenses, and the Comptroller of the Currency, as ex officio member of the Federal Reserve Board, shall, in addition to the salary now paid him as Comptroller of the Currency, receive the sum of \$7,000 annually for his services as a member of said Board.

The members of said board, the Secretary of the Treasury, the Assistant Secretaries of the Treasury, and the Comptroller of the Currency shall be ineligible during the time they are in office and for two years thereafter to hold any office, position, or employment in any member bank. Of the five members thus appointed by the President at least two shall be persons experienced in banking or finance. One shall be designated by the President to serve for two, one for four, one for six, one for eight, and one for ten years, and thereafter each member so appointed shall serve for a term of ten years unless sooner removed for cause by the President. Of the five persons thus appointed, one shall be designated by the President as governor and one as vice governor of the Federal Reserve Board. The governor of the Federal Reserve Board, subject to its supervision, shall be the active executive officer. The Secretary of the Treasury may assign offices in the Department of the Treasury for the use of the Federal Reserve Board. Each member of the Federal Reserve Board shall within fifteen days after notice of appointment make and subscribe to the oath of office.

The Federal Reserve Board shall have power to levy semiannually upon the Federal reserve banks, in proportion to their capital stock and surplus, an assessment sufficient to pay its estimated expenses and the salaries of its members and employees for the half year succeeding the levying of such assessment, together with any deficit carried forward from the preceding half year.

The first meeting of the Federal Reserve Board shall be held in Washington, District of Columbia, as soon as may be after the passage of this Act, at a date to be fixed by the Reserve Bank Organization Committee. The Secretary of the Treasury shall be ex officio chairman of the Federal Reserve Board. No member of the Federal Reserve Board shall be an officer or director of any bank, banking institution, trust company, or Federal reserve bank nor hold stock in any bank, banking institution, or trust company; and before entering upon his duties as a member of the Federal Reserve Board he shall certify under oath to the Secretary of the Treasury that he has complied with this requirement. Whenever a vacancy shall occur, other than by expiration of term, among the five members of the Federal Reserve Board appointed by the President, as above provided, a successor shall be appointed by the President, with the advice and consent of the Senate, to fill such vacancy, and when appointed he shall hold office for the unexpired term of the member whose place he is selected to fill.

The President shall have power to fill all vacancies that may happen on the Federal Reserve Board during the recess of the Senate, by granting commissions which shall expire thirty days after the next session of the Senate convenes.

Nothing in this Act contained shall be construed as taking away any powers heretofore vested by law in the Secretary of the Treasury which relate to the supervision, management, and control of the Treasury Department and bureaus under such department, and wherever any power vested by this Act in the Federal Reserve Board or the Federal reserve agent appears to conflict with the powers of the Secretary of the Treasury, such powers shall be exercised subject to the supervision and control of the Secretary.

The Federal Reserve Board shall annually make a full report of its operations to the Speaker of the House of Representatives, who shall cause the same to be printed for the information of the Congress.

Section three hundred and twenty-four of the Revised Statutes of the United States shall be amended so as to read as follows: There shall be in the Department of the Treasury a bureau charged with the execution of all laws passed by Congress relating to the issue and regulation of national currency secured by United States bonds and, under the general supervision of the Federal Reserve Board, of all Federal reserve notes, the chief officer of which bureau shall be called the Comptroller of the Currency and shall perform his duties under the general directions of the Secretary of the Treasury.

SEC. 11. The Federal Reserve Board shall be authorized and empowered:

(a) To examine at its discretion the accounts, books and affairs of each Federal reserve bank and of each member bank and to require such statements and reports as it may deem necessary. The said board shall publish once each week a statement showing the condition of each Federal reserve bank and a consolidated statement for all Federal reserve banks. Such statements shall show in detail the assets and liabilities of the Federal reserve banks, single and combined, and shall furnish full information regarding the character of the money held as reserve and the amount, nature and maturities of the paper and other investments owned or held by Federal reserve banks.

(b) To permit, or, on the affirmative vote of at least five members of the Reserve Board to require Federal reserve banks to rediscount the discounted paper of other Federal reserve banks at rates of interest to be fixed by the Federal Reserve Board.

(c) To suspend for a period not exceeding thirty days, and from time to time to renew such suspension for periods not exceeding fifteen days, any reserve requirement specified in this Act: *Provided*, That it shall establish a graduated tax upon the amounts by which the reserve requirements of this Act may be permitted to fall below the level hereinafter specified: *And provided further*, That when the gold reserve held against Federal reserve notes falls below forty per centum, the Federal Reserve Board shall establish a graduated tax of not more than one per centum per annum upon such deficiency until the reserves fall to thirty-two and one-half per centum, and when said reserve falls below thirty-two and one-half per centum, a tax at the rate increasingly of not less than one and one-half per centum per annum upon each two and one-half per centum or fraction thereof that such reserve falls below thirty-two and one-half per centum. The tax shall be paid by the reserve bank, but the reserve bank shall add an amount equal to said tax to the rates of interest and discount fixed by the Federal Reserve Board.

(d) To supervise and regulate through the bureau under the charge of the Comptroller of the Currency the issue and retirement of Federal reserve notes, and to prescribe rules and regulations under which such notes may be delivered by the Comptroller to the Federal reserve agents applying therefor.

(e) To add to the number of cities classified as reserve and central reserve cities under existing law in which national banking associations are subject to the reserve requirements set forth in section twenty of this Act; or to reclassify existing reserve and central reserve cities or to terminate their designation as such.

(f) To suspend or remove any officer or director of any Federal reserve

bank, the cause of such removal to be forthwith communicated in writing by the Federal Reserve Board to the removed officer or director and to said bank.

(g) To require the writing off of doubtful or worthless assets upon the books and balance sheets of Federal reserve banks.

(h) To suspend, for the violation of any of the provisions of this Act, the operations of any Federal reserve bank, to take possession thereof, administer the same during the period of suspension, and, when deemed advisable, to liquidate or reorganize such bank.

(i) To require bonds of Federal reserve agents, to make regulations for the safeguarding of all collateral, bonds, Federal reserve notes, money or property of any kind deposited in the hands of such agents, and said board shall perform the duties, functions, or services specified in this Act, and make all rules and regulations necessary to enable said board effectively to perform the same.

(j) To exercise general supervision over said Federal reserve banks.

(k) To grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as the said board may prescribe.

(l) To employ such attorneys, experts, assistants, clerks, or other employees as may be deemed necessary to conduct the business of the board. All salaries and fees shall be fixed in advance by said board and shall be paid in the same manner as the salaries of the members of said board. All such attorneys, experts, assistants, clerks, and other employees shall be appointed without regard to the provisions of the Act of January sixteenth, eighteen hundred and eighty-three (volume twenty-two, United States Statutes at Large, page four hundred and three), and amendments thereto, or any rule or regulation made in pursuance thereof: *Provided*, That nothing herein shall prevent the President from placing said employees in the classified service.

**SEC. 12. Federal Advisory Council.** There is hereby created a Federal Advisory Council, which shall consist of as many members as there are Federal reserve districts. Each Federal reserve bank by its board of directors shall annually select from its own Federal reserve district one member of said council, who shall receive such compensation and allowances as may be fixed by his board of directors subject to the approval of the Federal Reserve Board. The meetings of said advisory council shall be held at Washington, District of Columbia, at least four times each year, and oftener if called by the Federal Reserve Board. The council may in addition to the meetings above provided for hold such other meetings in Washington, District of Columbia, or elsewhere, as it may deem necessary, may select its own officers and adopt its own methods of procedure, and a majority of its members shall constitute a quorum for the transaction of business. Vacancies in the council shall be filled by the respective reserve banks, and members selected to fill vacancies, shall serve for the unexpired term.

The Federal Advisory Council shall have power, by itself or through its officers, (1) to confer directly with the Federal Reserve Board on general business conditions; (2) to make oral or written representations concerning matters within the jurisdiction of said board; (3) to call for information and to make recommendations in regard to discount rates, rediscount business, note issues, reserve conditions in the various districts, the purchase and sale of gold or securities by reserve banks, open-market operations by said banks, and the general affairs of the reserve banking system.



SEC. 13. *Powers of Federal reserve banks.* Any Federal reserve bank may receive from any of its member banks, and from the United States, deposits of current funds in lawful money, national-bank notes, Federal reserve notes, or checks and drafts upon solvent member banks, payable upon presentation; or, solely for exchange purposes, may receive from other Federal reserve banks deposits of current funds in lawful money, national-bank notes, or checks and drafts upon solvent member or other Federal reserve banks, payable upon presentation.

Upon the indorsement of any of its member banks, with a waiver of demand, notice and protest by such bank, any Federal reserve bank may discount notes, drafts, and bills of exchange arising out of actual commercial transactions; that is, notes, drafts, and bills of exchange issued or drawn for agricultural, industrial, or commercial purposes, or the proceeds of which have been used, or are to be used, for such purposes, the Federal Reserve Board to have the right to determine or define the character of the paper thus eligible for discount, within the meaning of this Act. Nothing in this Act contained shall be construed to prohibit such notes, drafts, and bills of exchange, secured by staple agricultural products, or other goods, wares, or merchandise from being eligible for such discount; but such definition shall not include notes, drafts, or bills covering merely investments or issued or drawn for the purpose of carrying or trading in stocks, bonds, or other investment securities, except bonds and notes of the Government of the United States. Notes, drafts, and bills admitted to discount under the terms of this paragraph must have a maturity at the time of discount of not more than ninety days: *Provided*, That notes, drafts, and bills drawn or issued for agricultural purposes or based on live stock and having a maturity not exceeding six months may be discounted in an amount to be limited to a percentage of the capital of the Federal reserve bank, to be ascertained and fixed by the Federal Reserve Board.

Any Federal reserve bank may discount acceptances which are based on the importation or exportation of goods and which have a maturity at time of discount of not more than three months, and indorsed by at least one member bank. The amount of acceptances so discounted shall at no time exceed one-half the paid-up capital stock and surplus of the bank for which the rediscounts are made.

The aggregate of such notes and bills bearing the signature or indorsement of any one person, company, firm, or corporation rediscounted for any one bank shall at no time exceed ten per centum of the unimpaired capital and surplus of said bank; but this restriction shall not apply to the discount of bills of exchange drawn in good faith against actually existing values.

Any member bank may accept drafts or bills of exchange drawn upon it and growing out of transactions involving the importation or exportation of goods having not more than six months sight to run; but no bank shall accept such bills to an amount equal at any time in the aggregate to more than one-half its paid-up capital stock and surplus.

Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows: No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

First. Notes of circulation.

Second. Moneys deposited with or collected by the association.

Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

Fourth. Liabilities to the stockholders of the association for dividends and reserve profits.

Fifth. Liabilities incurred under the provisions of the Federal Reserve Act.

The rediscount by any Federal reserve bank of any bills receivable and of domestic and foreign bills of exchange, and of acceptances authorized by this Act, shall be subject to such restrictions, limitations, and regulations as may be imposed by the Federal Reserve Board.

SEC. 14. *Open-market operations.* Any Federal reserve bank may, under rules and regulations prescribed by the Federal Reserve Board, purchase and sell in the open market, at home or abroad, either from or to domestic or foreign banks, firms, corporations, or individuals, cable transfers and bankers' acceptances and bills of exchange of the kinds and maturities by this Act made eligible for rediscount, with or without the indorsement of a member bank.

Every Federal reserve bank shall have power:

(a) To deal in gold coin and bullion at home or abroad, to make loans thereon, exchange Federal reserve notes for gold, gold coin, or gold certificates, and to contract for loans of gold coin or bullion, giving therefor, when necessary, acceptable security, including the hypothecation of United States bonds or other securities which Federal reserve banks are authorized to hold;

(b) To buy and sell, at home or abroad, bonds and notes of the United States, and bills, notes, revenue bonds, and warrants with a maturity from date of purchase of not exceeding six months, issued in anticipation of the collection of taxes or in anticipation of the receipt of assured revenues by any State, county, district, political subdivision, or municipality in the continental United States, including irrigation, drainage and reclamation districts, such purchases to be made in accordance with rules and regulations prescribed by the Federal Reserve Board;

(c) To purchase from member banks and to sell, with or without its indorsement, bills of exchange arising out of commercial transactions, as hereinbefore defined;

(d) To establish from time to time, subject to review and determination of the Federal Reserve Board, rates of discount to be charged by the Federal reserve bank for each class of paper, which shall be fixed with a view of accommodating commerce and business;

(e) To establish accounts with other Federal reserve banks for exchange purposes and, with the consent of the Federal Reserve Board, to open and maintain banking accounts in foreign countries, appoint correspondents, and establish agencies in such countries wheresoever it may deem best for the purpose of purchasing, selling, and collecting bills of exchange, and to buy and sell with or without its indorsement, through such correspondents or agencies, bills of exchange arising out of actual commercial transactions which have not more than ninety days to run and which bear the signature of two or more responsible parties.

SEC. 15. *Government deposits.* The moneys held in the general fund of the Treasury, except the five per centum fund for the redemption of outstanding national-bank notes and the funds provided in this Act for the redemption of Federal reserve notes may, upon the direction of the Secretary of the Treasury, be deposited in Federal reserve banks, which banks, when required by the

Secretary of the Treasury, shall act as fiscal agents of the United States; and the revenues of the Government or any part thereof may be deposited in such banks, and disbursements may be made by checks drawn against such deposits.

No public funds of the Philippine Islands, or of the postal savings, or any Government funds, shall be deposited in the continental United States in any bank not belonging to the system established by this Act: *Provided, however,* That nothing in this Act shall be construed to deny the right of the Secretary of the Treasury to use member banks as depositories.

**SEC. 16. Note issues.** Federal reserve notes, to be issued at the discretion of the Federal Reserve Board for the purpose of making advances to Federal reserve banks through the Federal reserve agents as hereinafter set forth and for no other purpose, are hereby authorized. The said notes shall be obligations of the United States and shall be receivable by all national and member banks and Federal reserve banks and for all taxes, customs, and other public dues. They shall be redeemed in gold on demand at the Treasury Department of the United States, in the city of Washington, District of Columbia, or in gold or lawful money at any Federal reserve bank.

Any Federal reserve bank may make application to the local Federal reserve agent for such amount of the Federal reserve notes hereinbefore provided for as it may require. Such application shall be accompanied with a tender to the local Federal reserve agent of collateral in amount equal to the sum of the Federal reserve notes thus applied for and issued pursuant to such application. The collateral security thus offered shall be notes and bills, accepted for rediscount under the provisions of section thirteen of this Act, and the Federal reserve agent shall each day notify the Federal Reserve Board of all issues and withdrawals of Federal reserve notes to and by the Federal reserve bank to which he is accredited. The said Federal Reserve Board may at any time call upon a Federal reserve bank for additional security to protect the Federal reserve notes issued to it.

Every Federal reserve bank shall maintain reserves in gold or lawful money of not less than thirty-five per centum against its deposits and reserves in gold of not less than forty per centum against its Federal reserve notes in actual circulation, and not offset by gold or lawful money deposited with the Federal reserve agent. Notes so paid out shall bear upon their faces a distinctive letter and serial number, which shall be assigned by the Federal Reserve Board to each Federal reserve bank. Whenever Federal reserve notes issued through one Federal reserve bank shall be received by another Federal reserve bank they shall be promptly returned for credit or redemption to the Federal reserve bank through which they were originally issued. No Federal reserve bank shall pay out notes issued through another under penalty of a tax of ten per centum upon the face value of notes so paid out. Notes presented for redemption at the Treasury of the United States shall be paid out of the redemption fund and returned to the Federal reserve banks through which they were originally issued, and thereupon such Federal reserve bank shall, upon demand of the Secretary of the Treasury, reimburse such redemption fund in lawful money or, if such Federal reserve notes have been redeemed by the Treasurer in gold or gold certificates, then such funds shall be reimbursed to the extent deemed necessary by the Secretary of the Treasury in gold or gold certificates, and such Federal reserve bank shall, so long as any of its Federal reserve notes remain outstanding, maintain with the Treasurer in gold an amount sufficient in the judgment of the Secretary to provide for all redemptions to be made by the

Treasurer. Federal reserve notes received by the Treasury, otherwise than for redemption, may be exchanged for gold out of the redemption fund hereinafter provided and returned to the reserve bank through which they were originally issued, or they may be returned to such bank for the credit of the United States. Federal reserve notes unfit for circulation shall be returned by the Federal reserve agents to the Comptroller of the Currency for cancellation and destruction.

The Federal Reserve Board shall require each Federal reserve bank to maintain on deposit in the Treasury of the United States a sum in gold sufficient in the judgment of the Secretary of the Treasury for the redemption of the Federal reserve notes issued to such bank, but in no event less than five per centum; but such deposit of gold shall be counted and included as part of the forty per centum reserve hereinbefore required. The board shall have the right, acting through the Federal reserve agent, to grant in whole or in part or to reject entirely the application of any Federal reserve bank for Federal reserve notes; but to the extent that such application may be granted the Federal Reserve Board shall, through its local Federal reserve agent, supply Federal reserve notes to the bank so applying, and such bank shall be charged with the amount of such notes and shall pay such rate of interest on said amount as may be established by the Federal Reserve Board, and the amount of such Federal reserve notes so issued to any such bank shall, upon delivery, together with such notes of such Federal reserve bank as may be issued under section eighteen of this Act upon security of United States two per centum Government bonds, become a first and paramount lien on all the assets of such bank.

Any Federal reserve bank may at any time reduce its liability for outstanding Federal reserve notes by depositing, with the Federal reserve agent, its Federal reserve notes, gold, gold certificates, or lawful money of the United States. Federal reserve notes so deposited shall not be reissued, except upon compliance with the conditions of an original issue.

The Federal reserve agent shall hold such gold, gold certificates, or lawful money available exclusively for exchange for the outstanding Federal reserve notes when offered by the reserve bank of which he is a director. Upon the request of the Secretary of the Treasury the Federal Reserve Board shall require the Federal reserve agent to transmit so much of said gold to the Treasury of the United States as may be required for the exclusive purpose of the redemption of such notes.

Any Federal reserve bank may at its discretion withdraw collateral deposited with the local Federal reserve agent for the protection of its Federal reserve notes deposited with it and shall at the same time substitute therefor other like collateral of equal amount with the approval of the Federal reserve agent under regulations to be prescribed by the Federal Reserve Board.

In order to furnish suitable notes for circulation as Federal reserve notes, the Comptroller of the Currency shall, under the direction of the Secretary of the Treasury, cause plates and dies to be engraved in the best manner to guard against counterfeits and fraudulent alterations, and shall have printed therefrom and numbered such quantities of such notes of the denominations of \$5, \$10, \$20, \$50, \$100, as may be required to supply the Federal reserve banks. Such notes shall be in form and tenor as directed by the Secretary of the Treasury under the provisions of this Act and shall bear the distinctive numbers of the several Federal reserve banks through which they are issued.

When such notes have been prepared, they shall be deposited in the Treas-

ury, or in the subtreasury or mint of the United States nearest the place of business of each Federal reserve bank and shall be held for the use of such bank subject to the order of the Comptroller of the Currency for their delivery, as provided by this Act.

The plates and dies to be procured by the Comptroller of the Currency for the printing of such circulating notes shall remain under his control and direction, and the expenses necessarily incurred in executing the laws relating to the procuring of such notes, and all other expenses incidental to their issue and retirement, shall be paid by the Federal reserve banks, and the Federal Reserve Board shall include in its estimate of expenses levied against the Federal reserve banks a sufficient amount to cover the expenses herein provided for.

The examination of plates, dies, bed pieces, and so forth, and regulations relating to such examination of plates, dies, and so forth, of national-bank notes provided for in section fifty-one hundred and seventy-four Revised Statutes, is hereby extended to include notes herein provided for.

Any appropriation heretofore made out of the general funds of the Treasury for engraving plates and dies, the purchase of distinctive paper, or to cover any other expense in connection with the printing of national-bank notes or notes provided for by the Act of May thirtieth, nineteen hundred and eight, and any distinctive paper that may be on hand at the time of the passage of this Act may be used in the discretion of the Secretary for the purposes of this Act, and should the appropriations heretofore made be insufficient to meet the requirements of this Act in addition to circulating notes provided for by existing law, the Secretary is hereby authorized to use so much of any funds in the Treasury not otherwise appropriated for the purpose of furnishing the notes aforesaid: *Provided, however,* That nothing in this section contained shall be construed as exempting national banks or Federal reserve banks from their liability to reimburse [*sic*] the United States for any expenses incurred in printing and issuing circulating notes.

Every Federal reserve bank shall receive on deposit at par from member banks or from Federal reserve banks checks and drafts drawn upon any of its depositors, and when remitted by a Federal reserve bank, checks and drafts drawn by any depositor in any other Federal reserve bank or member bank upon funds to the credit of said depositor in said reserve bank or member bank. Nothing herein contained shall be construed as prohibiting a member bank from charging its actual expense incurred in collecting and remitting funds, or for exchange sold to its patrons. The Federal Reserve Board shall, by rule, fix the charges to be collected by the member banks from its patrons whose checks are cleared through the Federal reserve bank and the charge which may be imposed for the service of clearing or collection rendered by the Federal reserve bank.

The Federal Reserve Board shall make and promulgate from time to time regulations governing the transfer of funds and charges therefor among Federal reserve banks and their branches, and may at its discretion exercise the functions of a clearing house for such Federal reserve banks, or may designate a Federal reserve bank to exercise such functions, and may also require each such bank to exercise the functions of a clearing house for its member banks.

SEC. 17. So much of the provisions of section fifty-one hundred and fifty-nine of the Revised Statutes of the United States, and section four of the Act of June twentieth, eighteen hundred and seventy-four, and section eight of

the Act of July twelfth, eighteen hundred and eighty-two, and of any other provisions of existing statutes as require that before any national banking associations [sic] shall be authorized to commence banking business it shall transfer and deliver to the Treasurer of the United States a stated amount of United States registered bonds is hereby repealed.

SEC. 18. *Refunding bonds.* After two years from the passage of this Act, and at any time during a period of twenty years thereafter, any member bank desiring to retire the whole or any part of its circulating notes, may file with the Treasurer of the United States an application to sell for its account, at par and accrued interest, United States bonds securing circulation to be retired.

The Treasurer shall, at the end of each quarterly period, furnish the Federal Reserve Board with a list of such applications, and the Federal Reserve Board may, in its discretion, require the Federal reserve banks to purchase such bonds from the banks whose applications have been filed with the Treasurer at least ten days before the end of any quarterly period at which the Federal Reserve Board may direct the purchase to be made: *Provided*, That Federal reserve banks shall not be permitted to purchase an amount to exceed \$25,000,000 of such bonds in any one year, and which amount shall include bonds acquired under section four of this Act by the Federal reserve bank.

*Provided further*, That the Federal Reserve Board shall allot to each Federal reserve bank such proportion of such bonds as the capital and surplus of such bank shall bear to the aggregate capital and surplus of all the Federal reserve banks.

Upon notice from the Treasurer of the amount of bonds so sold for its account, each member bank shall duly assign and transfer, in writing, such bonds to the Federal reserve bank purchasing the same, and such Federal reserve bank shall, thereupon, deposit lawful money with the Treasurer of the United States for the purchase price of such bonds, and the Treasurer shall pay to the member bank selling such bonds any balance due after deducting a sufficient sum to redeem its outstanding notes secured by such bonds, which notes shall be canceled and permanently retired when redeemed.

The Federal reserve banks purchasing such bonds shall be permitted to take out an amount of circulating notes equal to the par value of such bonds.

Upon the deposit with the Treasurer of the United States of bonds so purchased, or any bonds with the circulating privilege acquired under section four of this Act, any Federal reserve bank making such deposit in the manner provided by existing law, shall be entitled to receive from the Comptroller of the Currency circulating notes in blank, registered and countersigned as provided by law, equal in amount to the par value of the bonds so deposited. Such notes shall be the obligations of the Federal reserve bank procuring the same, and shall be in form prescribed by the Secretary of the Treasury, and to the same tenor and effect as national-bank notes now provided by law. They shall be issued and redeemed under the same terms and conditions as national-bank notes except that they shall not be limited to the amount of the capital stock of the Federal reserve bank issuing them.

Upon application of any Federal reserve bank, approved by the Federal Reserve Board, the Secretary of the Treasury may issue, in exchange for United States two per centum gold bonds bearing the circulation privilege, but against which no circulation is outstanding, one-year gold notes of the United States without the circulation privilege, to an amount not to exceed

one-half of the two per centum bonds so tendered for exchange, and thirty-year three per centum gold bonds without the circulation privilege for the remainder of the two per centum bonds so tendered: *Provided*, That at the time of such exchange the Federal reserve bank obtaining such one-year gold notes shall enter into an obligation with the Secretary of the Treasury binding itself to purchase from the United States for gold at the maturity of such one-year notes, an amount equal to those delivered in exchange for such bonds, if so requested by the Secretary, and at each maturity of one-year notes so purchased by such Federal reserve bank, to purchase from the United States such an amount of one-year notes as the Secretary may tender to such bank, not to exceed the amount issued to such bank in the first instance, in exchange for the two per centum United States gold bonds; said obligation to purchase at maturity such notes shall continue in force for a period not to exceed thirty years.

For the purpose of making the exchange herein provided for, the Secretary of the Treasury is authorized to issue at par Treasury notes in coupon or registered form as he may prescribe in denominations of one hundred dollars, or any multiple thereof, bearing interest at the rate of three per centum per annum, payable quarterly, such Treasury notes to be payable not more than one year from the date of their issue in gold coin of the present standard value, and to be exempt as to principal and interest from the payment of all taxes and duties of the United States except as provided by this Act, as well as from taxes in any form by or under State, municipal, or local authorities. And for the same purpose, the Secretary is authorized and empowered to issue United States gold bonds at par, bearing three per centum interest payable thirty years from date of issue, such bonds to be of the same general tenor and effect and to be issued under the same general terms and conditions as the United States three per centum bonds without the circulation privilege now issued and outstanding.

Upon application of any Federal reserve bank, approved by the Federal Reserve Board, the Secretary may issue at par such three per centum bonds in exchange for the one-year gold notes herein provided for.

**SEC. 19. Bank reserves.** Demand deposits within the meaning of this Act shall comprise all deposits payable within thirty days, and time deposits shall comprise all deposits payable after thirty days, and all savings accounts and certificates of deposit which are subject to not less than thirty days' notice before payment.

When the Secretary of the Treasury shall have officially announced, in such manner as he may elect, the establishment of a Federal reserve bank in any district, every subscribing member bank shall establish and maintain reserves as follows:

(a) A bank not in a reserve or central reserve city as now or hereafter defined shall hold and maintain reserves equal to twelve per centum of the aggregate amount of its demand deposits and five per centum of its time deposits, as follows:

In its vaults for a period of thirty-six months after said date five-twelfths thereof and permanently thereafter four-twelfths.

In the Federal reserve bank of its district, for a period of twelve months after said date, two-twelfths, and for each succeeding six months an additional one-twelfth, until five-twelfths have been so deposited, which shall be the amount permanently required.

For a period of thirty-six months after said date the balance of the reserves

may be held in its own vaults, or in the Federal reserve bank, or in national banks in reserve or central reserve cities as now defined by law.

After said thirty-six months' period said reserves, other than those hereinbefore required to be held in the vaults of the member bank and in the Federal reserve bank, shall be held in the vaults of the member bank or in the Federal reserve bank, or in both, at the option of the member bank.

(b) A bank in a reserve city, as now or hereafter defined, shall hold and maintain reserves equal to fifteen per centum of the aggregate amount of its demand deposits and five per centum of its time deposits, as follows:

In its vaults for a period of thirty-six months after said date six-fifteenths thereof, and permanently thereafter five-fifteenths.

In the Federal reserve bank of its district for a period of twelve months after the date aforesaid at least three-fifteenths, and for each succeeding six months an additional one-fifteenth, until six-fifteenths have been so deposited, which shall be the amount permanently required.

For a period of thirty-six months after said date the balance of the reserves may be held in its own vaults, or in the Federal reserve bank, or in national banks in reserve or central reserve cities as now defined by law.

After said thirty-six months' period all of said reserves, except those hereinbefore required to be held permanently in the vaults of the member bank and in the Federal reserve bank, shall be held in its vaults or in the Federal reserve bank, or in both, at the option of the member bank.

(c) A bank in a central reserve city, as now or hereafter defined, shall hold and maintain a reserve equal to eighteen per centum of the aggregate amount of its demand deposits and five per centum of its time deposits, as follows:

In its vaults six-eighteenths thereof.

In the Federal reserve bank seven-eighteenths.

The balance of said reserves shall be held in its own vaults or in the Federal reserve bank, at its option.

Any Federal reserve bank may receive from the member banks as reserves, not exceeding one-half of each installment, eligible paper as described in section fourteen properly indorsed and acceptable to the said reserve bank.

If a State bank or trust company is required by the law of its State to keep its reserves either in its own vaults or with another State bank or trust company, such reserve deposits so kept in such State bank or trust company shall be construed, within the meaning of this section, as if they were reserve deposits in a national bank in a reserve or central reserve city for a period of three years after the Secretary of the Treasury shall have officially announced the establishment of a Federal reserve bank in the district in which such State bank or trust company is situate. Except as thus provided, no member bank shall keep on deposit with any nonmember bank a sum in excess of ten per centum of its own paid-up capital and surplus. No member bank shall act as the medium or agent of a nonmember bank in applying for or receiving discounts from a Federal reserve bank under the provisions of this Act except by permission of the Federal Reserve Board.

The reserve carried by a member bank with a Federal reserve bank may, under the regulations and subject to such penalties as may be prescribed by the Federal Reserve Board, be checked against and withdrawn by such member bank for the purpose of meeting existing liabilities: *Provided, however,* That no bank shall at any time make new loans or shall pay any dividends unless and until the total reserve required by law is fully restored.

In estimating the reserves required by this Act, the net balance of amounts



due to and from other banks shall be taken as the basis for ascertaining the deposits against which reserves shall be determined. Balances in reserve banks due to member banks shall, to the extent herein provided, be counted as reserves.

National banks located in Alaska or outside the continental United States may remain nonmember banks, and shall in that event maintain reserves and comply with all the conditions now provided by law regulating them; or said banks, except in the Philippine Islands, may, with the consent of the Reserve Board, become member banks of any one of the reserve districts, and shall, in that event, take stock, maintain reserves, and be subject to all the other provisions of this Act.

SEC. 20. So much of sections two and three of the Act of June twentieth, eighteen hundred and seventy-four, entitled "An Act fixing the amount of United States notes, providing for a redistribution of the national-bank currency, and for other purposes," as provides that the fund deposited by any national banking association with the Treasurer of the United States for the redemption of its notes shall be counted as a part of its lawful reserve as provided in the Act aforesaid, is hereby repealed. And from and after the passage of this Act such fund of five per centum shall in no case be counted by any national banking association as a part of its lawful reserve.

SEC. 21. *Bank examinations.* Section fifty-two hundred and forty, United States Revised Statutes, is amended to read as follows:

The Comptroller of the Currency, with the approval of the Secretary of the Treasury, shall appoint examiners who shall examine every member bank at least twice in each calendar year and oftener if considered necessary: *Provided, however,* That the Federal Reserve Board may authorize examination by the State authorities to be accepted in the case of State banks and trust companies and may at any time direct the holding of a special examination of State banks or trust companies that are stockholders in any Federal reserve bank. The examiner making the examination of any national bank, or of any other member bank, shall have power to make a thorough examination of all the affairs of the bank and in doing so he shall have power to administer oaths and to examine any of the officers and agents thereof under oath and shall make a full and detailed report of the condition of said bank to the Comptroller of the Currency.

The Federal Reserve Board, upon the recommendation of the Comptroller of the Currency, shall fix the salaries of all bank examiners and make report thereof to Congress. The expense of the examinations herein provided for shall be assessed by the Comptroller of the Currency upon the banks examined in proportion to assets or resources held by the banks upon the dates of examination of the various banks.

In addition to the examinations made and conducted by the Comptroller of the Currency, every Federal reserve bank may, with the approval of the Federal reserve agent or the Federal Reserve Board, provide for special examination of member banks within its district. The expense of such examinations shall be borne by the bank examined. Such examinations shall be so conducted as to inform the Federal reserve bank of the condition of its member banks and of the lines of credit which are being extended by them. Every Federal reserve bank shall at all times furnish to the Federal Reserve Board such information as may be demanded concerning the condition of any member bank within the district of the said Federal reserve bank.

No bank shall be subject to any visitatorial powers other than such as are authorized by law, or vested in the courts of justice or such as shall be or shall have been exercised or directed by Congress, or by either House thereof or by any committee of Congress or of either House duly authorized.

The Federal Reserve Board shall, at least once each year, order an examination of each Federal reserve bank, and upon joint application of ten member banks the Federal Reserve Board shall order a special examination and report of the condition of any Federal reserve bank.

SEC. 22. No member bank or any officer, director, or employee thereof shall hereafter make any loan or grant any gratuity to any bank examiner. Any bank officer, director, or employee violating this provision shall be deemed guilty of a misdemeanor and shall be imprisoned not exceeding one year or fined not more than \$5,000, or both; and may be fined a further sum equal to the money so loaned or gratuity given. Any examiner accepting a loan or gratuity from any bank examined by him or from an officer, director, or employee thereof shall be deemed guilty of a misdemeanor and shall be imprisoned not exceeding one year or fined not more than \$5,000, or both; and may be fined a further sum equal to the money so loaned or gratuity given; and shall forever thereafter be disqualified from holding office as a national-bank examiner. No national-bank examiner shall perform any other service for compensation while holding such office for any bank or officer, director, or employee thereof.

Other than the usual salary or director's fee paid to any officer, director, or employee of a member bank and other than a reasonable fee paid by said bank to such officer, director, or employee for services rendered to such bank, no officer, director, employee, or attorney of a member bank shall be a beneficiary of or receive, directly or indirectly, any fee, commission, gift, or other consideration for or in connection with any transaction or business of the bank. No examiner, public or private, shall disclose the names of borrowers or the collateral for loans of a member bank to other than the proper officers of such bank without first having obtained the express permission in writing from the Comptroller of the Currency, or from the board of directors of such bank, except when ordered to do so by a court of competent jurisdiction, or by direction of the Congress of the United States, or of either House thereof, or any committee of Congress or of either House duly authorized. Any person violating any provision of this section shall be punished by a fine of not exceeding \$5,000 or by imprisonment not exceeding one year, or both.

Except as provided in existing laws, this provision shall not take effect until sixty days after the passage of this Act.

SEC. 23. The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent that the subsequent transferee fails to meet such liability; but this provision shall not be construed to affect in any way any recourse which

such shareholders might otherwise have against those in whose names such shares are registered at the time of such failure.

**SEC. 24. Loans on farm lands.** Any national banking association not situated in a central reserve city may make loans secured by improved and unencumbered farm land, situated within its Federal reserve district, but no such loan shall be made for a longer time than five years, nor for an amount exceeding fifty per centum of the actual value of the property offered as security. Any such bank may make such loans in an aggregate sum equal to twenty-five per centum of its capital and surplus or to one-third of its time deposits and such banks may continue hereafter as heretofore to receive time deposits and to pay interest on the same.

The Federal Reserve Board shall have power from time to time to add to the list of cities in which national banks shall not be permitted to make loans secured upon real estate in the manner described in this section.

**SEC. 25. Foreign branches.** Any national banking association possessing a capital and surplus of \$1,000,000 or more may file application with the Federal Reserve Board, upon such conditions and under such regulations as may be prescribed by the said board, for the purpose of securing authority to establish branches in foreign countries or dependencies of the United States for the furtherance of the foreign commerce of the United States, and to act, if required to do so, as fiscal agents of the United States. Such application shall specify, in addition to the name and capital of the banking association filing it, the place or places where the banking operations proposed are to be carried on, and the amount of capital set aside for the conduct of its foreign business. The Federal Reserve Board shall have power to approve or to reject such application if, in its judgment, the amount of capital proposed to be set aside for the conduct of foreign business is inadequate, or if for other reasons the granting of such application is deemed inexpedient.

Every national banking association which shall receive authority to establish foreign branches shall be required at all times to furnish information concerning the condition of such branches to the Comptroller of the Currency upon demand, and the Federal Reserve Board may order special examinations of the said foreign branches at such time or times as it may deem best. Every such national banking association shall conduct the accounts of each foreign branch independently of the accounts of other foreign branches established by it and of its home office, and shall at the end of each fiscal period transfer to its general ledger the profit or loss accruing at each branch as a separate item.

**SEC. 26. [Inconsistent acts — repeals.]** All provisions of law inconsistent with or superseded by any of the provisions of this Act are to that extent and to that extent only hereby repealed: *Provided*, Nothing in this Act contained shall be construed to repeal the parity provision or provisions contained in an Act approved March fourteenth, nineteen hundred entitled "An Act to define and fix the standard of value, to maintain the parity of all forms of money issued or coined by the United States, to refund the public debt, and for other purposes," and the Secretary of the Treasury may for the purpose of maintaining such parity and to strengthen the gold reserve, borrow gold on the security of United States bonds authorized by section two of the Act last referred to or for one-year gold notes bearing interest at a rate of not to exceed three per

centum per annum, or sell the same if necessary to obtain gold. When the funds of the Treasury on hand justify, he may purchase and retire such outstanding bonds and notes.

SEC. 27. [*National currency associations — national monetary commission — Revised Statutes sections reenacted — tax on circulation of national bank notes.*] The provisions of the Act of May thirtieth, nineteen hundred and eight, authorizing national currency associations, the issue of additional national-bank circulation, and creating a National Monetary Commission, which expires by limitation under the terms of such Act on the thirtieth day of June, nineteen hundred and fourteen, are hereby extended to June thirtieth, nineteen hundred and fifteen, and sections fifty-one hundred and fifty-three, fifty-one hundred and seventy-two, fifty-one hundred and ninety-one, and fifty-two hundred and fourteen of the Revised Statutes of the United States, which were amended by the Act of May thirtieth, nineteen hundred and eight, are hereby reenacted to read as such sections read prior to May thirtieth, nineteen hundred and eight, subject to such amendments or modifications as are prescribed in this Act: *Provided, however,* That section nine of the Act first referred to in this section is hereby amended so as to change the tax rates fixed in said Act by making the portion applicable thereto read as follows:

National banking associations having circulating notes secured otherwise than by bonds of the United States, shall pay for the first three months a tax at the rate of three per centum per annum upon the average amount of such of their notes in circulation as are based upon the deposit of such securities, and afterwards an additional tax rate of one-half of one per centum per annum for each month until a tax of six per centum per annum is reached, and thereafter such tax of six per centum per annum upon the average amount of such notes.

SEC. 28. [*Reduction of capital of national banking associations.*] Section fifty-one hundred and forty-three of the Revised Statutes is hereby amended and reenacted to read as follows: Any association formed under this title may, by the vote of shareholders owning two-thirds of its capital stock, reduce its capital to any sum not below the amount required by this title to authorize the formation of associations; but no such reduction shall be allowable which will reduce the capital of the association below the amount required for its outstanding circulation, nor shall any reduction be made until the amount of the proposed reduction has been reported to the Comptroller of the Currency and such reduction has been approved by the said Comptroller of the Currency and by the Federal Reserve Board, or by the organization committee pending the organization of the Federal Reserve Board.

SEC. 29. [*If part of act held invalid — effect on remainder.*] If any clause, sentence, paragraph, or part of this Act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this Act, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

SEC. 30. [*Right to amend.*] The right to amend, alter, or repeal this Act is hereby expressly reserved.

## **NATIONAL CEMETERIES.**

*See CEMETERIES.*

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## **NATIONAL FORESTS.**

*See TIMBER LANDS AND FOREST RESERVES.*

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## **NATIONAL MILITARY PARK.**

*See PUBLIC PARKS.*

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## **NATIONAL ZOÖLOGICAL PARK.**

*See PUBLIC PARKS.*

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## **NAUTICAL ALMANAC.**

*See NAVY.*

## NAVAL ACADEMY.

Act of March 7, 1912, Ch. 53, 286.

*Naval Academy — Course Reduced — Commissions to Midshipmen at Sea — Issue to Graduates of Class of 1909 — No Back Pay, etc.*  
286.

Act of March 4, 1913, Ch. 148, 286.

*Board of Visitors, 286.*

*Payment to Servants, 287.*

Act of July 9, 1913, Ch. 5, 287.

*Number of Midshipmen Increased — Commissions on Graduation,*  
287.

An Act Authorizing that commission of ensign be given midshipmen upon graduation from the Naval Academy.

[Act of March 7, 1912, ch. 53.]

[*Naval Academy — course reduced — commissions to midshipmen at sea — issue to graduates of class of 1909 — no back pay, etc.*] That the course at the Naval Academy shall be four years, and midshipmen on graduation shall be commissioned ensigns: *Provided*, That midshipmen now performing two years' service at sea in accordance with existing law shall be commissioned forthwith as ensigns from the date of the passage of this Act: *And provided*, That those midshipmen of the class which was graduated in nineteen hundred and nine, who have completed two years' service afloat, and who are due for promotion, shall be commissioned ensigns to take rank with the other members of their class, according to their standing as determined by their final multiples, respectively, for the six years' course, from the fifth day of June, nineteen hundred and eleven, the date of rank to which they were entitled prior to the passage of this Act: *And provided further*, That no back pay or allowances shall result by reason of the passage of this Act. [37 Stat. L. 73.]

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[*Board of Visitors.*] \* \* \* Hereafter the Board of Visitors to the Naval Academy shall consist of seven members of the Committee on Naval Affairs of the United States Senate and seven members of the Committee on Naval Affairs of the House of Representatives, to be appointed by the respective chairmen thereof, and the members so appointed shall visit the Naval Academy annually at such time as the chairman of the Board of Visitors shall appoint, and the members of each House of Congress of said board may visit said academy together or separately as the said board may elect during the session of Congress. The expenses of the members of the board shall be their actual expenses while engaged upon their duties as members of said board, not to exceed \$5 per day

Act of March 4, 1913.

## NAVAL ACADEMY.

Act of July 9, 1913.

and their actual expenses of travel by the shortest mail routes: *Provided*, That so much of chapter sixty-eight, Statutes at Large, volume twenty, page two hundred and ninety, as is inconsistent with the provisions of this Act is hereby repealed. [37 Stat. L. 907.]

This and the next paragraph are from See 5 Fed. Stat. Annot. 223, for the provision here repealed.  
the Navy Appropriation Act of March 4, 1913, ch. 148.

[*Payment to servants.*] \* \* \* That hereafter such additional payments from the midshipmen's commissary fund as the superintendent of the Naval Academy may deem necessary may be made to the servants authorized in the commissary department. [37 Stat. L. 907.]

An Act Providing for an increase in the number of midshipmen at the United States Naval Academy after June thirtieth, nineteen hundred and thirteen.

[Act of July 9, 1913, ch. 5.]

[*Number of midshipmen increased — commissions on graduation.*] That after June thirtieth, nineteen hundred and thirteen, and until June thirtieth, nineteen hundred and nineteen, there shall be allowed at the Naval Academy two midshipmen for each Senator, Representative, and Delegate in Congress, one for Porto Rico, two for the District of Columbia, and ten appointed each year at large: *Provided*, That midshipmen on graduation shall be commissioned ensigns in the Navy, or may be assigned by the Secretary of the Navy to fill vacancies in the lowest commissioned grades of the Marine Corps or Staff Corps of the Navy. [38 Stat. L. 103.]

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## NAVAL HOMES.

See *HOSPITALS AND ASYLUMS.*

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## NAVIGABLE STREAMS.

See *RIVERS, HARBORS, AND CANALS.*

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## NAVIGATION.

See *SHIPPING AND NAVIGATION.*

## NAVY.

**Act of March 11, 1912, Ch. 55, 289.**

*Officers — Suspended from Promotion for Six Months if Failing on Examination, 289.*

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*Pay Corps Increased — Limit for Fiscal Year, 289.*

*Officers Retired to Make Vacancies — Rank and Pay — Allowances for Death in Service — Cause of Death Restricted — Children Added to Beneficiaries — Pay of Chiefs of Bureaus — Increased Pay for Service, etc. Repealed — Present Commissions Not Affected — Retired Officers — Pay for Performing Active Duty — Limitation in Time of Peace — When Retired Pay Exceeds that of Lieutenant Senior Grade — Disposal of Useless Papers on Vessels, 290.*  
*Enlistment Term Made Four Years — Voluntary Extensions Permitted — Pay and Allowances at End of Existing Term — Reenlistments — Bounty to Be Given — Payment at End of Four Years if Term Extended — Increased Pay for Reenlistments — Extension Equivalent to Continuous Service — Discharges Within Three Months of Expiration of Term — No Reduction or Increase of Pay, etc. 291.*

*Civilian Employees in Island Possessions, 292.*

*Recruiting Seamen — Certificate of Age Required — Under Oath of Applicant — Discharge of Minors, 292.*

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*Bureau of Construction and Repairs — Technical Services, 297.*

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*Bureau of Docks and Yards — Technical Services, 297.*

**Act of March 4, 1913, Ch. 142, 297.**

*Bureau of Equipment — Technical Services, 297.*



Act of March 4, 1913, Ch. 148, 297.

*Naval and Military Academy Service — Longevity Restrictions as to, in Navy and Marine Corps — Longevity Credit to Appointments from Civil Life Repealed — Precedence of Staff Officers — Aviation Duty — Pay Increased for Details on — Nurse Corps — Payments of Commutation to, Allowed — Officers to Receive Pay, etc. from Dates of Commissions, 298.*

*Additional Pay to Employees while on Leave Not Allowed, 299.*

*Purchase of Projectiles, 299.*

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*Contracts to be Awarded by Items, 300.*

*Marine Corps — Provisions — Navy Ration or Commutation — Purchases of Articles for Sale to Officers, etc. 300.*

Act of December 19, 1913, Ch. 301.

*Marine Corps — Tenure of Office of Major General Commandant, 301.*

CROSS-REFERENCES.

*Improper Enlistments, see ARTICLES FOR THE GOVERNMENT OF THE NAVY.*

*Forfeiture of Citizenship by Desertion, see CITIZENSHIP.*

*Navy Mail Clerk, see POSTAL SERVICE.*

See also NAVAL ACADEMY.

An Act To amend section fifteen hundred and five of the Revised Statutes of the United States providing for the suspension from promotion of officers of the Navy if not professionally qualified.

[Act of March 11, 1912, ch. 55.]

[Navy — officers — suspended from promotion for six months if failing on examination.] That section fifteen hundred and five of the Revised Statutes be, and is hereby, amended to read as follows:

“Sec. 1505. Any officer of the Navy on the active list below the rank of commander who, upon examination for promotion, is found not professionally qualified, shall be suspended from promotion for a period of six months from the date of approval of said examination, and shall suffer a loss of numbers equal to the average six months’ rate of promotion to the grade for which said officer is undergoing examination during the five fiscal years next preceding the date of approval of said examination, and upon the termination of said suspension from promotion he shall be reexamined, and in case of his failure upon such reexamination he shall be dropped from the service with not more than one year’s pay: *Provided*, That the provisions of this Act shall be effective from and after January first, nineteen hundred and eleven.” [37 Stat. L. 73.]

For R. S. sec. 1505 as it formerly read see 5 Fed. Stat. Annot. 297.

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[Pay Corps increased — limit for fiscal year.] \* \* \* The grades of the active list of the Pay Corps of the Navy are hereby increased by ten additional paymasters, in all eighty-six paymasters, and by twenty additional passed as-  
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sistant and assistant paymasters, in all one hundred and sixteen passed assistant and assistant paymasters: *Provided*, That the total increase of the Pay Corps of the Navy shall not exceed twenty during the first fiscal year. [37 Stat. L. 328.]

This is from the Navy Appropriation Act of Aug. 22, 1912, ch. 335.

[*Officers retired to make vacancies — rank and pay — allowances for death in service — cause of death restricted — children added to beneficiaries — pay of chiefs of bureaus — increased pay for service, etc., repealed — present commissions not affected — retired officers — pay for performing active duty — limitation in time of peace — when retired pay exceeds that of lieutenant senior grade — disposal of useless papers on vessels.*] \* \* \* That hereafter any officer retired under the provisions of sections eight and nine of the Act approved March third, eighteen hundred and ninety-nine, an Act to reorganize and increase the efficiency of the personnel of the Navy and Marine Corps of the United States, shall be retired with the rank and three-fourths the sea pay of the grade from which he is retired.

That the Act approved May thirteenth, nineteen hundred and eight, making appropriations for the naval service for the fiscal year ending June thirtieth, nineteen hundred and nine, and for other purposes, in so far as it relates to the payment of six months' pay to the widow of an officer or enlisted man and so forth, be amended to read as follows:

"That hereafter immediately upon official notification of the death, from wounds or disease not the result of his own misconduct, of any officer or enlisted man on the active list of the Navy and Marine Corps the Paymaster General of the Navy shall cause to be paid to the widow, and, if no widow, to the children, and, if there be no children, to any other dependent relative of such officer or enlisted man previously designated by him, an amount equal to six months' pay at the rate received by such officer or enlisted man at the date of his death, less seventy-five dollars in the case of an officer and thirty-five dollars in the case of an enlisted man, to defray expenses of interment, and the residue, if any, of the amount reserved shall be paid subsequently to the designated person."

That the portion of the Act entitled "An Act making appropriations for the naval service for the fiscal year ending June thirtieth, nineteen hundred and eleven, and for other purposes," approved June twenty-fourth, nineteen hundred and ten, which reads as follows:

"The pay and allowances of chiefs of bureaus of the Navy Department shall be the highest shore-duty pay and allowances of the rear admiral of the lower nine, and all officers of the Navy who are now serving or who shall hereafter serve as chief of bureau in the Navy Department, and are eligible for retirement after thirty years' service, shall have, while on the active list, the rank, title, and emoluments of a chief of bureau, in the same manner as is already provided by statute law for such officers upon retirement by reason of age or length of service, and such officers, after thirty years' service, shall be entitled to and shall receive new commissions in accordance with the rank and title hereby conferred," be, and the same is hereby, repealed: *Provided*, That no officer who has received his commission under the provisions of said Act shall be deprived of said commission or the rank, title, and emoluments thereof by virtue of this repeal.

Hereafter any naval officer on the retired list may, with his consent, in the discretion of the Secretary of the Navy, be ordered to such duty as he may be

able to perform at sea or on shore, and while so employed in time of peace shall receive the pay and allowances of an officer of the active list of the same rank: *Provided*, That no such retired officer so employed on active duty shall receive, in time of peace, any greater pay and allowances than the pay and allowances which are now or may hereafter be provided by law for a lieutenant senior grade on the active list of like length of service: *And provided further*, That any such officer whose retired pay exceeds the highest pay and allowances of the grade of lieutenant senior grade, shall, while so employed in time of peace, receive his retired pay only, in lieu of all other pay and allowances.

The Act "to authorize and provide for the disposal of useless papers in executive departments," approved February sixteenth, eighteen hundred and eighty-nine, is hereby amended so that accumulations in the files of vessels of the Navy of papers that, in the judgment of the commander in chief of the fleet, are not needed or useful in the transaction of current business and have no permanent value or historical interest may be disposed of by the commander in chief of the fleet by sale, after advertisement for proposals, as waste papers if practicable, or if not practicable, then otherwise, as may appear best for the interests of the Government, the commander in chief of the fleet to make report thereon to the Secretary of the Navy; provided always that no papers less than two years old from the date of the last indorsement thereon and no correspondence, or the related papers, with officers or representatives of a foreign government shall be destroyed or disposed of by such commander in chief of the fleet. [37 Stat. L. 328.]

This is from sec. 1 of the Navy Appropriation Act of Aug. 22, 1912, ch. 335.

For the Act of March 3, 1899 (Navy Personnel Act) see 5 Fed. Stat. Annot. 249.

For the provision of the Act of May 13, 1908, hereby amended, see 1909 Supp. Fed. Stat. Annot. 390, 391.

For the provision of the Act of June 24, 1910, hereby amended, see 1912 Supp. Fed. Stat. Annot. 281.

For the Act of Feb. 16, 1889, hereby amended, see 3 Fed. Stat. Annot. 65.

*[Enlistment term made four years — voluntary extensions permitted — pay and allowances at end of existing term — reenlistments — bounty to be given — payment at end of four years if term extended — increased pay for reenlistments — extension equivalent to continuous service — discharges within three months of expiration of term — no reduction or increase of pay, etc.]*

\* \* \* That the term of enlistment of all enlisted men of the United States Navy other than those who are enlisted during minority shall be four years.

That the term of enlistment of any enlisted man in the Navy may, by his voluntary written agreement, under such regulations as may be prescribed by the Secretary of the Navy with the approval of the President, be extended for a period of either one, two, three, or four full years from the date of expiration of the then existing four-year term of enlistment, and subsequent to said date such enlisted men as extend the term of enlistment as authorized in this section shall be entitled to and shall receive the same pay and allowances in all respects as though regularly discharged and reenlisted immediately upon expiration of their term of enlistment, and such extension shall not operate to deprive them upon discharge at the termination thereof of any right, privilege, or benefit to which they would be entitled at the expiration of a four-year term of enlistment.

That section fifteen hundred and seventy-three of the Revised Statutes of the United States as amended by section sixteen of an Act entitled "An Act to reorganize and increase the efficiency of the personnel of the Navy and Marine

Corps of the United States," approved March third, eighteen hundred and ninety-nine, be, and the same is hereby, amended to read as follows: "If any enlisted man or apprentice, being honorably discharged, shall reenlist for four years within four months thereafter, he shall, on presenting his honorable discharge or on accounting in a satisfactory manner for its loss, be entitled to a gratuity of four months' pay equal in amount to that which he would have received if he had been employed in actual service: *Provided*, That any enlisted man in the Navy whose term of enlistment has been extended for an aggregate of four years shall, after the expiration of the preceding four-year term of enlistment upon which the extension is made and if otherwise entitled to an honorable discharge, be paid the gratuity above provided: *And provided*, That any man who has received an honorable discharge from his last term of enlistment, or who has received a recommendation for reenlistment upon the expiration of his last term of enlistment, who reenlists for a term of four years within four months from the date of his discharge, shall receive an increase of one dollar and thirty-six cents per month to the pay prescribed for the rating in which he serves for each successive reenlistment: *And provided further*, That an extension of the period of enlistment as hereinbefore authorized, aggregating four years, shall be held and considered as equivalent to continuous service with respect to all rights, privileges, and benefits granted for such service pursuant to law."

That under such regulations as the Secretary of the Navy may prescribe, with the approval of the President, any enlisted man may be discharged at any time within three months before the expiration of his term of enlistment or extended enlistment without prejudice to any right, privilege, or benefit that he would have received, except pay and allowances for the unexpired period not served, or to which he would thereafter become entitled, had he served his full term of enlistment or extended enlistment: *Provided*, That nothing in this Act shall be held to reduce or increase the pay and allowances of enlisted men of the Navy now authorized pursuant to law. [37 Stat. L. 330.]

This is from the Navy Appropriation Act of Aug. 22, 1912, ch. 335.

For R. S. sec. 1573 as it read prior to this amendment see 5 Fed. Stat. Annot. 332.

[*Civilian employees in island possessions.*] \* \* \* That the accounting officers of the Treasury are hereby authorized and directed to allow, in the settlement of accounts of disbursing officers involved, payments made under the appropriation "Contingent, Navy," to civilian employees appointed by the Navy Department for duty in and serving at naval stations maintained in the island possessions during the fiscal year nineteen hundred and thirteen. [37 Stat. L. 331.]

This is from the Navy Appropriation Act of Aug. 22, 1912, ch. 335.

[*Recruiting seamen — certificate of age required — under oath of applicant — discharge of minors.*] \* \* \* That no part of this appropriation shall be expended in recruiting seamen, ordinary seamen, or apprentice seamen unless, in case of minors, a certificate of birth or a verified written statement by the parents, or either of them, or in case of their death a verified written statement by the legal guardian, be first furnished to the recruiting officer, showing applicant to be of age required by naval regulations, which shall be presented with the application for enlistment; except in cases where such certificate is unobtainable, enlistment may be made when the recruiting officer is convinced that oath of applicant as to age is credible; but when it is afterwards found, upon evidence satisfactory to the Navy Department, that recruit

has sworn falsely as to age, and is under eighteen years of age at the time of enlistment, he shall, upon request of either parent, or in case of their death by the legal guardian, be released from service in the Navy, upon payment of full cost of first outfit, unless, in any given case, the Secretary, in his discretion, shall relieve said recruit of such payment. [37 Stat. L. 332.]

This is from the Navy Appropriation Act of Aug. 22, 1912, ch. 335.

[*Bureau of Equipment — distribution of duties, etc., directed — discontinuance of bureau on completion — use of appropriations restricted — report to Congress of distribution, etc.*] DISTRIBUTION OF DUTIES: That duties assigned by law to the Bureau of Equipment shall be distributed among the other bureaus and offices of the Navy Department in such manner as the Secretary of the Navy shall consider expedient and proper during the fiscal year ending June thirtieth, nineteen hundred and thirteen, and the Secretary of the Navy, with the approval of the President, is hereby authorized and directed to assign and transfer to said other bureaus and offices, respectively, all available funds heretofore and hereby appropriated for the Bureau of Equipment and such civil employees of the bureau as are authorized by law, and when such distribution of duties, funds, and employees shall have been completed, the Bureau of Equipment shall be discontinued as hereinbefore provided: *Provided*, That nothing herein shall be so construed as to authorize the expenditure of any appropriation for purposes other than those specifically provided by the terms of the appropriations, or the submission of estimates for the Naval Establishment for the fiscal year nineteen hundred and fourteen, except in accordance with the order and arrangement of the naval appropriation Act for the year nineteen hundred and twelve: *Provided further*, That the Secretary of the Navy shall report to Congress at the beginning of its next ensuing session the distribution of the duties of the Bureau of Equipment made by him under the authorization herein granted, with full statement in relation to said distribution and the performance of navy-yard work therein involved. [37 Stat. L. 339.]

This is from the Navy Appropriation Act of Aug. 22, 1912, ch. 335.

[*Nautical Almanac — exchange of data with foreign offices — termination — work of office force — use of employees on tables of the planets, etc. — meridian of Washington.*] \* \* \* The Secretary of the Navy is hereby authorized to arrange for the exchange of data with such foreign almanac offices as he may from time to time deem desirable with a view to reducing the amount of duplication of work in preparing the different national nautical and astronomical almanacs and increasing the total data which may be of use to navigators and astronomers available for publication in the American Ephemeris and Nautical Almanac: *Provided*, That any such arrangement shall be terminable on one year's notice: *Provided further*, That the work of the Nautical Almanac Office during the continuance of any such arrangement shall be conducted so that in case of emergency the entire portion of the work intended for the use of navigators may be computed by the force employed by that office, and without any foreign cooperation whatsoever: *Provided further*, That any employee of the Nautical Almanac Office who may be authorized in any annual appropriation bill and whose services in whole or in part can be spared from the duty of preparing for publication the annual volumes of the American Ephemeris and Nautical Almanac may be employed by said office in the duty of improving the tables of the planets, moon, and stars, to be used in prepar-

ing for publication the annual volumes of the office: *Provided further*, That section four hundred and thirty-five, Revised Statutes, is hereby repealed. [37 Stat. L. 342.]

This is from the Navy Appropriation Act of Aug. 22, 1912, ch. 335. For R. S. sec. 435, see 5 Fed. Stat. Annot. 246.

[*Medical Department — Dental Corps — assistant dental surgeons — pharmacists.*] \* \* \* That the appointment of not more than thirty assistant dental surgeons be, and the same is hereby, authorized, said assistant dental surgeons to be a part of the Medical Department of the United States Navy, to serve professionally the personnel of the naval service, and to perform such other duties as may be prescribed by competent authority.

That all original appointments herein authorized shall be made by the Secretary of the Navy in the grade of acting assistant dental surgeon, and all appointees to such grade shall be citizens of the United States, between twenty-four and thirty-two years of age, and shall be graduates of standard medical or dental colleges trained in the several branches of dentistry, of good moral character, of unquestionable professional repute, and before appointment shall pass satisfactory physical and professional examinations, including tests of skill in practical dentistry, of proficiency in the several usual subjects in a standard dental college course, and in such other subjects of general education as are now or may hereafter be required for admission to the Medical Corps of the Navy.

That at the end of three years from the passage of this Act all acting assistant dental surgeons who have had two or more years' service under their original appointment, as herein provided, shall undergo such physical and competitive professional examinations as the Secretary of the Navy may prescribe to determine their fitness to receive commissions in the Navy, and if found qualified they shall be appointed assistant dental surgeons, with the rank of lieutenant (junior grade), in the order of standing as determined by the professional examinations provided for in this Act.

That after the competitive examinations provided for in section three of this Act have been held, acting assistant dental surgeons thereafter appointed shall serve a probationary period of three years, and upon the completion of such period shall undergo such examinations as the Secretary of the Navy may prescribe to determine their fitness to receive commissions in the Navy, and, if found qualified, they shall be appointed assistant dental surgeons, with the rank of lieutenant (junior grade).

That if any acting assistant dental surgeon shall fail upon the examinations prescribed in this Act he shall be honorably discharged from the naval service, and the appointment of an acting dental surgeon may be revoked at any time in the discretion of the Secretary of the Navy.

That all appointees authorized by this Act shall take rank and precedence in the same manner in all respects as in the case of appointees to the Medical Corps of the Navy, and shall not exercise command over persons in the Navy other than dental surgeons and such enlisted men as may be detailed to assist them by competent authority.

That all officers of the dental corps authorized by this Act shall receive the same pay and allowances as officers of corresponding rank and length of service in the Medical Corps of the Navy.

That all officers of the dental corps authorized by this Act shall be eligible to retirement in the same manner and under the same conditions as officers

of the Medical Corps of the Navy: *Provided*, That section fourteen hundred and forty-five of the Revised Statutes of the United States shall not be applicable to the officers herein authorized: *And provided further*, That the dentist now employed at the Naval Academy shall not be displaced by the operation of this Act and he shall have the same official status, pay, and allowances as may be provided for the senior dental surgeon at the Military Academy.

That the Secretary of the Navy is hereby authorized to appoint, for temporary service, suitably qualified acting dental surgeons when necessary to the health and efficiency of the personnel of the Naval Service: *Provided*, That the total strength of the dental corps, including those appointed for temporary service under this Act, shall not exceed the proportion of one to each thousand of the authorized enlisted strength of the Navy and Marine Corps: *Provided further*, That appointments issued under authority of this Act may be revoked at any time, shall have no legal force or effect except for the time the temporary appointee is in active service, and shall include no right of retirement.

That all appointments authorized by this Act, except the appointment of acting dental surgeons, shall be made by the President, by and with the advice and consent of the Senate.

That all laws and parts of laws inconsistent with the provisions of this Act be, and the same are hereby, repealed: *Provided*, That the tests of qualifications for appointment to the said reserve corps and to the dental corps may be varied to suit the subjects of such branch of the healing art or specialty of surgery of which specialists may be required and in the discretion of the Secretary of the Navy such specialists may be grouped separately: *Provided further*, That of the dental surgeons hereby authorized to be appointed to said Medical Reserve Corps and to the said Dental Corps, the whole number ordered to active duty shall not exceed the number the Secretary of the Navy may deem actually necessary to the health and efficiency of the personnel of the Navy and Marine Corps and, in time of peace, the number shall not exceed the proportion of one dental officer to one thousand of said personnel.

That pharmacists shall, after six years from date of warrant, be commissioned chief pharmacists after passing satisfactorily such examination as the Secretary of the Navy may prescribe, and shall, on promotion, have the rank, pay, and allowances of chief boatswains. [37 Stat. L. 344.]

This is from the Navy Appropriation Act of Aug. 22, 1912, ch. 335.

[*Commutation of rations to prisoners.*] \* \* \* That the Secretary of the Navy is authorized to commute rations for such general courts-martial prisoners in such amounts as seem to him proper, which may vary in accordance with the location of the naval prison, but which shall in no case exceed thirty cents per diem for each ration so commuted. [37 Stat. L. 346.]

This is from the Navy Appropriation Act of Aug. 22, 1912, ch. 335.

[*Exchange of typewriters, etc.*] \* \* \* That hereafter wornout typewriting and computing machines for the naval establishment may be exchanged as a part of the purchase price of new ones. [37 Stat. L. 346.]

This is from the Navy Appropriation Act of Aug. 22, 1912, ch. 335.

[*Gunnery sergeants — pay, allowances, etc.*] \* \* \* That the gunnery sergeants of the Marine Corps shall hereafter receive the same pay, and be

entitled to the allowances, rank, continuous-service pay, and retired pay of a first sergeant in said corps. [37 Stat. L. 351.]

This is from the Navy Appropriation Act of Aug. 22, 1912, ch. 335.

[*Navy ration or commutation.*] \* \* \* and no law shall be construed to entitle marines on shore duty to any rations, or commutation thereof, other than such as now are or may hereafter be allowed to enlisted men in the Army: *Provided, however,* That hereafter when it is impracticable, or the expense is found greater to supply marines serving on shore duty in the island possessions and on foreign stations with the Army ration, such marines may be allowed the Navy ration or commutation therefor. [37 Stat. L. 352.]

This is from the Navy Appropriation Act of Aug. 22, 1912, ch. 335.

[*Duties of enlisted men on battleships when docked, etc., limited.*] \* \* \* No enlisted men or seamen, not including commissioned and warrant officers, on battleships of the Navy, when such battleships are docked or laid up at any navy yard for repairs, shall be ordered or required to perform any duties except such as are or may be performed by the crew while at sea or in a foreign port. [37 Stat. L. 355.]

This is from the Navy Appropriation Act of Aug. 22, 1912, ch. 335.

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SEC. 2. [*Prohibited naval enlistments.*] That section fourteen hundred and twenty of the Revised Statutes, as amended by the Acts of Congress approved May twelfth, eighteen hundred and seventy-nine, and February twenty-third, eighteen hundred and eighty-one, be, and the same is hereby, amended to read as follows:

**"Sec. 1420.** No minor under the age of fourteen years, no insane or intoxicated person, and no person who has deserted in time of war from the naval or military service of the United States, shall be enlisted in the naval service." [37 Stat. L. 356.]

The above is the first part of sec. 2 of the Act of Aug. 22, 1912, ch. 336. The remainder of this section amends R. S. sec. 1624. See the title ARTICLES FOR THE GOVERNMENT OF THE NAVY, *ante*, p. 29. Sec. 1 of this Act

amends R. S. sec. 1998, and is given under the title CITIZENSHIP, *ante*, p. 43.

For R. S. sec. 1420 as it read prior to this amendment see 5 Fed. Stat. Annot. 271.

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[*Bureau of Equipment — technical services.*] \* \* \* The services of draftsmen and such other technical services as the Secretary of the Navy may deem necessary may be employed only in the Bureau of Equipment, and at rates of compensation not exceeding those paid hereunder prior to January first, nineteen hundred and twelve, to carry into effect the various appropriations for "Increase of the Navy" and "Equipment of vessels," to be paid from the appropriation "Equipment of vessels": *Provided,* That the expenditures on this account for the fiscal year nineteen hundred and thirteen shall not exceed \$9,500. A statement of the persons employed hereunder, their duties, and the compensation paid to each shall be made to Congress each year in the annual estimates. [37 Stat. L. 391.]

This and the four paragraphs following are from the Legislative, Executive, and Judicial Appropriation Act of Aug. 23, 1912, ch. 350.



[*Bureau of Steam Engineering — technical services.*] \* \* \* The services of draftsmen and such other technical services as the Secretary of the Navy may deem necessary may be employed only in the Bureau of Steam Engineering and at rates of compensation not exceeding those paid hereunder prior to January first, nineteen hundred and twelve, to carry into effect the various appropriations for "Increase of the Navy" and "Steam machinery," to be paid from the appropriation "Steam machinery": *Provided*, That the expenditures on this account for the fiscal year nineteen hundred and thirteen shall not exceed \$33,700. A statement of the persons employed hereunder, their duties, and the compensation paid to each shall be made to Congress each year in the annual estimates. [37 Stat. L. 393.]

[*Bureau of construction and repair — technical services.*] \* \* \* The services of draftsmen and such other technical services as the Secretary of the Navy may deem necessary may be employed only in the Bureau of Construction and Repair and at rates of compensation not exceeding those paid hereunder prior to January first, nineteen hundred and twelve, to carry into effect the various appropriations for "Increase of the Navy" and "Construction and Repair," to be paid from the appropriation "Construction and Repair": *Provided*, That the expenditures on this account for the fiscal year nineteen hundred and thirteen shall not exceed \$88,300. A statement of the persons employed hereunder, their duties, and the compensation paid to each shall be made to Congress each year in the annual estimates. [37 Stat. L. 393.]

[*Bureau of ordnance — technical services.*] \* \* \* The services of clerks, draftsmen, and such other technical services as the Secretary of the Navy may deem necessary may be employed only in the Bureau of Ordnance, and at rates of compensation not exceeding those paid hereunder prior to January first, nineteen hundred and twelve, to carry into effect the various appropriations for "Increase of the Navy" and "Ordnance and ordnance stores" to be paid from the appropriation "Ordnance and ordnance stores": *Provided*, That the expenditures on this account for the fiscal year nineteen hundred and thirteen shall not exceed \$12,800. A statement of the persons employed hereunder, their duties, and the compensation paid to each, shall be made to Congress each year in the annual estimates. [37 Stat. L. 393.]

[*Bureau of docks and yards — technical services.*] \* \* \* The services of skilled draftsmen and such other technical services as the Secretary of the Navy may deem necessary may be employed only in the Bureau of Yards and Docks to carry into effect the various appropriations and allotments thereunder and be paid from such appropriations and allotments: *Provided*, That the expenditures on this account for the fiscal year nineteen hundred and thirteen shall not exceed \$50,000. A statement of the persons employed hereunder, their duties, and the compensation paid to each, shall be made to Congress each year in the annual estimates. [37 Stat. L. 394.]

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[*Bureau of equipment — technical services.*] \* \* \* The services of draftsmen and such other technical services as the Secretary of the Navy may deem necessary may be employed only in the Bureau of Equipment, and at rates of compensation not exceeding those paid hereunder prior to January

first, nineteen hundred and twelve, to carry into effect the various appropriations for "Increase of the Navy" and "Equipment of vessels," to be paid from the appropriation "Equipment of vessels": *Provided*, That the expenditures on this account for the fiscal year nineteen hundred and fourteen shall not exceed \$9,500. A statement of the persons employed hereunder, their duties, and the compensation paid to each shall be made to Congress each year in the annual estimates. [37 Stat. L. 768.]

This is from the Legislative, Executive, and Judicial Appropriation Act of March 4, 1913, ch. 142.

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[*Naval and military academy service — longevity restrictions as to, in Navy and Marine Corps — longevity credit to appointments from civil life repealed — precedence of staff officers — aviation duty — pay increased for details on — Nurse Corps — payments of commutation to, allowed — officers to receive pay, etc., from dates of commissions.*] \* \* \* Hereafter the service of a midshipman at the United States Naval Academy, or that of a cadet at the United States Military Academy, who may hereafter be appointed to the United States Naval Academy, or to the United States Military Academy, shall not be counted in computing for any purpose the length of service of any officer in the Navy or in the Marine Corps.

That so much of an Act entitled "An Act to reorganize and increase the efficiency of the personnel of the Navy and Marine Corps," approved March third, eighteen hundred and ninety-nine, which reads as follows: "and that all officers, including warrant officers, who have been or may be appointed to the Navy from civil life shall, on the date of appointment, be credited for computing their pay, with five years' service," shall not apply to any person entering the Navy from and after the passage of this Act: *Provided*, That section fourteen hundred and eighty-six of the Revised Statutes shall not apply in the case of officers who enter the Navy after the passage of this Act and all such officers shall take precedence when of the same grade according to their respective dates of commission in that grade.

That from and after the passage and approval of this Act the pay and allowances that are now or may be hereafter fixed by law for officers of the Navy and Marine Corps shall be increased thirty-five per centum for such officers as are now or may hereafter be detailed by the Secretary of the Navy on aviation duty: *Provided*, That this increase of pay and allowances shall be given to such officers only as are actual flyers of heavier-than-air craft, and while so detailed: *Provided further*, That no more than thirty officers of the Navy and Marine Corps shall be detailed to aviation service: *Provided further*, That no officer above the rank of lieutenant commander in the Navy or major in the Marine Corps shall be detailed for actual flying: *Provided further*, That nothing in this provision shall be construed to increase the total number of officers now in the Navy or Marine Corps.

That the accounting officers of the Treasury are hereby authorized and directed to allow in the accounts of disbursing officers of the Navy all payments heretofore made by them in accordance with orders or regulations of the Secretary of the Navy for commutation of subsistence to members of the Nurse Corps of the Navy at the rate therein specified.

That all officers of the Navy who, since the third day of March, eighteen hundred and ninety-nine, have been advanced or may hereafter be advanced

in grade or rank pursuant to law shall be allowed the pay and allowances of the higher grade or rank from the dates stated in their commissions. [37 Stat. L. 891.]

This is from the Navy Appropriation Act 1899, see 5 Fed. Stat. Annot. 249.  
of March 4, 1913, ch. 148. For R. S. sec. 1486, see 5 Fed. Stat. Annot.  
For the Navy Personnel Act of March 3, 293.

[*Additional pay to employees while on leave not allowed.*] \* \* \* That employees while taking their leaves of absence shall not receive compensation for services rendered during the period of such leave of absence in addition to leave pay. [37 Stat. L. 893.]

This is from the Navy Appropriation Act of March 4, 1913, ch. 148.

[*Purchase of projectiles.*] \* \* \* That hereafter no part of any appropriation shall be expended for the purchase of shells or projectiles for the Navy except for shells or projectiles purchased in accordance with the terms and conditions of proposals submitted by the Secretary of the Navy to all the manufacturers of shells and projectiles and upon bids received in accordance with the terms and requirements of such proposals: *Provided*, That this restriction shall not apply to purchases of shells or projectiles of an experimental nature or to be used for experimental purposes and paid for from the appropriation "Experiments, Bureau of Ordnance": *Provided*, That hereafter the Secretary of the Navy is hereby authorized to make emergency purchases of war material abroad: *And provided further*, That when such purchases are made abroad, this material shall be admitted free of duty. [37 Stat. L. 896.]

This is from the Navy Appropriation Act of March 4, 1913, ch. 148.

[*Establishing coal depots.*] \* \* \* Section fifteen hundred and fifty-two of the Revised Statutes of the United States, authorizing the Secretary of the Navy to establish, at such places as he may deem necessary, suitable depots for coal and other fuel for the supply of steamships of war, is hereby repealed. [37 Stat. L. 898.]

This is from the Navy Appropriation Act of March 4, 1913, ch. 148. For R. S. sec. 1552, see 5 Fed. Stat. Annot. 307.

[*Naval hospitals.*] Section four thousand eight hundred and ten of the Revised Statutes of the United States is hereby amended so as to read as follows:  
"Sec. 4810. The Secretary of the Navy shall procure at suitable places proper sites for Navy hospitals, and if the necessary buildings are not procured with the site, shall cause such to be erected, having due regard to economy, and giving preference to such plans as with most convenience and least cost will admit of subsequent additions, when the funds permit and circumstances require; and shall provide, at one of the establishments, a permanent asylum for disabled and decrepit Navy officers, seamen, and marines: *Provided*, That hereafter no sites shall be procured or hospital buildings erected or extensions to existing hospitals made unless hereafter authorized by Congress: *Provided*, That the sum of \$70,000 is appropriated, to be paid out of any money in the Treasury not otherwise appropriated, for the building of a new power plant at the Naval Hospital, Chelsea, Massachusetts, said sum of money to be paid into the Treas-

ury from the proceeds of sale of land authorized by the naval Act of June twenty-ninth, nineteen hundred and six." [37 Stat. L. 902.]

This is from the Navy Appropriation Act of March 4, 1913, ch. 148.

For R. S. sec. 4810 as it read prior to this amendment see 3 Fed. Stat. Annot. 252.

[*Dental Reserve Corps.*] \* \* \* That a Navy Dental Reserve Corps is hereby authorized to be organized and operated under the provisions of the Act approved August twenty-second, nineteen hundred and twelve, providing for the organization and operation of a Navy Medical Reserve Corps, and differing therefrom in no respect other than that the qualification requirements of the appointees shall be dental surgeons and graduates of reputable schools of medicine or dentistry instead of "graduates of reputable schools of medicine," and so many of said appointees may be ordered to temporary active service as the Secretary of the Navy may deem necessary to the health and efficiency of the personnel of the Navy and Marine Corps, providing the whole number of both regular corps and reserve corps dental surgeons in active service shall not exceed, in time of peace, one to each one thousand five hundred of the said personnel, and no dental surgeon shall render service other than temporary service until his appointment shall have been confirmed by the Senate: *Provided further*, That Dental Corps officers of permanent tenure shall be appointed from the Dental Reserve Corps membership in accordance with the said provisions of the said Act, and all such appointees shall be citizens of the United States between twenty-two and thirty years of age, of good moral character, of unquestionable professional repute, and before appointment shall pass satisfactory physical and professional examinations, and when appointed shall take rank and precedence in the same manner in all respects as in the case of appointees to the Medical Corps of the Navy and shall receive corresponding pay and allowances and, when they reach the age of sixty-four years, be entitled to retired pay. [37 Stat. L. 903.]

This is from the Navy Appropriation Act of March 4, 1913, ch. 148.

[*Contracts to be awarded by items.*] \* \* \* That from and after the passage of this Act all awards of contracts for provisions for the Navy shall be made by individual items; the contract for each item being awarded to the lowest responsible bidder. [37 Stat. L. 904.]

This is from the Navy Appropriation Act of March 4, 1913, ch. 148.

[*Marine Corps — provisions — navy ration or commutation — purchases of articles for sale to officers, etc.*] PROVISIONS, MARINE CORPS: For noncommissioned officers, musicians, and privates serving ashore; subsistence and lodging of enlisted men when traveling on duty, or cash in lieu thereof; commutation of rations to enlisted men regularly detailed as clerks and messengers; payment of board and lodging of applicants for enlistment while held under observation, recruits, and recruiting parties; transportation of provisions, and the employment of necessary labor connected therewith; ice for offices and preservation of rations, \$890,000. No law shall be construed to entitle enlisted men on shore duty to any rations or commutation therefor other than such as are now or may hereafter be allowed enlisted men in the Army: *Provided, however*, That when it is impracticable or the expense is found greater to supply marines serving on shore duty in the island possessions and on foreign stations with the Army ration, such marines may be allowed the Navy ration or commutation therefor: *Provided*, That hereafter so much of this appropriation as may be necessary

may be applied for the purchase, for sale to officers, enlisted men, and civilian employees, of such articles of subsistence stores as may from time to time be designated and under such regulations as may be prescribed by the Secretary of the Navy. [*§7 Stat. L. 909.*]

This is from the Navy Appropriation Act of March 4, 1913, ch. 148.

**An Act To make the tenure of the office of the major general commandant of the Marine Corps for a term of four years.**

[*Act of Dec. 19, 1913, ch. —.*]

[*Marine Corps — tenure of office of major general commandant.*] That hereafter when a vacancy shall exist in the position of commandant of the Marine Corps the President may appoint to such position, by and with the advice and consent of the Senate, an officer of the Marine Corps on the active list not below the grade of field officer, who shall hold office as such commandant for a term of four years, unless sooner relieved, and who, while so serving, shall have the rank, pay, and allowances of a major general in the Army; and any officer appointed under the provisions of this Act who shall be retired from the position of commandant of the Marine Corps, in accordance with the provisions of sections twelve hundred and fifty-one, sixteen hundred and twenty-two, and sixteen hundred and twenty-three, Revised Statutes of the United States, or by reason of age or length of service, shall have the rank and retired pay of a major general; if retired for any other reason, he shall be placed on the retired list of officers of the grade to which he belonged at the time of his retirement: *Provided*, That an officer serving as commandant shall be carried as an additional number in his grade while so serving, and after his return to duty in his grade until said grade is reduced to the number authorized by law: *Provided further*, That nothing herein contained shall operate to increase or reduce the total number of officers in the Marine Corps now provided by law. [*§8 Stat. L. —.*]

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## NEUTRALITY.

*Export of War Material, see IMPORTS AND EXPORTS.*

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## OATH.

See *PUBLIC OFFICERS.*

## **OFFICERS.**

*See PUBLIC OFFICERS.*

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## **OFFICIAL REGISTER.**

*See PUBLIC DOCUMENTS.*

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## **OIL AND GAS LANDS.**

*See PUBLIC LANDS.*

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## **PANAMA CANAL.**

*See RIVERS, HARBORS, AND CANALS.*

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## **PARCEL POST.**

*See POSTAL SERVICE.*

## **PARKS.**

See *PUBLIC PARKS.*

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## **PAROLE.**

See *PRISONS AND PRISONERS.*

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## **PASSENGER STEAMERS.**

See *STEAM VESSELS,*

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## **PELAGIC SEALING.**

See *ALASKA.*

## PENAL LAWS.

Act of February 15, 1912, Ch. 38, 304.

*Making, Importing, etc., Tokens, Prints, etc., Similar to United States or Foreign Coins—Punishment for—Illustrations Permitted in Books, etc.—School Arithmetics Added, 304.*

### CROSS-REFERENCE.

*Larceny of Goods in Interstate Commerce, see INTERSTATE COMMERCE.*

An Act To amend section one hundred and seventy-one of the penal laws of the United States, approved March fourth, nineteen hundred and nine.

[Act of Feb. 15, 1912, ch. 38.]

[*Making, importing, etc., tokens, prints, etc., similar to United States or foreign coins — punishment for — illustrations permitted in books, etc. — school arithmetics added.*] That section one hundred and seventy-one of the penal laws of the United States, approved March fourth, nineteen hundred and nine, be amended so as to read as follows:

“SEC. 171. Whoever within the United States or any place subject to the jurisdiction thereof shall make, or cause or procure to be made, or shall bring therein from any foreign country, or shall have in possession with intent to sell, give away, or in any other manner use the same, any business or professional card, notice, placard, token, device, print, or impression, or any other thing whatsoever, in the likeness or similitude as to design, color, or the inscription thereon of any of the coins of the United States or of any foreign country that have been or hereafter may be issued as money, either under the authority of the United States or under the authority of any foreign Government, shall be fined not more than one hundred dollars. But nothing in this section shall be construed to forbid or prevent the printing and publishing of illustrations of coins and medals or the making of the necessary plates for the same to be used in illustrating numismatic and historical books and journals and school arithmetics and the circulars of legitimate publishers and dealers in the same.” [37 Stat. L. 64.]

Sec. 171 of the Penal Laws as originally enacted is given in 1909 Supp. Fed. Stat. Annot. 451.



## PENSIONS.

Act of August 17, 1912, Ch. 301, 305.

*Sec. 1. Agents Abolished, 305.*

- 2. Arrangement of Pensioners in Groups—Payments Quarterly—Fractional Payments, 305.*
- 3. Checks without Separate Vouchers to be Sent Pensioners—Delivery of Pension Mail by Postal Authorities Restricted, 306.*
- 4. Punishment for Forging, etc., Checks, 306.*
- 5. Acting Disbursing Clerk in Case of Sickness, etc.—Clerks to Sign Checks to be Designated—Bond Required, 306.*
- 6. Payment Due Inmates of Volunteer Soldiers' Homes, 307.*

Act of August 24, 1912, Ch. 355, 307.

*Temporary Extra Clerks on Service Pensions—Employment of Former Government Clerks—Further Legislation for Continuance, 307.*

Act of February 19, 1913, Ch. 59, 307.

*Indian War Pensions—Rate Increased, 307.*

Act of May 11, 1912, Ch. 123, 307.

- Sec. 1. Pensions—Granted for Service in Civil War to Persons 62 Years Old or Over—Rate for Permanent Disability Irrespective of Service or Age—Mexican War Service—Rate—Commencement—Existing Pensioners or Applicants—No Double Pension—Not Applicable to Pensioners at a Higher Rate, 307.*
- 2. Rank Not Considered, 309.*
  - 3. Fees for Services Limited to Applications for Original Pension, 309.*
  - 4. Pensioners Included, 309.*
  - 5. Record of Pensions Granted—Tabulations—Increase with Advancing Age without Further Application, 309.*

[SEC. 1.] [*Agents abolished.*] \* \* \* Section forty-seven hundred and seventy-eight of the Revised Statutes of the United States authorizing the appointment of agents for the payment of pensions, and section forty-seven hundred and eighty of the Revised Statutes of the United States, authorizing the establishment of agencies by the President of the United States are hereby repealed to take effect from and after the thirty-first day of January, nineteen hundred and thirteen, and the existing pension agencies are abolished from and after said date. [37 Stat. L. 312.]

This is from the Pensions Appropriation Act of Aug. 17, 1912, ch. 301.

For R. S. secs. 4778, 4780, hereby repealed, see 5 Fed. Stat. Annot. 682, 684.

SEC. 2. [*Arrangement of pensioners in groups—payments quarterly—fractional payments.*] That the Secretary of the Interior is authorized in the

payment of pensions to arrange the pensioners in three groups as he may think proper, and may from time to time change any pensioner or class of pensioners from one group to another as he may deem convenient for the transaction of the public business. The pensioners in the first group shall be paid their quarterly pensions on January fourth, April fourth, July fourth, and October fourth of each year; the pensioners in the second group shall be paid their quarterly pensions on February fourth, May fourth, August fourth, and November fourth, of each year; the pensioners in the third group shall be paid their quarterly pensions on March fourth, June fourth, September fourth, and December fourth of each year. The Secretary of the Interior is authorized to cause payments of pension to be made for the fractional parts of a quarter which may be made necessary by the transfer of a pensioner from one group to another. [37 Stat. L. 312.]

See note under sec. 6, *infra*.

SEC. 3. [*Checks without separate vouchers to be sent pensioners — delivery of pension mail by postal authorities restricted.*] That not later than January first, nineteen hundred and thirteen, pensions shall be paid by checks drawn, under the direction of the Secretary of the Interior, in such form as to protect the United States against loss, without separate vouchers or receipts, and payable by the proper assistant treasurer or designated depository, except in the case of any pensioner in which the law authorizes the pension to be paid to some person other than the pensioner, or in which the Secretary of the Interior may consider a voucher necessary for the protection of the Government. Such checks shall be transmitted by mail to the payee thereof at his last known address. That postmasters, delivery clerks, letter carriers, and all other postal employees are prohibited from delivering any such mail to any person whomsoever, if the addressee has died or removed, or in the case of a widow believed by the postal employee intrusted with the delivery of such mail to have remarried; and the postmaster in every such case shall forthwith return such mail with a statement of the reasons for so doing, and if because of death or remarriage, the date thereof, if known. Checks returned as herein provided on account of the death or remarriage of the pensioner shall be canceled. [37 Stat. L. 312.]

SEC. 4. [*Punishment for forging, etc., checks.*] That whoever shall forge the indorsement of the person to whose order any pension check shall be drawn, or whoever with the knowledge that such indorsement is forged shall utter such check, or whoever, by falsely personating such person, shall receive from any person, firm, corporation, or officer or employee of the United States the whole or any portion of the amount represented by such check, shall upon conviction be punished by a fine of not more than one thousand dollars or be imprisoned not more than five years or both. [37 Stat. L. 313.]

SEC. 5. [*Acting disbursing clerk in case of sickness, etc. — clerks to sign checks to be designated — bond required.*] That in case of sickness or unavoidable absence of the disbursing clerk for the payment of pensions from his office, the Commissioner of Pensions may, with the approval of the Secretary of the Interior, authorize the chief clerk of his office or some other clerk employed therein to temporarily act as such disbursing clerk for payment of pensions. With the approval of the Commissioner of Pensions and the Secretary of the Interior, the disbursing clerk for the payment of pensions may designate and

authorize the necessary number of clerks to sign the name of the disbursing clerk for the payment of pensions to official checks. The disbursing clerk shall give bond with good and sufficient surety for such amount and in such form as the Secretary of the Interior may approve, and such bond shall be held to cover and apply to the acts of the persons authorized to act in his place. [37 Stat. L. 313.]

SEC. 6. [*Payment due inmates of Volunteer Soldiers' Homes.*] That nothing in this Act shall be construed as amending or repealing that portion of the sundry civil appropriation Act for the fiscal year eighteen hundred and eighty-three (Statutes at Large, volume twenty-two, page three hundred and twenty-two) concerning the payment of pensions due inmates of the National Home for Disabled Volunteer Soldiers. [37 Stat. L. 313.]

The above secs. 2-6 are from the Pensions Appropriation Act of Aug. 17, 1912, ch. 301. As to pension of inmates of National Home, see 3 Fed. Stat. Annot. 264.

[*Temporary extra clerks on service pensions — employment of former government clerks — further legislation for continuance.*] \* \* \* Three hundred thousand dollars, or so much thereof as may be necessary, to employ, temporarily, extra clerks by the Commissioner of Pensions to aid him in the work incident to the adjudication of pension claims filed under the Act entitled "An Act granting a service pension to certain defined veterans of the Civil War and the War with Mexico," approved May eleventh, nineteen hundred and twelve, at salaries not to exceed \$1,200 each; and in order to facilitate said work the Commissioner of Pensions is authorized to employ clerks heretofore employed in other departments of the Government service, or others who may be sufficiently skilled to do the required work, without complying with the requirements of the civil-service laws: *Provided, however,* That none of said extra clerks shall continue in the service beyond the fiscal year of this appropriation without further legislation, or by reason of said employment alone be eligible for transfer to the service in other departments, or be continued longer than may be necessary to do the work hereby provided for. [37 Stat. L. 454.]

This is from the Sundry Civil Appropriation Act of Aug. 24, 1912, ch. 355.

An Act To increase the pensions of surviving soldiers of Indian wars in certain cases.

[Act of February 19, 1913, ch. 59.]

[*Indian war pensions — rate increased.*] That from and after the passage of this Act the rate of pension to surviving soldiers of the various Indian wars who are now on the pension roll or who may hereafter be placed thereon under the Acts of July twenty-seventh, eighteen hundred and ninety-two, June twenty-seventh, nineteen hundred and two, and May thirtieth, nineteen hundred and eight, shall be twenty dollars per month. [37 Stat. L. 679.]

An Act Granting pensions to certain enlisted men, soldiers, and officers who served in the Civil War and the War with Mexico.

[Act of May 11, 1912, ch. 128.]

[SEC. 1.] [*Pensions — granted for service in Civil War to persons 62 years old or over.*] That any person who served ninety days or more in the military.

or naval service of the United States during the late Civil War, who has been honorably discharged therefrom, and who has reached the age of sixty-two years or over, shall, upon making proof of such facts, according to such rules and regulations as the Secretary of the Interior may provide, be placed upon the pension roll and be entitled to receive a pension as follows: In case such person has reached the age of sixty-two years and served ninety days, thirteen dollars per month; six months, thirteen dollars and fifty cents per month; one year, fourteen dollars per month; one and a half years, fourteen dollars and fifty cents per month; two years, fifteen dollars per month; two and a half years, fifteen dollars and fifty cents per month; three years or over, sixteen dollars per month. In case such person has reached the age of sixty-six years and served ninety days, fifteen dollars per month; six months, fifteen dollars and fifty cents per month; one year, sixteen dollars per month; one and a half years, sixteen dollars and fifty cents per month; two years, seventeen dollars per month; two and a half years, eighteen dollars per month; three years or over, nineteen dollars per month. In case such person has reached the age of seventy years and served ninety days, eighteen dollars per month; six months, nineteen dollars per month; one year, twenty dollars per month; one and a half years, twenty-one dollars and fifty cents per month; two years, twenty-three dollars per month; two and a half years, twenty-four dollars per month; three years or over, twenty-five dollars per month. In case such person has reached the age of seventy-five years and served ninety days, twenty-one dollars per month; six months, twenty-two dollars and fifty cents per month; one year, twenty-four dollars per month; one and a half years, twenty-seven dollars per month; two years or over, thirty dollars per month.

[*Rate for permanent disability irrespective of service or age.*] That any person who served in the military or naval service of the United States during the Civil War and received an honorable discharge, and who was wounded in battle or in line of duty and is now unfit for manual labor by reason thereof, or who from disease or other causes incurred in line of duty resulting in his disability is now unable to perform manual labor, shall be paid the maximum pension under this Act, to wit, thirty dollars per month, without regard to length of service or age.

[*Mexican War service — rate.*] That any person who has served sixty days or more in the military or naval service of the United States in the War with Mexico and has been honorably discharged therefrom, shall, upon making like proof of such service, be entitled to receive a pension of thirty dollars per month.

[*Commencement — existing pensioners or applicants — no double pension — not applicable to pensioners at a higher rate.*] All of the aforesaid pensions shall commence from the date of filing of the applications in the Bureau of Pensions after the passage and approval of this Act: *Provided*, That pensioners who are sixty-two years of age or over, and who are now receiving pensions under existing laws, or whose claims are pending in the Bureau of Pensions, may, by application to the Commissioner of Pensions, in such form as he may prescribe, receive the benefits of this Act; and nothing herein contained shall prevent any pensioner or person entitled to a pension from prosecuting his claim and receiving a pension under any other general or special Act: *Provided*, That no person shall receive a pension under any other law at the same time or for the same period that he is receiving a pension under the provisions of this Act: *Provided further*, That no person who is now receiving or shall hereafter receive a greater pension, under any other general or special law, than he would

be entitled to receive under the provisions herein shall be pensionable under this Act. [37 Stat. L. 112.]

SEC. 2. [*Rank not considered.*] That rank in the service shall not be considered in applications filed hereunder. [37 Stat. L. 113.]

SEC. 3. [*Fees for services limited to applications for original pension.*] That no pension attorney, claim agent, or other person shall be entitled to receive any compensation for services rendered in presenting any claim to the Bureau of Pensions, or securing any pension, under this Act, except in applications for original pension by persons who have not heretofore received a pension. [37 Stat. L. 113.]

SEC. 4. [*Pensioners included.*] That the benefits of this Act shall include any person who served during the late Civil War, or in the War with Mexico, and who is now or may hereafter become entitled to pension under the Acts of June twenty-seventh, eighteen hundred and ninety, February fifteenth, eighteen hundred and ninety-five, and the joint resolutions of July first, nineteen hundred and two, and June twenty-eighth, nineteen hundred and six, or the Acts of January twenty-ninth, eighteen hundred and eighty-seven, March third, eighteen hundred and ninety-one, and February seventeenth, eighteen hundred and ninety-seven. [37 Stat. L. 113.]

See the title PENSIONS, 5 Fed. Stat. Annot. 606.

SEC. 5. [*Record of pensions granted — tabulations — increase with advancing age without further application.*] That it shall be the duty of the Commissioner of Pensions, as each application for pension filed under this Act is adjudicated, to cause to be kept a record showing the name, length of service, and age of each claimant, the monthly rate of payment granted to or received by him, and the county and State of his residence; and shall at the end of the fiscal year nineteen hundred and fourteen tabulate the records so obtained by States and counties, and to furnish certified copies thereof upon demand and payment of such fee therefor as is provided by law for certified copies of records in the executive departments; and that further increase of rate under this Act on account of advancing age shall be made without further application by pensioner and shall take effect and commence from the date he is shown by the aforesaid record to have attained the age provided by this Act as a basis of rating: *Provided*, That where a claim has been heretofore adjudicated and the record therein does not sufficiently establish the date of birth of the soldier or sailor pensioner nothing herein shall prevent such further investigation as is deemed necessary, in order to establish a record upon which future increases of rate under this Act, on account of advancing age, may be possible, the object being to advance automatically the rate of pension, as provided for by this Act, without unnecessary expense to the pensioner. [37 Stat. L. 1019.]

This section was amended to read as here given by the Act of March 4, 1913, ch. 109. Originally this section was as follows:

SEC. 5. That it shall be the duty of the Commissioner of Pensions, as each application for pension under this Act is adjudicated, to cause to be kept a record showing the name and length of service of each claimant, the monthly rate of payment granted to or

received by him, and the county and State of his residence; and shall at the end of the fiscal year nineteen hundred and fourteen tabulate the record so obtained by States and counties, and shall furnish certified copies thereof upon demand and the payment of such fee therefor as is provided by law for certified copies of records in the executive departments. [37 Stat. L. 113.]

## PHILIPPINE ISLANDS.

Act of March 23, 1912, Ch. 65, 310.

*Philippine Citizenship Defined — Extension of Right to Citizenship by Legislature, 310.*

### CROSS-REFERENCES.

*Income Tax, see INTERNAL REVENUE.*  
*See also CUSTOMS DUTIES.*

An Act To amend an Act approved July first, nineteen hundred and two, entitled "An Act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes."

[Act of March 23, 1912, ch. 65.]

[*Philippine citizenship defined — extension of right to citizenship by legislature.*] That section four of the Act of Congress approved July first, nineteen hundred and two, entitled "An Act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes," is hereby amended to read as follows:

"Sec. 4. That all inhabitants of the Philippine Islands continuing to reside therein who were Spanish subjects on the eleventh day of April, eighteen hundred and ninety-nine, and then resided in said islands, and their children born subsequent thereto, shall be deemed and held to be citizens of the Philippine Islands and as such entitled to the protection of the United States, except such as shall have elected to preserve their allegiance to the Crown of Spain in accordance with the provisions of the treaty of peace between the United States and Spain signed at Paris December tenth, eighteen hundred and ninety-eight: *Provided*, That the Philippine Legislature is hereby authorized to provide by law for the acquisition of Philippine citizenship by those natives of the Philippine Islands who do not come within the foregoing provisions, the natives of other insular possessions of the United States, and such other persons residing in the Philippine Islands who could become citizens of the United States under the laws of the United States if residing therein." [37 Stat. L. 77.]

Section 4 of the Act of July 1, 1902, as originally enacted is given in 5 Fed. Stat. Annot. 719.

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## PHOSPHORUS MATCHES.

See *INTERNAL REVENUE.*

## **PLANT QUARANTINE ACT.**

See *AGRICULTURE*.

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## **PLANTS.**

See *AGRICULTURE*.

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## **POLITICAL CONTRIBUTIONS.**

See *ELECTIONS*.

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## **PORTO RICO.**

*Income Tax*, see *INTERNAL REVENUE*.

*United States Court for Porto Rico*, see *JUDICIARY*.

See also *AGRICULTURE*.

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## **PORTS OF ENTRY AND DELIVERY.**

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## POSTAL SERVICE.

**Act of August 24, 1912, Ch. 389, 313.**

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*Canceling Machine — Maximim Rent, 313.*

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*3. Navy Mail Clerks — Bond Requirement Modified, 316.*

*4. Mail Transportation — Readjustment of Pay for Mail Diverted at Weighing Periods, 316.*

*5. Workdays, First and Second Class Offices, Limited to Eight Hours, 317.*

*6. Classified Civil Service — Removals — Postal Employees Not Prohibited Membership in Society for Improving Conditions, etc. — Right to Petition Congress Not to be Interfered with, 317.*

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*First Grade Clerks Abolished, Appointments to be at \$800, 323.*

*Pay of Substitutes for Employees Absent, 323.*

*Rewards to Employees for Inventions, 323.*

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## CROSS-REFERENCES.

*Prize Fight Films, Sending by Mail*, see *PRIZE FIGHTS*.

*Official Register, Postal Service to be Omitted from*, see *PUBLIC DOCUMENTS*.

*Postal Savings Accounts*, see *TREASURY DEPARTMENT*.

See also *POST-OFFICE DEPARTMENT*.

**An Act Making appropriations for the service of the Post Office Department for the fiscal year ending June thirtieth, nineteen hundred and thirteen, and for other purposes.**

[*Act of Aug. 24, 1912, ch. 389.*]

[*SEC. 1.*] [*Sunday delivery of mail restricted.*] \* \* \* That hereafter post offices of the first and second classes shall not be open on Sundays for the purpose of delivering mail to the general public, but this provision shall not prevent the prompt delivery of special delivery mail. [*37 Stat. L. 543.*]

[*Canceling machines — maximum rent.*] \* \* \* That hereafter no contract shall be made for any canceling machine for more than two hundred and seventy dollars per annum, including repairs on said machines, and that all contracts entered into shall be let after having advertised for bids, and shall be awarded on the basis of cheapness and efficiency. [*37 Stat. L. 544.*]

[*Rewards to employees for inventions.*] \* \* \* The Postmaster General is hereby authorized to pay, in his discretion, rewards to postal employees whose inventions are adopted for use in the postal service, and for that purpose the sum of ten thousand dollars is hereby appropriated: *Provided*, That not to exceed one thousand dollars shall be paid for one invention. [*37 Stat. L. 545.*]

[*Leaves of absence to repair shops employees.*] \* \* \* That hereafter the employees of the mail-bag repair shop in Washington, District of Columbia, and Chicago, Illinois, and the employees of the mail-lock repair shop in Washington, District of Columbia, may be allowed thirty days annual leave of absence. [*37 Stat. L. 546.*]

[*Restriction on sending second-class matter by freight.*] \* \* \* From and after the passage of this Act the Post Office Department shall not extend or enlarge its present policy of sending second-class matter by freight trains. [*37 Stat. L. 547.*]

[*Steel cars required.*] \* \* \* That after the first of July, nineteen hundred and seventeen, the Postmaster General shall not approve or allow to be used or pay for any full railway post-office car not constructed of steel or steel underframe or equally indestructible material, and not less than twenty-five per centum of the railway post-office cars of a railroad company not conforming to the provisions of this Act shall be replaced with cars constructed of steel annually after June, nineteen hundred and thirteen; and all cars accepted for this service and contracted for by the railroad companies after the passage of this Act shall be constructed of steel. [*37 Stat. L. 547.*]

[*Travel allowances for clerks on duty over ten hours, authorized.*] \* \* \* That hereafter in addition to the salaries by law provided the Postmaster General is hereby authorized to make travel allowances in lieu of actual expenses, at

fixed rates per annum, not exceeding in the aggregate the sum annually appropriated, to railway postal clerks, acting railway postal clerks, and substitute railway postal clerks, including substitute railway postal clerks for railway postal clerks granted leave with pay on account of sickness, assigned to duty in railway post-office cars, while on duty, after ten hours from the time of beginning their initial run, under such regulations as he may prescribe, and in no case shall such an allowance exceed one dollar per day. [37 Stat. L. 548.]

[*Disability allowance, etc., to clerks — pay in case of death.*] \* \* \* That acting clerks may be employed in place of clerks or substitutes injured while on duty who shall be granted leave of absence with full pay during the period of disability, but not exceeding one year, then at the rate of fifty per centum of the clerk's annual salary for the period of disability exceeding one year but not exceeding twelve months additional, and that the Postmaster General may pay the sum of two thousand dollars, which shall be exempt from payment of debts of the deceased, to the legal representative of any sea-post clerk or substitute sea-post clerk who shall be killed while on duty, or who, being injured while on duty, shall die within one year thereafter as the result of such injury. [37 Stat. L. 550.]

[*Second-class matter — additional publications admitted as — conditions — advertisements permitted — restrictions — limitation of circulation — paid with dues — office of publication required — publications in raised characters for the blind carried free.*] \* \* \* That from and after the passage of this Act all periodical publications issued from a known place of publication at stated intervals, and as frequently as four times a year, by or under the auspices of a benevolent or fraternal society or order organized under the lodge system and having a bona fide membership of not less than one thousand persons, or by a regularly incorporated institution of learning, or by a regularly established State institution of learning supported in whole or in part by public taxation, or by or under the auspices of a trades union, and all publications of strictly professional, literary, historical, or scientific societies, including the bulletins issued by State boards of health, and by State boards or departments of public charities and corrections, shall be admitted to the mails as second-class matter, and the postage thereon shall be the same as on other second-class matter; and such periodical publications, issued by or under the auspices of benevolent or fraternal societies or orders or trades unions, or by strictly professional, literary, historical, or scientific societies, shall have the right to carry advertising matter, whether such matter pertains to such benevolent or fraternal societies or orders, trades unions, strictly professional, literary, historical, or scientific societies, or to other persons, institutions, or concerns; but such periodical publications, hereby permitted to carry advertising matter, must not be designed or published primarily for advertising purposes, and shall be originated and published to further the objects and purposes of such benevolent or fraternal societies or orders, trades-unions, or other societies, respectively; and all such periodicals shall be formed of printed paper sheets, without board, cloth, leather or other substantial binding, such as distinguish printed books for preservation from periodical publications: *Provided*, That the circulation through the mails of periodical publications issued by, or under the auspices of, benevolent or fraternal societies or orders, or trades-unions, or by strictly professional, literary, historical, or scientific societies, as second-class mail matter, shall be limited to copies mailed to such members as pay therefor, either as a part of their

dues or assessments, or otherwise, not less than fifty per centum of the regular subscription price; to other bona fide subscribers; to exchanges, and ten per centum of such circulation as sample copies: *Provided further*, That when such members pay therefor as a part of their dues or assessments, individual subscriptions or receipts shall not be required: *Provided further*, That the office of publication of any such periodical publication shall be fixed by the association or body by which it is published, or by its executive board, and such publication shall be printed at such place and entered at the nearest post office thereto.

That hereafter magazines, periodicals, and other regularly issued publications in raised characters for the use of the blind, whether prepared by hand or printed, which contain no advertisements and for which no subscription fee is charged, shall be transmitted in the United States mails free of postage and under such regulations as the Postmaster General may prescribe. [37 Stat. L. 550.]

[*Rural Delivery Service — maximum salary — no reductions.*] \* \* \* That on and after September thirtieth, nineteen hundred and twelve, letter carriers of the Rural Delivery Service shall receive a salary not exceeding one thousand one hundred dollars per annum: *Provided, however*, That because of the compensation herein provided no rural letter carrier shall receive less salary than before the passage of this Act. [37 Stat. L. 553.]

SEC. 2. [Contracts for supplies with persons combining to fix prices, etc., forbidden.] No contract for furnishing supplies to the Post Office Department or the postal service shall be made with any person who has entered, or proposed to enter, into any combination to prevent the making of any bid for furnishing such supplies, or to fix a price or prices therefor, or who has made any agreement, or given or performed, or promised to give or perform, any consideration whatever to induce any other person not to bid for any such contract, or to bid at a specified price or prices thereon; and if any person so offending is a contractor for furnishing such supplies, his contract may be annulled, and the person so offending shall be liable to a fine of not less than one hundred dollars nor more than five thousand dollars, and may be further punished, in the discretion of the court, by imprisonment for not less than three months nor more than one year.

[*Publications — sworn statements of names, etc., of editors, owners, stockholders, etc., to be filed semi-annually — circulation of daily newspapers.*] That it shall be the duty of the editor, publisher, business manager, or owner of every newspaper, magazine, periodical, or other publication to file with the Postmaster General and the postmaster at the office at which said publication is entered, not later than the first day of April and the first day of October of each year, on blanks furnished by the Post Office Department, a sworn statement setting forth the names and post-office addresses of the editor and managing editor, publisher, business managers, and owners, and, in addition, the stockholders, if the publication be owned by a corporation; and also the names of known bondholders, mortgagees, or other security holders; and also, in the case of daily newspapers, there shall be included in such statement the average of the number of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months: *Provided*, That the provisions of this paragraph shall not apply to religious, fraternal, temperance, and

scientific, or other similar publications. It shall not be necessary to include in such statement the names of persons owning less than one per centum of the total amount of stock in such mortgages, or other securities. A copy of such sworn statement shall be published in the second issue of such newspaper magazine, or other publication printed next after the filing of such statement. Any such publication shall be subject to the privileges of the mail and shall not be subject to the provisions of this paragraph within ten days after the date of its publication.

That all editorial or other similar matter published in any newspaper, magazine, or periodical for the publication of which money or other valuable consideration is paid, accepted or received shall be deemed to be "editorial advertisement." Any editor or publisher publishing any such editorial advertisement for which compensation is paid, accepted or received with intent to defraud the same, shall upon conviction in any court having jurisdiction be fined not less than one hundred dollars (\$100) nor more than five hundred dollars (\$500) or imprisoned not less than one month

weight on any of the routes affected: *Provided further*, That readjustment made hereunder shall not take effect before July first, nineteen hundred and twelve, and shall be for diversions occurring after January first, nineteen hundred and twelve. [*§7 Stat. L. 554.*]

SEC. 5. [*Workdays, first and second class offices, limited to eight hours.*] That on and after March fourth, nineteen hundred and thirteen, letter carriers in the City Delivery Service and clerks in first and second class post offices shall be required to work not more than eight hours a day: *Provided*, That the eight hours of service shall not extend over a longer period than ten consecutive hours, and the schedules of duty of the employees shall be regulated accordingly.

That in cases of emergency, or if the needs of the service require, letter carriers in the City Delivery Service and clerks in first and second class post offices can be required to work in excess of eight hours a day, and for such additional services they shall be paid extra in proportion to their salaries as fixed by law.

That should the needs of the service require the employment on Sunday of letter carriers in the City Delivery Service and clerks in first and second class post offices, the employees who are required and ordered to perform Sunday work shall be allowed compensatory time on one of the six days following the Sunday on which they perform such service. [*§7 Stat. L. 554.*]

SEC. 6. [*Classified civil service — removals — postal employees not prohibited membership in society for improving conditions, etc. — right to petition Congress not to be interfered with.*] That no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; and copies of charges, notice of hearing, answer, reasons for removal, and of the order of removal shall be made a part of the records of the proper department or office, as shall also the reasons for reduction in rank or compensation; and copies of the same shall be furnished to the person affected upon request, and the Civil Service Commission also shall, upon request, be furnished copies of the same: *Provided, however*, That membership in any society, association, club, or other form of organization of postal employees not affiliated with any outside organization imposing an obligation or duty upon them to engage in any strike, or proposing to assist them in any strike, against the United States, having for its objects, among other things, improvements in the condition of labor of its members, including hours of labor and compensation therefor and leave of absence, by any person or groups of persons in said postal service, or the presenting by any such person or groups or persons of any grievance or grievances to the Congress or any Member thereof shall not constitute or be cause for reduction in rank or compensation or removal of such person or groups of persons from said service. The right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress, or any Member thereof, or to furnish information to either House of Congress, or to any committee or member thereof, shall not be denied or interfered with. [*§7 Stat. L. 555.*]

SEC. 7. [*Railway mail service — grades and salaries of employees.*] That after September thirtieth, nineteen hundred and twelve, the Postmaster General may appoint railway postal clerks in such manner and of such respective grades and salaries as may be provided for in the annual appropriation acts for the service of the Post Office Department, for the purpose of sorting and distributing the mail in railway post offices, railway post-office terminals and transfer offices, and for service in the offices of division superintendents and chief clerks, and as transfer clerks and such other services as may pertain to the Railway Mail Service. Such clerks shall be designated as railway postal clerks and shall be divided into the following grades, with corresponding salaries per annum not exceeding the following rates:

Grade one, at not exceeding nine hundred dollars.

Grade two, at not exceeding one thousand dollars.

Grade three, at not exceeding one thousand one hundred dollars.

Grade four, at not exceeding one thousand two hundred dollars.

Grade five, at not exceeding one thousand three hundred dollars.

Grade six, at not exceeding one thousand four hundred dollars.

Grade seven, at not exceeding one thousand five hundred dollars.

Grade eight, at not exceeding one thousand six hundred dollars.

Grade nine, at not exceeding one thousand seven hundred dollars.

Grade ten, at not exceeding one thousand eight hundred dollars.

Chief clerks, at not exceeding two thousand dollars.

The Postmaster General shall classify and fix the salaries of railway postal clerks, under such regulations as he may prescribe, in the grades provided by law; and for the purpose of organization and of establishing maximum grades to which promotions may be made successively as hereinafter provided, he shall classify railway post offices, terminal railway post offices, and transfer offices with reference to their character and importance in three classes, with salary grades as follows: Class A, nine hundred dollars to one thousand two hundred dollars; class B, nine hundred dollars to one thousand three hundred dollars; and class C, nine hundred dollars to one thousand five hundred dollars. He may assign to the offices of division superintendents and chief clerks such railway postal clerks as may be necessary and fix their salaries within the grades provided by law without regard to the classification of railway post offices.

After September thirtieth, nineteen hundred and twelve, clerks in class A shall be promoted successively to grade three, clerks in class B shall be promoted successively to grade four, and clerks in class C shall be promoted successively to grade five, at the beginning of the quarter following the expiration of a year's satisfactory service in the next lower grade. Promotions above these grades within the maximum grades of the classification may be made in the discretion of the Postmaster General for meritorious service. No promotion shall be made except upon evidence satisfactory to the Post Office Department of the efficiency and faithfulness of the employee during the preceding year.

A clerk of any grade of any classification of railway post offices, terminal railway post offices, transfer offices, or in the office of a division superintendent or chief clerk, may be transferred and assigned to any classification of railway post offices, terminal railway post offices, transfer offices, or to an office of a division superintendent or chief clerk under such regulations as the Postmaster General may deem proper.

Clerks assigned as clerks in charge of crews consisting of more than one clerk shall be clerks of grades five to ten, inclusive, and may be promoted one grade

only after three years' continuous, satisfactory, and faithful service in such capacity.

A clerk who fails of promotion because of unsatisfactory service may be promoted at the beginning of the second quarter thereafter or any subsequent quarter for satisfactory and faithful service during the intervening period.

Clerks in the highest grade in their respective lines or other assignments shall be eligible for promotion to positions of clerks in charge in said lines or corresponding positions in other assignments, and clerks assigned as assistant chief clerks and clerks in charge of crews consisting of more than one clerk, either assigned to the line, the transfer service, or to a terminal railway post office, and clerks in the highest grades in offices of division superintendents in their respective divisions, shall, after two years of continuous service in such capacity, be eligible for promotion to positions of chief clerks in said division for satisfactory, efficient, and faithful service during the preceding two-year period, under such regulations as the Postmaster General shall prescribe.

Whenever a clerk shall have been reduced in salary for any cause he may be restored to his former grade or advanced to an intermediate grade at the beginning of any quarter following the reduction, for satisfactory and faithful service during the intervening period.

In filling positions below that of chief clerk no clerk shall be advanced more than one grade in a period of a year.

All clerks appointed to the Railway Mail Service and to perform duty on railway post offices shall reside at some point on the route to which they are assigned; but railway postal clerks appointed prior to February twenty-eighth, eighteen hundred and ninety-five, and now performing such duty shall not be required to change their residences, except when transferred to another line: *Provided, however,* That because of the reclassification herein provided, no clerk shall receive less salary than before the passage of this Act. All laws and parts of laws in conflict herewith are hereby repealed. [37 Stat. L. 555.]

SEC. 8. [*Fourth-class mail — the parcel post.*]. That hereafter fourth-class mail matter shall embrace all other matter, including farm and factory products, not now embraced by law in either the first, second, or third class, not exceeding eleven pounds in weight, nor greater in size than seventy-two inches in length and girth combined, nor in form or kind likely to injure the person of any postal employee or damage the mail equipment or other mail matter and not of a character perishable within a period reasonably required for transportation and delivery.

That for the purposes of this section the United States and its several Territories and possessions, excepting the Philippine Islands, shall be divided into units of area thirty minutes square, identical with a quarter of the area formed by the intersecting parallels of latitude and meridians of longitude, represented on appropriate postal maps or plans, and such units of area shall be the basis of eight postal zones, as follows:

The first zone shall include all territory within such quadrangle, in conjunction with every contiguous quadrangle, representing an area having a mean radial distance of approximately fifty miles from the center of any given unit of area.

The second zone shall include all units of area outside the first zone lying in whole or in part within a radius of approximately one hundred and fifty miles from the center of a given unit of area.

The third zone shall include all units of area outside the second zone lying in whole or in part within a radius of approximately three hundred miles from the center of a given unit of area.

The fourth zone shall include all units of area outside the third zone lying in whole or in part within a radius of approximately six hundred miles from the center of a given unit of area.

The fifth zone shall include all units of area outside the fourth zone lying in whole or in part within a radius of approximately one thousand miles from the center of a given unit of area.

The sixth zone shall include all units of area outside the fifth zone lying in whole or in part within a radius of approximately one thousand four hundred miles from the center of a given unit of area.

The seventh zone shall include all units of area outside the sixth zone lying in whole or in part within a radius of approximately one thousand eight hundred miles from the center of a given unit of area.

The eighth zone shall include all units of area outside the seventh zone.

That the rate of postage on fourth-class matter weighing not more than four ounces shall be one cent for each ounce or fraction of an ounce; and on such matter in excess of four ounces in weight the rate shall be by the pound, as hereinafter provided, the postage in all cases to be prepaid by distinctive postage stamps affixed.

That except as provided in the next preceding paragraph postage on matter of the fourth class shall be prepaid at the following rates:

On all matter mailed at the post office from which a rural route starts, for delivery on such route, or mailed at any point on such route for delivery at any other point thereon, or at the office from which the route starts, or on any rural route starting therefrom, and on all matter mailed at a city carrier office, or at any point within its delivery limits, for delivery by carriers from that office, or at any office for local delivery, five cents for the first pound or fraction of a pound and one cent for each additional pound or fraction of a pound.

For delivery within the first zone, except as provided in the next preceding paragraph, five cents for the first pound or fraction of a pound and three cents for each additional pound or fraction of a pound.

For delivery within the second zone, six cents for the first pound or fraction of a pound and four cents for each additional pound or fraction of a pound.

For delivery within the third zone, seven cents for the first pound or fraction of a pound and five cents for each additional pound or fraction of a pound.

For delivery within the fourth zone, eight cents for the first pound or fraction of a pound and six cents for each additional pound or fraction of a pound.

For delivery within the fifth zone, nine cents for the first pound or fraction of a pound and seven cents for each additional pound or fraction of a pound.

For delivery within the sixth zone, ten cents for the first pound or fraction of a pound and nine cents for each additional pound or fraction of a pound.

For delivery within the seventh zone, eleven cents for the first pound or fraction of a pound and ten cents for each additional pound or fraction of a pound.

For delivery within the eighth zone and between the Philippine Islands and any portion of the United States, including the District of Columbia and the several Territories and possessions, twelve cents for the first pound or fraction of a pound and twelve cents for each additional pound or fraction of a pound.

That the Postmaster General shall provide such special equipment, maps,



stamps, directories, and printed instructions as may be necessary for the administration of this section; and for the purposes of this section, and to supplement existing appropriations, including the hiring of teams and drivers, there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of seven hundred and fifty thousand dollars.

The classification of articles mailable as well as the weight limit, the rates of postage, zone or zones and other conditions of mailability under this Act, if the Postmaster General shall find on experience that they or any of them are such as to prevent the shipment of articles desirable, or to permanently render the cost of the service greater than the receipts of the revenue therefrom, he is hereby authorized, subject to the consent of the Interstate Commerce Commission after investigation, to reform from time to time such classification, weight limit, rates, zone or zones or conditions, or either, in order to promote the service to the public or to insure the receipt of revenue from such service adequate to pay the cost thereof.

The Postmaster General shall make provision by regulation for the indemnification of shippers, for shipment injured or lost, by insurance or otherwise, and, when desired, for the collection on delivery of the postage and price of the article shipped, fixing such charges as may be necessary to pay the cost of such additional services.

The Postmaster General may readjust the compensation of star route and screen wagon contractors if it should appear that as a result of the parcel post system the weight of the mails handled by them has been materially increased. Before such readjustment, however, a detailed account must be kept as to the amount of business handled by such star route or screen wagon contractors before and after this section becomes effective for such a period as to clearly demonstrate the amount of the increase and that such increase in the weight of the mails was due to the adoption of the parcel post system.

That the establishment of zones and postage rates of this section shall go into effect January first, nineteen hundred and thirteen.

That this Act shall not in any way affect the postage rate on seeds, cuttings, bulbs, roots, scions, and plants, as fixed by section 482 of the Postal Laws and Regulations.

That for the purpose of a further inquiry into the subject of the general parcel post and all related subjects a joint committee of six persons (Members of Congress), three of whom shall be appointed by the President of the Senate, and three by the Speaker of the House of Representatives, is constituted, with full power to appoint clerks, stenographers, and experts to assist them in this work. That the Postmaster General and the Interstate Commerce Commission shall furnish such data and otherwise render such assistance to the said committee as may be desired or available. For the purpose of defraying the expenses of this committee the sum of twenty-five thousand dollars is hereby appropriated out of the moneys in the Treasury not otherwise appropriated. The committee shall report fully to Congress at the earliest date possible.

That all laws and parts of laws in conflict with the provisions of this section are hereby repealed. [*§7 Stat. L. 557.*]

SEC. 9. [*Experimental delivery in towns and villages.*] That after June thirtieth, nineteen hundred and twelve, experimental mail delivery may be established, under such regulations as the Postmaster General may prescribe, in towns and villages having post offices of the second or third class that are not by law now entitled to free delivery service, and the sum of one hundred

thousand dollars is hereby appropriated to enable postmasters to employ the necessary assistance to deliver the mail in such villages, and the amount to be expended at any office shall not exceed one thousand eight hundred dollars a year. [37 Stat. L. 559.]

SEC. 10. [*Postal savings depositories.*] That the sum of four hundred thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any money in the Treasury not otherwise appropriated to enable the Postmaster General to continue the establishment, maintenance, and extension of postal savings depositories, including the reimbursement of the Secretary of the Treasury for expenses incident to the preparation, issue, and registration of the bonds authorized by the Act of June twenty-fifth, nineteen hundred and ten: *Provided*, That out of such sum an amount not to exceed ten thousand dollars may be expended for the rental, if necessary, of quarters for the central office of the Postal Savings System in the District of Columbia: *And provided further*, That all expenditures in the Postal Savings System shall be audited by the Auditor for the Post Office Department: *And provided further*, That the Postmaster General shall select and designate the post offices which are to be postal savings depository offices, and shall appoint and fix the compensation of such superintendents, inspectors, and other employees as may be necessary in conducting, supervising, and directing the business of such offices, including the employees of a central office at Washington, District of Columbia, and shall prescribe the hours during which postal savings depository offices shall remain open. He shall also from time to time make rules and regulations with respect to the deposits in and withdrawals of moneys from postal savings depositories and the issue of pass books or such other devices as he may adopt as evidence of such deposits or withdrawals. The provisions of the Act approved June twenty-fifth, nineteen hundred and ten, are hereby modified accordingly. The unexpended balance of the appropriation for the fiscal year nineteen hundred and twelve of five hundred thousand dollars made by section five of the Act approved March fourth, nineteen hundred and eleven, for the postal savings system, is hereby reappropriated and made available during the fiscal year nineteen hundred and thirteen for the purposes mentioned in this section. [37 Stat. L. 559.]

For the Act of June 25, 1910, see 1912 Supp. Fed. Stat. Annot. 294.

SEC. 11. [*Navy mail clerks — Marine Corps included.*] That the provision in the Act making appropriations for the service of the Post Office Department, approved May twenty-seventh, nineteen hundred and eight, authorizing the designation of enlisted men of the Navy as navy mail clerks and assistant navy mail clerks, be amended to include in such designation enlisted men of the Marine Corps, by the insertion in the said provision, after the words "United States Navy," the words "or Marine Corps." [37 Stat. L. 560.]

For the provision from the Act of May 27, 1908, here referred to, see 1909 Supp. Fed. Stat. Annot. 525.

SEC. 12. [*Appropriation from Treasury to meet deficiencies.*] That if the revenues of the Post Office Department shall be insufficient to meet the appropriations made by this Act, a sum equal to such deficiency of the revenue of said department is hereby appropriated, to be paid out of any money in the Treasury not otherwise appropriated, to supply said deficiencies in the revenues for the Post Office Department for the year ending June thirtieth, nineteen hundred

and thirteen, and the sum needed may be advanced to the Post Office Department upon requisition of the Postmaster General. [37 Stat. L. 560.]

SEC. 13. [*Restrictions on meetings of societies, not applicable.*] That the provisions of section eight of the Act making appropriations for the District of Columbia approved June twenty-sixth, nineteen hundred and twelve, shall not apply to the appropriations provided by this Act. [37 Stat. L. 560.]

SEC. 14. [*Expenditures for July and August.*] That the Postmaster General may expend for the service of the Post Office Department during the months of July and August, nineteen hundred and twelve, a greater amount than that provided for by the joint resolutions extending appropriations for the necessary operations of the Government under certain contingencies, approved July first, August first, and August fifteenth, nineteen hundred and twelve: *Provided*, That the total expenditures under this Act for the whole of the fiscal year nineteen hundred and thirteen shall not exceed the amounts hereby appropriated. [37 Stat. L. 560.]

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[*First grade clerks abolished, appointments to be at \$800.*] \* \* \* That after June thirtieth, nineteen hundred and thirteen, the first grade for clerks and carriers shall be abolished and that appointments shall be made to the second grade, salary \$800; and that clerks and carriers at first-class offices shall be promoted successively to the fifth grade and clerks and carriers at second-class offices shall be promoted successively to the fourth grade. [37 Stat. L. 794.]

This and the remaining paragraphs under this title are from the Postal Service Appropriation Act of March 4, 1913, ch. 143.

[*Pay of substitutes for employees absent.*] \* \* \* That after June thirtieth, nineteen hundred and thirteen, substitute letter carriers in the City Delivery Service and substitute post-office clerks employed in first and second class post offices shall be paid at the rate of forty cents an hour when working for a carrier or clerk absent without pay.

That substitute carriers and substitute clerks when assigned to perform the work of regular employees absent on vacations, or when performing auxiliary or temporary work, shall be paid at the rate of 30 cents an hour. Every substitute carrier and substitute post-office clerk who has served as such substitute for a period of one year or more shall, when appointed to a regular position, receive the salary of a second grade carrier or clerk, \$800 per annum, as his initial salary, and all other promotions shall be regulated according to the classification Act approved March second, nineteen hundred and seven. [37 Stat. L. 795.]

[*Rewards to employees for inventions.*] \* \* \* The Postmaster General is hereby authorized to offer and pay periodically a cash reward for the invention, suggestion, or series of suggestions for an improvement or economy in device, design, or process applicable to the postal service submitted by one or more employees of the Post Office Department which shall be deemed the most valuable of those submitted and adopted for use, and for that purpose the sum of \$10,000 is hereby appropriated: *Provided*, That to obtain this reward the winning suggestion or invention must be one that will clearly effect a

material economy or increase efficiency: *Provided further*, That the sums awarded to employees in accordance with this Act shall be paid them in addition to their usual compensation: *Provided further*, That the total amount paid under the provisions of this Act shall not exceed \$1,000 in any month or for any one invention or suggestion: *And provided further*, That no employee shall be paid a reward under this Act until he has properly executed an agreement to the effect that the use by the United States of the invention, suggestion, or series of suggestions made by him shall not form the basis of a further claim of any nature upon the United States by him, his heirs, or assigns, and that no application for patent has been made for any such invention. [37 Stat. L. 795.]

[*Canceling machines — maximum rent.*] \* \* \* That hereafter no contract shall be made for any canceling machine for more than \$270 per annum, including repairs on said machines, and that all contracts entered into shall be let after having advertised for bids, and shall be awarded on the basis of cheapness and efficiency. [37 Stat. L. 795.]

[*Allowance of leave to railway postal clerk when substitute is provided.*] \* \* \* That hereafter the Postmaster General may, in his discretion, under such regulations as he may provide, allow any railway postal clerk who is not entitled to annual leave under other provision of law leave of absence with pay for a period not exceeding thirty days, with the understanding that his duties will be performed without expense to the Government during the period for which leave is granted, he to provide a substitute at his own expense. [37 Stat. L. 798.]

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## POST OFFICE DEPARTMENT.

Act of March 4, 1913, Ch. 149, 324.

*Auditor for Post Office Department — Money Orders Not to be Assorted, 324.*

### CROSS-REFERENCE.

See also *POSTAL SERVICE*.

[*Auditor for Post Office Department — money orders not to be assorted.*] \* \* \* Hereafter the Auditor for the Post Office Department shall not assort and verify the money orders pertaining to postmasters' issued lists covering the period from January first, nineteen hundred and twelve, to June thirtieth, nineteen hundred and twelve: *Provided*, That the statements for said period and accompanying money orders shall be retained as a part of the record of unpaid money orders required by the Act approved May twenty-seventh, nineteen hundred and eight. [37 Stat. L. 915.]

This is from the Deficiencies Appropriation Act of March 4, 1913, ch. 149.

## PRESIDENT.

Act of March 4, 1913, Ch. 149, 325.

*International Congresses, etc. — Authority Required for Participation, 325.*

### CROSS-REFERENCE.

*Export of Arms, Limitation by President, see IMPORTS AND EXPORTS.*

*[International congresses, etc. — authority required for participation.]*

\* \* \* Hereafter the Executive shall not extend or accept any invitation to participate in any international congress, conference, or like event, without first having specific authority of law to do so. [*37 Stat. L. 913.*]

This is from the Deficiencies Appropriation Act of March 4, 1913, ch. 149.

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## PRINTING.

See *PUBLIC PRINTING.*

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## PRISONS AND PRISONERS.

Act of April 30, 1912, Ch. 97, 325.

*International Prison Commission — Continuance as Member — Pro Rata Share, etc. Authorized Annually, 325.*

Act of January 23, 1913, Ch. 9, 326.

*United States Prisoners — Release on Parole, 326.*

*[International Prison Commission — continuance as member — pro rata share, etc., authorized annually.]* \* \* \* The United States shall continue as an adhering member of the International Prison Commission and participate in the work of said commission. The Secretary of the Treasury be, and he is hereby, authorized annually to pay the pro rata share of the United States in the administration expenses of the International Prison Commission and the

Act of Jan. 23, 1913.

## PRIZE FIGHTS.

Act of July 31, 1912.

necessary expenses of a commissioner to represent the United States on said commission at its annual meetings, together with necessary clerical and other expenses, out of any money which shall be appropriated for such purposes from time to time by Congress. [37 Stat. L. 100.]

This is from the Diplomatic and Consular Service Appropriation Act of April 30, 1912, ch. 97.

An Act To amend "An Act to parole United States prisoners, and for other purposes," approved June twenty-fifth, nineteen hundred and ten.

[Act of January 23, 1913, ch. 9.]

[*United States prisoners — release on parole.*] That section one of the "Act to parole United States prisoners, and for other purposes," approved June twenty-fifth, nineteen hundred and ten, be amended so as to read as follows, to wit:

"That every prisoner who has been or may hereafter be convicted of any offense against the United States and is confined in execution of the judgment of such conviction in any United States penitentiary or prison, for a definite term or terms of over one year, or for the term of his natural life, whose record of conduct shows that he has observed the rules of such institution, and who, if sentenced for a definite term, has served one-third of the total of such term or terms for which he was sentenced, or, if sentenced for the term of his natural life, has served not less than fifteen years, may be released on parole as hereinafter provided." [37 Stat. L. 650.]

For this section of the Act of June 25, 1910, as originally enacted, see 1912 Supp. Fed. Stat. Annot. 304.

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## PRIZE.

See *SALVAGE*.

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## PRIZE FIGHTS.

Act of July 31, 1912, Ch. 263, 326.

*Sec. 1. Prize-fight Films — Sending by Mail or Express Unlawful, 326.*

*2. Receiving, etc., Unlawful, 327.*

*3. Punishment for Violations, 327.*

An Act To prohibit the importation and the interstate transportation of films or other pictorial representations of prize fights, and for other purposes.

[Act of July 31, 1912, ch. 263.]

[SEC. 1.] [*Prize-fight films — sending by mail or express unlawful.*] That it shall be unlawful for any person to deposit or cause to be deposited in the

United States mails for mailing or delivery, or to deposit or cause to be deposited with any express company or other common carrier for carriage, or to send or carry from one State or Territory of the United States or the District of Columbia to any other State or Territory of the United States or the District of Columbia, or to bring or to cause to be brought into the United States from abroad, any film or other pictorial representation of any prize fight or encounter of pugilists, under whatever name, which is designed to be used or may be used for purposes of public exhibition. [37 Stat. L. 240.]

SEC. 2. [*Receiving, etc., unlawful.*] That it shall be unlawful for any person to take or receive from the mails, or any express company or other common carrier, with intent to sell, distribute, circulate, or exhibit any matter or thing herein forbidden to to [*sic*] be deposited for mailing, delivery, or carriage in interstate commerce. [37 Stat. L. 241.]

SEC. 3. [*Punishment for violations.*] That any person violating any of the provisions of this Act shall for each offense, upon conviction thereof, be fined not more than one thousand dollars or sentenced to imprisonment at hard labor for not more than one year, or both, at the discretion of the court. [37 Stat. L. 241.]

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## PROHIBITION LAWS.

See *INTOXICATING LIQUORS*.

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## PUBLIC BUILDINGS.

See *PUBLIC PROPERTY, BUILDINGS, AND GROUNDS*.

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## PUBLIC CONTRACTS.

See *LABOR*.

## PUBLIC DOCUMENTS.

Act of June 23, 1913, Ch. 3, 328.

*Sec. 5. Public Library Depositories — To Receive Publications, etc. — New Designations, 328.*

Act of October 22, 1913, Ch. 32, 328.

*Official Register — Postal Service to be Omitted from, 328.*

SEC. 5. [*Public library depositories — to receive publications, etc. — new designations.*] That libraries heretofore designated by law as depositories to receive books and other Government publications shall hereafter, during their existence, continue such receipt; and new designations may be made when libraries heretofore chosen shall cease to exist or other designations shall hereafter be authorized by law. [*38 Stat. L. 75.*]

This is from the Sundry Civil Appropriation Act of June 23, 1913, ch. 3.

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[*Official Register — postal service to be omitted from.*] Hereafter the Official Register of the United States shall not contain the names of those persons heretofore published in Volume II relating to the postal service, namely, postmasters, assistant postmasters, clerks in post offices, city and rural carriers, employees of the sea-post service, employees of the Railway Mail Service, employees of the mail messenger service, and mail contractors; nor shall it contain the statement of allowances made to contractors for carrying the mails or the list of ships and vessels belonging to the United States, as heretofore published in the said Official Register; and all Acts or parts of Acts inconsistent with the foregoing provision are hereby repealed. [*38 Stat. L. 224.*]

This is from the Deficiencies Appropriation Act of Oct. 22, 1913, ch. 32. See 6 Fed. Stat. Annot. 170.

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## PUBLIC HEALTH SERVICE.

See *HEALTH AND QUARANTINE.*



## PUBLIC LANDS.

Act of January 26, 1912, Ch. 17, 331.

*Time Extended for Final Proof of Desert-land Entries, Weld and Larimer Counties, Colo. — Affidavit of Cause of Delay Required — Limitation, 331.*

Act of March 28, 1912, Ch. 67, 331.

*Isolated Tracts, etc. — Sales at Auction Authorized, 331.*

Act of April 13, 1912, Ch. 77, 332.

*Sec. 1. Cheyenne River and Standing Rock Reservations — Homesteaders on Ceded Lands Allowed Additional Time for Payment, 332.*

*2. Forfeiture for Nonpayment, 332.*

*3. Valid Adverse Claims Not Affected, 333.*

Act of April 15, 1912, Ch. 78, 333.

*Sec. 1. Coeur d'Alene Indian Reservation — Homesteaders on Ceded Lands Allowed Additional Time for Payment, 333.*

*2. Forfeiture for Nonpayment, 333.*

*3. Valid Adverse Claims Not Affected, 333.*

Joint Resolution No. 13 of March 3, 1913, 333.

*Coeur d'Alene Indian Reservation — Additional Time Allowed for Payments due for Homesteads, 333.*

Act of April 23, 1912, Ch. 87, 334.

*Coal Lands in Alabama Opened to Agricultural Surface Entry, 334.*

Act of April 27, 1912, Ch. 92, 334.

*Kiowa-Comanche and Apache Ceded Lands — Time Extended for Payments by Homesteaders on Pasture, etc., Lands, 334.*

Act of April 27, 1912, Ch. 91, 335.

*Wind River Reservation — Commutation Allowed Certain Homesteaders on, 335.*

Act of April 30, 1912, Ch. 99, 335.

*Disposal of Surface of Coal Lands to States, etc. 335.*

Act of April 30, 1912, Ch. 101, 335.

*Time Extended for Final Proof in Desert-land Entries, 335.*

Act of June 6, 1912, Ch. 153, 336.

*Homestead Entries — Patent to Issue on Proof of Three Years' Residence, etc. — Transfers for Public Purposes — Leaves of Absence Allowed — Commutation — Proof Required if Entryman Dies — Area of Cultivation Required Yearly — For Enlarged Homesteads — Nebraska Arid Land and Irrigation Entries — Notice of Law to Entryman — Land to Revert on Failure to Establish Residence, etc. — Beginning of Residence — Extension Permitted, 336.*

Act of June 13, 1912, Ch. 166, 337.

*Enlarged Homesteads — Entries of 320 Acres Permitted — States Affected — California and North Dakota Added, 337.*

## PUBLIC LANDS.

Act of July 24, 1912, Ch. 251, 338.

*Assignment of Desert-land Entries with Reclamation Projects — To Conform to Farm Units, 338.*

Act of August 9, 1912, Ch. 280, 338.

*Homestead Entries — Preference Rights to Settlers on Enlarged Homesteads on Nonirrigable Lands — Boundaries to be Marked — Entry to be Made in Three Months — Forfeiture if Not Cultivated, etc. 338.*

Act of August 24, 1912, Ch. 355, 339.

*Local Land Offices — Incurring Expenses, 339.*

*Homesteads — Failure to Give Notice, Not to Prejudice Rights of Entrymen, 339.*

Act of August 24, 1912, Ch. 367, 339.

*Sec. 1. Classified Oil and Gas Lands Open to Entry of Surface — Limit to Desert Entries — Incomplete Entries May be Perfected, etc., 339.*

*2. Applications to Recognize Reservation of Oil or Gas, 339.*

*3. Patent to Certain Reservation of Oil or Gas Rights, 340.*

Act of August 24, 1912, Ch. 369, 340.

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**An Act Authorizing the Secretary of the Interior to grant further extension of time within which to make proof on desert-land entries in the counties of Weld and Larimer, Colorado.**

[*Act of Jan. 26, 1912, ch. 17.*]

[*Time extended for final proof of desert-land entries, Weld and Larimer counties, Colo. — affidavit of cause of delay required — limitation.*] That the Secretary of the Interior may, in his discretion, grant to any entryman who has heretofore made entry under the desert-land laws in the counties of Weld and Larimer, in the State of Colorado, a further extension of the time within which he is required to make final proof: *Provided*, That such entryman shall, by his corroborated affidavit filed in the land office of the district where such land is located, show to the satisfaction of the Secretary that because of unavoidable delay in the construction of irrigation works intended to convey water to the land embraced in his entry he is, without fault on his part, unable to make proof of the reclamation and cultivation of said lands as required by law within the time limited therefor; but such extension shall not be granted for a period of more than three years, and this Act shall not affect contests initiated for a valid existing reason. [37 Stat. L. 56.]

**An Act To amend section twenty-four hundred and fifty-five of the Revised Statutes of the United States, relating to isolated tracts of public land.**

[*Act of March 28, 1912, ch. 67.*]

[*Isolated tracts, etc. — sales at auction authorized.*] That section twenty-four hundred and fifty-five of the Revised Statutes of the United States be amended to read as follows:

**“Sec. 2455.** It shall be lawful for the Commissioner of the General Land Office to order into market and sell at public auction, at the land office of the

district in which the land is situated, for not less than one dollar and twenty-five cents an acre, any isolated or disconnected tract or parcel of the public domain not exceeding one quarter section which, in his judgment, it would be proper to expose for sale after at least thirty days' notice by the land officers of the district in which such land may be situated: *Provided*, That any legal subdivisions of the public land, not exceeding one quarter section, the greater part of which is mountainous or too rough for cultivation, may, in the discretion of said commissioner, be ordered into the market and sold pursuant to this Act upon the application of any person who owns lands or holds a valid entry of, lands adjoining such tract, regardless of the fact that such tract may not be isolated or disconnected within the meaning of this Act: *Provided further*, That this Act shall not defeat any vested right which has already attached under any pending entry or location." [37 Stat. L. 77.]

For R. S. sec. 2455 as it read prior to the amendment see 6 Fed. Stat. Annot. 525.

**An Act Extending the time of payment to certain homesteaders on the Cheyenne River Indian Reservation, in the State of South Dakota, and on the Standing Rock Indian Reservation, in the States of South Dakota and North Dakota.**

[Act of April 13, 1912, ch. 77.]

[SEC. 1.] [*Cheyenne River and Standing Rock Reservations — homesteaders on ceded lands allowed additional time for payment.*] That any person who has heretofore made a homestead entry for land which was formerly a part of the Cheyenne River Indian Reservation, in the State of South Dakota, or the Standing Rock Indian Reservation, in the States of South Dakota and North Dakota, authorized by the Act approved May twenty-ninth, nineteen hundred and eight, may apply to the register and receiver of the land office in the district or districts in which the land is located for an extension of time within which to make payment of any amount that is about to become due, and upon the payment of interest for one year in advance, at five per centum per annum upon the amount due, such payment will be extended for a period of one year, and any payment so extended may annually thereafter be extended for a period of one year in the same manner: *Provided*, That the last payment and all other payments must be made within a period not exceeding one year after the last payment becomes due by the terms of the Act under which the entry was made; that all moneys paid for interest as herein provided shall be deposited in the Treasury to the credit of the Indians as a part of the proceeds received for the land: *And provided further*, That any entryman who has resided upon and cultivated the land embraced in his entry for the period of time required by law in order to make commutation proof, may make proof, and if the same is approved, further residence and cultivation will not be required: *Provided*, That any and all payments must be made when due unless the entryman applies for an extension and pays interest at five per centum per annum in advance upon the amount due as herein provided, and patent shall be withheld until full and final payment of the purchase price is made in accordance with the provisions hereof. [37 Stat. L. 84.]

SEC. 2. [*Forfeiture for nonpayment.*] That failure to make any payment that may be due, unless the same be extended, or to make any extended payment at or before the time to which such payment has been extended as herein

provided, will forfeit the entry and the same shall be canceled, and any and all payments theretofore made shall be forfeited. [37 Stat. L. 84.]

SEC. 3. [*Valid adverse claims not affected.*] That nothing herein contained shall affect any valid adverse claim initiated prior to the passage of this Act. [37 Stat. L. 84.]

An Act To provide for an extension of time of payment of all unpaid payments due from homesteaders on the Coeur d'Alene Indian Reservation, as provided for under an Act of Congress approved June twenty-first, nineteen hundred and six.

[Act of April 15, 1912, ch. 78.]

[SEC. 1.] [*Coeur d'Alene Indian Reservation — homesteaders on ceded lands, allowed additional time for payment.*] That any person who has heretofore made a homestead entry for land which was formerly a part of the Coeur d'Alene Indian Reservation, in the State of Idaho, authorized by the Act approved June twenty-first, nineteen hundred and six, may apply to the register and receiver of the land office in the district or districts in which the land is located for an extension of time within which to make payment of any amount that is about to become due, and upon the payment of interest for one year in advance, at five per centum per annum upon the amount due, such payment will be extended for a period of one year, and any payment so extended may annually thereafter be extended for a period of one year in the same manner: *Provided*, That the last payment and all other payments must be made within a period not exceeding one year after the last payment becomes due by the terms of the Act under which the entry was made; that all moneys paid for interest as herein provided shall be deposited in the Treasury to the credit of the Indians as a part of the proceeds received for the lands. [37 Stat. L. 85.]

Further extension of time, see Joint Resolution March 3, 1913, immediately following this Act.

SEC. 2. [*Forfeiture for nonpayment.*] That failure to make any payment that may be due, unless the same be extended, or to make any extended payment at or before the time to which such payment has been extended as herein provided, will forfeit the entry and the same shall be canceled, and any and all payments theretofore made shall be forfeited. [37 Stat. L. 85.]

SEC. 3. [*Valid adverse claims not affected.*] That nothing herein contained shall affect any valid adverse claim initiated prior to the passage of this Act. [37 Stat. L. 85.]

Joint Resolution Providing for extending provisions of the Act authorizing extension of payments to homesteaders on the Coeur d'Alene Indian Reservation, Idaho.

[Joint Resolution No. 13, of March 3, 1913.]

[*Coeur d'Alene Indian Reservation — additional time allowed for payments due for homesteads.*] That the provisions of an Act of Congress approved April fifteenth, nineteen hundred and twelve, authorizing the extension of time within which to make payments of certain moneys by homestead entrymen upon the

Coeur d'Alene Indian Reservation, in the State of Idaho, be extended and held to apply to payments that became due prior to the passage of the Act under the same conditions that apply to payments becoming due subsequent to the passage of the law. That nothing herein contained shall affect any valid adverse claim initiated prior to the passage of this resolution. [37 Stat. L. 1025.]

**An Act Extending the operation of the Act of June twenty-second, nineteen hundred and ten, to coal lands in Alabama.**

• [Act of April 23, 1912, ch. 37.]

[*Coal lands in Alabama opened to agricultural surface entry.*] That unreserved public lands containing coal deposits in the State of Alabama which are now being withheld from homestead entry under the provisions of the Act entitled "An Act to exclude the public lands in Alabama from the operations of the laws relating to mineral lands," approved March third, eighteen hundred and eighty-three, may be entered under the homestead laws of the United States subject to the provisions, terms, conditions, and limitations prescribed in the Act entitled "An Act to provide for agricultural entries on coal lands," approved June twenty-second, nineteen hundred and ten. [37 Stat. L. 90.]

For the Act of June 22, 1910, see 1912 Supp. Fed. Stat. Annot. 317.

**An Act Authorizing the Secretary of the Interior to subdivide and extend the deferred payments of settlers in the Kiowa-Comanche and Apache ceded lands in Oklahoma.**

[Act of April 27, 1912, ch. 92.]

[*Kiowa-Comanche and Apache ceded lands — time extended for payments by homesteaders on pasture, etc., lands.*] That the Secretary of the Interior is hereby authorized and directed to subdivide into two parts each of the deferred annual payments on lands heretofore sold and entered under the Act entitled "An Act to open to settlement five hundred and five thousand acres of land in the Kiowa-Comanche and Apache Indian Reservations in the State of Oklahoma, approved June sixth, nineteen hundred and six," and the Act entitled "An Act giving preference rights to settlers on the Pasture Reserve numbered three to purchase land leased to them for agricultural purposes in Comanche County, Oklahoma," approved June twenty-eighth, nineteen hundred and six, and extend the time of payment from the date on which each payment so divided becomes due under existing law: *Provided*, That one of the parts into which each deferred annual payment is subdivided shall be paid annually thereafter until the entire amount due is paid, and that not more than one of such parts shall be required to be paid annually: *Provided*, That all interest due on such deferred payments on the date of the passage and approval of this Act shall be added to the principal, become a part thereof, and, together with all deferred payments, bear interest at the rate of four per centum per annum until paid: *Provided further*, That no patent or specie of title shall pass until all payments and interest are paid in full: *And provided further*, That full discretion is vested in the Secretary of the Interior to refuse an extension for fraud of the purchasers under the above-named acts. [37 Stat. L. 91.]

**An Act Providing for patents to homesteads on the ceded portion of the Wind River Reservation in Wyoming.**

[*Act of April 27, 1912, ch. 91.*]

[*Wind River reservation — commutation allowed certain homesteaders on.*] That any person who, prior to December sixteenth, nineteen hundred and eleven, made homestead entry on the ceded portion of the Wind River Reservation in Wyoming, and has not abandoned the same, and who has been unable to secure water for the irrigation of the lands covered by his entry, may secure title to the same upon the submission of satisfactory proof that he has established and maintained actual bona fide residence upon his land for a period of not less than eight months and upon payment of all sums remaining due on said land as provided for by the Act of March third, nineteen hundred and five. [37 Stat. L. 91.]

**An Act To supplement the Act of June twenty-second, nineteen hundred and ten, entitled "An Act to provide for agricultural entries on coal lands."**

[*Act of April 30, 1912, ch. 99.*]

[*Disposal of surface of coal lands to states, etc.*] That from and after the passage of this Act unreserved public lands of the United States, exclusive of Alaska, which have been withdrawn or classified as coal lands or are valuable for coal shall, in addition to the classes of entries or filings described in the Act of Congress approved June twenty-second, nineteen hundred and ten, entitled "An Act to provide for agricultural entries on coal lands," be subject to selection by the several States within whose limits the lands are situate, under grants made by Congress, and to disposition, in the discretion of the Secretary of the Interior, under the laws providing for the sale of isolated or disconnected tracts of public lands, but there shall be a reservation to the United States of the coal in all such lands so selected or sold and of the right to prospect for, mine, and remove the same in accordance with the provisions of said Act of June twenty-second, nineteen hundred and ten, and such lands shall be subject to all the conditions and limitations of said Act. [37 Stat. L. 105.]

For the Act of June 22, 1910, see 1912 Supp. Fed. Stat. Annot. 317.

**An Act Authorizing the Secretary of the Interior to grant further extension of time within which to make proof on desert-land entries.**

[*Act of April 30, 1912, ch. 101.*]

[*Time extended for final proof in desert-land entries.*] That the Secretary of the Interior may, in his discretion, in addition to the extension authorized by existing law, grant to any entryman under the desert-land laws a further extension of the time within which he is required to make final proof: *Provided*, That such entryman shall, by his corroborated affidavit filed in the land office of the district where such land is located, show to the satisfaction of the Secretary that because of unavoidable delay in the construction of irrigation works intended to convey water to the land embraced in his entry he is, without fault on his part, unable to make proof of the reclamation and cultivation of said lands as required by law within the time limited therefor; but such extension shall not be granted for a period of more than three years, and this Act

shall not affect contests initiated for a valid existing reason: *Provided*, That the total extension of the statutory period for making final proof that may be allowed in any one case under this Act, and any other existing statutes of either general or local application, shall be limited to six years in the aggregate. [37 Stat. L. 106.]

An Act To amend section twenty-two hundred and ninety-one and section twenty-two hundred and ninety-seven of the Revised Statutes of the United States relating to homesteads.

[Act of June 6, 1912, ch. 153.]

[*Homestead entries.*] That section twenty-two hundred and ninety-one and section twenty-two hundred and ninety-seven of the Revised Statutes of the United States be amended to read as follows:

“**Sec. 2291.** [*Patent to issue on proof of three years' residence, etc. — transfers for public purposes. — leaves of absence allowed — commutation — proof required if entryman dies — area of cultivation required yearly — for enlarged homesteads — Nebraska arid land and irrigation entries — notice of law to entrymen.*] No certificate, however, shall be given or patent issued therefor until the expiration of three years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry, or if he be dead his widow, or in case of her death his heirs or devisee, or in case of a widow making such entry her heirs or devisee, in case of her death, proves by himself and by two credible witnesses that he, she, or they have a habitable house upon the land and have actually resided upon and cultivated the same for the term of three years succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she, or they will bear true allegiance to the Government of the United States, then in such case he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law: *Provided*, That upon filing in the local land office notice of the beginning of such absence, the entryman shall be entitled to a continuous leave of absence from the land for a period not exceeding five months in each year after establishing residence, and upon the termination of such absence the entryman shall file a notice of such termination in the local land office, but in case of commutation the fourteen months' actual residence as now required by law must be shown, and the person commuting must be at the time a citizen of the United States: *Provided*, That when the person making entry dies before the offer of final proof those succeeding to the entry must show that the entryman had complied with the law in all respects to the date of his death and that they have since complied with the law in all respects, as would have been required of the entryman had he lived, excepting that they are relieved from any requirement of residence upon the land: *Provided further*, That the entryman shall, in order to comply with the requirements of cultivation herein provided for, cultivate not less than one-sixteenth of the area of his entry, beginning with the second year of the entry, and not less than one-eighth, beginning with the third year of the entry, and until final proof, except that in the case of entries under section six of the enlarged-homestead law double the area of cultivation herein provided shall be required, but the Secretary of the Interior may, upon a satisfactory showing, under rules and regulations prescribed by him, reduce the required area of cultivation: *Provided*, That the above provision as to cultivation shall not ap-



ply to entries under the Act of April twenty-eighth, nineteen hundred and four, commonly known as the Kinkaid Act, or entries under the Act of June seventeenth, nineteen hundred and two, commonly known as the reclamation Act, and that the provisions of this section relative to the homestead period shall apply to all unperfected entries as well as entries hereafter made upon which residence is required: *Provided*, That the Secretary of the Interior shall, within sixty days after the passage of this Act, send a copy of the same to each homestead entryman of record who may be affected thereby, by ordinary mail to his last known address, and any such entryman may, by giving notice within one hundred and twenty days after the passage of this Act, by registered letter to the register and receiver of the local land office, elect to make proof upon his entry under the law under which the same was made without regard to the provisions of this Act." [37 Stat. L. 123.]

See 6 Fed. Stat. Annot. 292.

**"Sec. 2297.** [*Land to revert on failure to establish residence, etc., — beginning of residence — extension permitted.*] If, at any time after the filing of the affidavit as required in section twenty-two hundred and ninety and before the expiration of the three years mentioned in section twenty-two hundred and ninety-one, it is proved, after due notice to the settler, to the satisfaction of the register of the land office that the person having filed such affidavit has failed to establish residence within six months after the date of entry, or abandoned the land for more than six months at any time, then and in that event the land so entered shall revert to the Government: *Provided*, That the three years' period of residence herein fixed shall date from the time of establishing actual permanent residence upon the land: *And provided further*, That where there may be climatic reasons, sickness, or other unavoidable cause, the Commissioner of the General Land Office may, in his discretion, allow the settler twelve months from the date of filing in which to commence his residence on said land under such rules and regulations as he may prescribe." [37 Stat. L. 124.]

See 6 Fed. Stat. Annot. 310.

An Act To amend section one of an Act entitled "An Act to provide for an enlarged homestead," approved February nineteenth, nineteen hundred and nine.

[Act of June 13, 1912, ch. 166.]

[*Enlarged homesteads — entries of 320 acres permitted — states affected — California and North Dakota added.*] That section one of the Act entitled "An Act to provide for an enlarged homestead," approved February nineteenth, nineteen hundred and nine, be, and is hereby, amended so as to read as follows:

"SECTION 1. That any person who is a qualified entryman under the homestead laws of the United States may enter, by legal subdivisions, under the provisions of this Act, in the States of Arizona, California, Colorado, Montana, Nevada, New Mexico, North Dakota, Oregon, Utah, Washington, and Wyoming, three hundred and twenty acres, or less, of nonmineral, nonirrigable, unreserved, and unappropriated surveyed public lands which do not contain merchantable timber, located in a reasonably compact body, and not over one and one-half miles in extreme length: *Provided*, That no lands shall be subject to entry under the provisions of this Act until such lands shall have been des-

ignated by the Secretary of the Interior as not being, in his opinion, susceptible of successful irrigation at a reasonable cost from any known source of water supply. [37 Stat. L. 132.]

**An Act Relating to partial assignments of desert-land entries within reclamation projects made since March twenty-eighth, nineteen hundred and eight.**

[Act of July 24, 1912, ch. 251.]

[Assignment of desert-land entries within reclamation projects — to conform to farm units.] That a desert-land entry within the exterior limits of a Government reclamation project may be assigned in whole or in part under the Act of March twenty-eighth, nineteen hundred and eight (Thirty-fifth Statutes at Large, page fifty-two), and the benefits and limitations of the Act of June twenty-seventh, nineteen hundred and six (Thirty-fourth Statutes at Large, page five hundred and twenty), shall apply to such desert-land entryman and his assignees: *Provided*, That all such assignments shall conform to and be in accordance with farm units to be established by the Secretary of the Interior upon the application of the desert-land entryman. All such assignments heretofore made in good faith shall be recognized under this Act. [37 Stat. L. 200.]

For the Act of March 28, 1908, see 1909 Supp. Fed. Stat. Annot. 550; for the Act of June 27, 1906, see 1909 Fed. Stat. Annot. 543.

**An Act To amend section three of the Act of Congress approved May fourteenth, eighteen hundred and eighty (Twenty-first Statutes at Large, page one hundred and forty).**

[Act of August 9, 1912, ch. 280.]

[Homestead entries — preference rights to settlers on enlarged homesteads on nonirrigable lands — boundaries to be marked — entry to be made in three months — forfeiture if not cultivated, etc.] That section three of the Act of Congress approved May fourteenth, eighteen hundred and eighty (Twenty-first Statutes at Large, page one hundred and forty), be, and the same is hereby, amended by adding thereto the following:

*Provided*, That any settler upon lands designated by the Secretary of the Interior as subject to the provisions of sections one to five of the enlarged homestead Acts of February nineteenth, nineteen hundred and nine (Thirty-fifth Statutes at Large, page six hundred and thirty-nine), and June seventeenth, nineteen hundred and ten (Thirty-sixth Statutes at Large, page five hundred and thirty-one), shall be entitled to the preference right of entry accorded by this section, provided he shall have plainly marked the exterior boundaries of the lands claimed as his homestead: *And provided further*, That after the designation by the Secretary of the Interior of public lands for entry under the nonresidence provisions of the enlarged homestead Acts of February nineteenth, nineteen hundred and nine, and June seventeenth, nineteen hundred and ten, any person who shall have plainly marked the exterior boundaries of the lands claimed under said provisions of law and made valuable improvements thereon shall have a preference right to enter the lands so claimed and improved at any time within three months after the date on which such lands become subject to entry; but such right shall forfeit unless the settler or claimant under the provisions of the enlarged homestead Acts shall annually culti-

vate and improve the lands in the form and manner and to the extent therein required following date of initiation of his claim hereunder. [37 Stat. L. 267.]

For the Act of May 14, 1880, which is Fed. Stat. Annot. 560. For the Act of June here amended, see 6 Fed. Stat. Annot. 300. 17, 1910, see 1912 Supp. Fed. Stat. Annot. For the Act of Feb. 19, 1909, see 1909 Supp. 316.

[*Local land offices — incurring expenses.*] \* \* \* That no expenses chargeable to the Government shall be incurred by registers and receivers in the conduct of local land offices except upon previous specific authorization by the Commissioner of the General Land Office. [37 Stat. L. 454.]

This and the following paragraph are from the Sundry Civil Appropriation Act of Aug. 24, 1912, ch. 355.

[*Homesteads — failure to give notice, not to prejudice rights of entrymen.*] \* \* \* That the failure of a homestead entryman to give notice of election of making his proof as required by the Act of June sixth, nineteen hundred and twelve, being an Act to amend sections two hundred and ninety-one and two hundred and ninety-seven of the Revised Statutes of the United States, relating to homesteads, shall not in anywise prejudice his rights to proceed in accordance with the law under which such entry was made. [37 Stat. L. 455.]

**An Act To provide for agricultural entries on oil and gas lands.**

[Act of August 24, 1912, ch. 367.]

[SEC. 1.] [*Classified oil and gas lands open to entry of surface — limit to desert entries — incomplete entries may be perfected, etc.*] That from and after the passage of this Act unreserved public lands of the United States in the State of Utah, which have been withdrawn or classified as oil lands, or are valuable for oil, shall be subject to appropriate entry under the homestead laws by actual settlers only, the desert-land law, to selection by the State of Utah under grants made by Congress and under section four of the Act approved August eighteenth, eighteen hundred and ninety-four, known as the Carey Act, and to withdrawal under the Act approved June seventeenth, nineteen hundred and two, known as the reclamation Act, and to disposition in the discretion of the Secretary of the Interior under the law providing for the sale of isolated or disconnected tracts of public lands, whenever such entry, selection, or withdrawal shall be made with a view of obtaining or passing title, with a reservation to the United States of the oil and gas in such lands and of the right to prospect for, mine, and remove the same. But no desert entry made under the provisions of this Act shall contain more than one hundred and sixty acres: *Provided*, That those who have initiated nonmineral entries, selections, or locations in good faith, prior to the passage of this Act, on lands withdrawn or classified as oil lands, may perfect the same under the provisions of the laws under which said entries were made, but shall receive the limited patent provided for in this Act. [37 Stat. L. 496.]

For sec. 4 of the Act of Aug. 18, 1894 see 6 Fed. Stat. Annot. 397. For the Act of June 17, 1902, see 7 Fed. Stat. Annot. 1098.

SEC. 2. [*Applications to recognize reservation of oil or gas.*] That any person desiring to make entry under the homestead laws or the desert-land law,

and the State of Utah desiring to make selection under section four of the Act of August eighteenth, eighteen hundred and ninety-four, known as the Carey Act, or under grants made by Congress, and the Secretary of the Interior in withdrawing under the reclamation Act lands classified as oil lands, or valuable for oil, with a view of securing or passing title to the same in accordance with the provisions of said Acts, shall state in the application for entry, selection, or notice of withdrawal that the same is made in accordance with and subject to the provisions and reservations of this Act. [37 Stat. L. 496.]

See note under preceding section.

SEC. 3. [*Patent to certain reservation of oil or gas rights.*] That upon satisfactory proof of full compliance with the provisions of the laws under which entry is made and of this Act the entryman shall be entitled to a patent to the land entered by him, which patent shall contain a reservation to the United States of all the oil and gas in the lands so patented, together with the right to prospect for, mine, and remove the same upon rendering compensation to the patentee for all damages that may be caused by prospecting for and removing such oil or gas. The reserved oil and gas deposits in such lands shall be disposed of only as shall be [be] hereafter expressly directed by law. [37 Stat. L. 496.]

An Act To amend section two of an Act to authorize the President of the United States to make withdrawals of public lands in certain cases, approved June twenty-fifth, nineteen hundred and ten.

[Act of August 24, 1912, ch. 369.]

[*Withdrawals for specified purposes — mining rights continued — rights of bona fide oil or gas claimants — status of prior claims — homestead, etc., entries not affected — creation of forest reserves restricted.*] That section two of the Act of Congress approved June twenty-fifth, nineteen hundred and ten (Thirty-sixth Statutes at Large, page eight hundred and forty-seven), be, and the same hereby is, amended to read as follows:

"SEC. 2. That all lands withdrawn under the provisions of this Act shall at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals: *Provided*, That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands and who, at such date, is in the diligent prosecution of work leading to the discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work: *Provided further*, That this Act shall not be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to June twenty-fifth, nineteen hundred and ten: *And provided further*, That there shall be excepted from the force and effect of any withdrawal made under the provisions of this Act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settle-

ment was made: *And provided further*, That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created, within the limits of the States of California, Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by Act of Congress." [37 Stat. L. 497.]

For sec. 2 of the Act of June 25, 1910, as originally enacted, see 1912 Supp. Fed. Stat. Annot. 321.

**An Act For the relief of certain homesteaders in Nebraska.**

[Act of August 24, 1912, ch. 371.]

[*Determination of qualification of entrymen, Nebraska arid lands.*] That the qualifications of a former homestead entryman who has heretofore been permitted to make an additional or another entry under the Act entitled "An Act to amend the homestead laws as to certain unappropriated and unreserved public lands in Nebraska," approved April twenty-eighth, nineteen hundred and four, shall be determined by the qualifications, except as to citizenship, possessed on the date of his first entry in all cases where the rights of third persons shall not have intervened and the additional or second entry has not been canceled. [37 Stat. L. 499.]

For the Act of April 28, 1904, see 10 Fed. Stat. Annot. 360.

**An Act Validating certain homestead entries.**

[Act of August 24, 1912, ch. 381.]

[*Enlarged homesteads — validation of technically disqualified entries.*] That all pending homestead entries made in good faith prior to September first, nineteen hundred and eleven, under the provisions of the enlarged homestead laws, by persons who, before making such enlarged homestead entry, had acquired title to a technical quarter section of land under the homestead law, and therefore were not qualified to make an enlarged homestead entry, be, and the same are hereby, validated, if in all other respects regular, in all cases where the original homestead entry was for less than one hundred and sixty acres of land. [37 Stat. L. 506.]

**An Act Providing when patents shall issue to the purchaser or heirs of certain lands in the State of Oregon.**

[Act of February 11, 1913, ch. 87.]

[SEC. 1.] [*Umatilla Indian Reservation — patents to purchasers of lands on.*] That all persons who have heretofore purchased any of the lands of the Umatilla Indian Reservation, in the State of Oregon, and have made or shall make full and final payment therefor in conformity with the Acts of Congress of March third, eighteen hundred and eighty-five, and of July first, nineteen hundred and two, respecting the sale of such lands, shall be entitled to receive patent therefor upon submitting satisfactory proof to the Secretary of the Interior that the untimbered lands so purchased are not susceptible of cultivation or residence, and are exclusively grazing lands, incapable of any profitable use other than for grazing purposes. [37 Stat. L. 635.]

SEC. 2. [*Completion by heirs.*] That where a party entitled to claim the benefits of this Act dies before securing a patent therefor, it shall be competent for the executor or administrator of the estate of such party, or one of the heirs, to make the necessary proofs and payments therefor to complete the same; and the patent in such cases shall be made in favor of the heirs of the deceased purchaser and the title to said lands shall inure to such heirs, as if their names had been especially mentioned. [37 Stat. L. 665.]

**An Act To amend an Act entitled "An Act to provide for an enlarged homestead."**

[*Act of February 11, 1913, ch. 39.*]

[*Enlarged homesteads.*] That sections three and four of the Act entitled "An Act to provide for an enlarged homestead," approved February nineteenth, nineteen hundred and nine, and of an Act entitled "An Act to provide for an enlarged homestead," approved June seventeenth, nineteen hundred and ten, be, and the same are hereby, amended to read as follows:

"SEC. 3. That any homestead entryman of lands of the character herein described, upon which entry final proof has not been made, shall have the right to enter public lands, subject to the provisions of this Act, contiguous to his former entry, which shall not, together with the original entry, exceed three hundred and twenty acres.

"SEC. 4. That at the time of making final proofs, as provided in section twenty-two hundred and ninety-one of the Revised Statutes, the entryman under this Act shall, in addition to the proofs and affidavits required under said section, prove by two credible witnesses that at least one-sixteenth of the area embraced in such entry was continuously cultivated for agricultural crops other than native grasses beginning with the second year of the entry, and that at least one-eighth of the area embraced in the entry was so continuously cultivated beginning with the third year of the entry: *Provided*, That any qualified person who has heretofore made or hereafter makes additional entry under the provisions of section three of this Act may be allowed to perfect title to his original entry by showing compliance with the provisions of section twenty-two hundred and ninety-one of the Revised Statutes respecting such original entry, and thereafter in making proof upon his additional entry shall be credited with residence maintained upon his original entry from the date of such original entry, but the cultivation required upon entries made under this Act must be shown respecting such additional entry, which cultivation, while it may be made upon either the original or additional entry, or upon both entries, must be cultivation in addition to that relied upon and used in making proof upon the original entry; or, if he elects, his original and additional entries may be considered as one, with full credit for residence upon and improvements made under his original entry, in which event the amount of cultivation herein required shall apply to the total area of the combined entry, and proof may be made upon such combined entry whenever it can be shown that the cultivation required by this section has been performed; and to this end the time within which proof must be made upon such combined entry is hereby extended to seven years from the date of the original entry: *Provided further*, That nothing herein contained shall be so construed as to require residence upon the combined entry in excess of the period of residence, as required by section twenty-two hundred and ninety-one of the Revised Statutes." [37 Stat. L. 666.]

An Act To authorize the sale and disposition of the surplus and unallotted lands in the Standing Rock Indian Reservation, in the States of South Dakota and North Dakota, and making appropriation and provision to carry the same into effect.

[Act of February 14, 1913, ch. 54.]

[SEC. 1.] [*Standing Rock Indian Reservation — sale of surplus lands.*] That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell and dispose of all that portion of the Standing Rock Indian Reservation, in the States of South Dakota and North Dakota, lying and being within the following-described boundaries, to wit: Commencing at a point in the center of the main channel of the Missouri River where the township line between townships eighteen and nineteen north intersects the same; thence west on said township line to a point where the range line between ranges twenty-two and twenty-three east intersects the same; thence north along the said range line to the northwest corner of section nineteen, in township twenty-one north, of range twenty-three east; thence east on the section line north of sections nineteen, twenty, twenty-one, twenty-two, twenty-three, and twenty-four to a point where the same intersects the range line between ranges twenty-three and twenty-four east; thence north along said range line to a point where the same intersects the State line between the States of South Dakota and North Dakota; thence west on said State line to a point where the range line between ranges eighty-four and eighty-five west in North Dakota intersects the same; thence north on said range line between ranges eighty-four and eighty-five west to a point where it intersects the center of the main channel of the Cannon Ball River; thence in a northeasterly direction down and along the center of the main channel of said Cannon Ball River to a point where it intersects the center of the main channel of the Missouri River; thence in a southerly direction along the center of the main channel of the said Missouri River to the place of beginning, and including also entirely all islands, if any, in said river, except such portions thereof as have been allotted to Indians: *Provided*, That sections sixteen and thirty-six of the lands in each township therein shall not be disposed of, but shall be reserved for the use of the common schools of the States of South Dakota and North Dakota, respectively: *Provided further*, That the Secretary of the Interior may reserve such lands as he may deem necessary for agency, school, and religious purposes, to remain reserved as long as needed and as long as agency, school, or religious institutions are maintained thereon for the benefit of said Indians: *Provided, however*, That the Secretary of the Interior is hereby authorized and directed to issue a patent in fee simple to the duly authorized missionary board, or other proper authority of any religious organization, heretofore engaged in mission or school work on said reservation, for such lands thereon (not included in any town site herein provided for) as have been heretofore set apart to such organization for mission or school purposes. [37 Stat. L. 675.]

SEC. 2. [*Opened to settlement by proclamation — allotments to be completed — mineral lands reserved — rights of soldiers and sailors.*] That the lands shall be disposed of by proclamation under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which the lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of said lands except as prescribed

in said proclamation: *Provided*, That prior to said proclamation the Secretary of the Interior shall cause allotments to be made to every man, woman, and child belonging to or holding tribal relations in said reservation who have not heretofore received the allotments to which they are entitled under provisions of existing laws: *Provided, however*, That the said Secretary is hereby authorized to designate the superintendent of the Standing Rock Indian School to allot each child born subsequent to the completion of the allotments herein provided for and sixty days prior to the date set by said proclamation for the entry of said surplus lands: *Provided further*, That the Secretary of the Interior be, and he is hereby, authorized and directed to cause to be surveyed all the unsurveyed lands, if any, within said reservation, and to cause an examination to be made of the lands by experts of the Geological Survey, and if there be found any lands bearing coal or other valuable minerals the said Secretary is hereby authorized to reserve them from allotment or disposition until further action by Congress: *And provided further*, That the rights of honorably discharged Union soldiers and sailors of the late Civil and Spanish Wars or Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged. [37 Stat. L. 676.]

For R. S. secs. 2304, 2305, as amended, see 6 Fed. Stat. Annot. 322, 323.

SEC. 3. [*Townsites.*] That before any of the land is disposed of, as hereinafter provided, and before the States of South Dakota and North Dakota, respectively, shall be permitted to select or locate any lands to which it may be entitled by reason of the loss of sections sixteen or thirty-six, or any portions thereof, by reason of allotments thereof to any Indian or Indians, the Secretary of the Interior is authorized to reserve from said lands such tracts for town-site purposes as in his opinion may be required for the future public interests, and he may cause same to be surveyed into lots and blocks and disposed of under such regulations as he may prescribe, and he is hereby authorized to set apart and reserve for school, park, and other public purposes not more than ten acres in any one town site, and patents shall be issued to the lands so set apart and reserved for school, park, and other public purposes to the municipality legally charged with the care and custody of lands donated for such purposes. The purchase price of all town lots sold in town sites, as hereinafter provided, shall be paid at such time and in such installments as the Secretary of the Interior may direct. He shall cause not more than twenty per centum of the net proceeds arising from such sales to be set apart and expended under his direction in the construction of schoolhouses and other public buildings, or in improvements within the town sites wherein such lots are located. The net proceeds derived from the sale of such lots and lands within the town sites as aforesaid shall be credited to the Indians as hereinafter provided: *Provided further*, That all children of school age and of Indian parentage shall be admitted at all times to the public schools within said town sites on an equal footing with all other children admitted to the said schools. [37 Stat. L. 676.]

SEC. 4. [*Homesteads — price of lands.*] That the price of said lands entered as homesteads under the provisions of this Act shall be as follows: Upon all lands entered or filed upon within three months after the same shall be opened for settlement and entry, five dollars per acre, and upon all lands entered or filed upon after the expiration of three months and within six months after



the same shall have been opened for settlement and entry, three dollars and fifty cents per acre; after the expiration of six months, after the same shall have been opened for settlement and entry, the price shall be two dollars and fifty cents an acre. [37 Stat. L. 676.]

SEC. 5. [*Payment of purchase price — forfeiture — sale of lands remaining after five years.*] That the price of said lands shall be paid in accordance with the rules and regulations to be prescribed by the Secretary of the Interior upon the following terms: One-fifth of the purchase price to be paid in cash at the time of entry, and the balance in five equal installments, the first within two years and the remainder annually in three, four, five, and six years, respectively, from and after the date of entry. In case any entryman fails to make the annual payments, or any of them, when due, all rights in and to the land covered by his entry shall cease, and any payments theretofore made shall be forfeited and the entry canceled, and the lands shall be reoffered for sale and entry under the provisions of the homestead law at the price fixed herein: *Provided*, That nothing in this Act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed herein, receiving credit for the payments previously made. In addition to the price to be paid for the land the entryman shall pay the same fees and commissions at the time of commutation of final entry as now provided by law where the price of land is one dollar and twenty-five cents per acre; and when the entryman shall have complied with all the requirements and terms of the homestead laws as to settlement and residence, and shall have made all the required payments aforesaid, he shall be entitled to patent for the lands entered: *Provided further*, That any lands remaining unsold after said lands have been opened to entry for five years may be sold to the highest bidder for cash, without regard to the prescribed price thereof fixed under the provisions of this Act, under such rules and regulations as the Secretary of the Interior may prescribe, and patents therefor shall be issued to the purchasers. [37 Stat. L. 677.]

SEC. 6. [*Deposit of proceeds to credit of Indians — use of fund.*] That from the proceeds arising from the sale and disposition of the lands aforesaid, exclusive of the customary fees and commissions, there shall be deposited in the Treasury of the United States, to the credit of the Indians belonging and having tribal rights on the said reservation, the sums of which the said tribe may be entitled, which shall draw interest at three per centum per annum; that the moneys derived from the sale of said lands and deposited in the Treasury of the United States to the credit of said Indians shall be at all times subject to appropriation by Congress for their education, support, and civilization: *Provided*, That from any moneys in the Treasury to the credit of the Standing Rock Indians derived from the proceeds arising from the sale and disposition of their portion of the surplus and unallotted lands disposed of under section six of the Act approved May twenty-ninth, nineteen hundred and eight, the Secretary of the Interior be, and he is hereby, authorized, in his discretion, to distribute and pay to each of the Indians belonging to said tribe and entitled thereto a sum not exceeding forty dollars per capita. [37 Stat. L. 677.]

SEC. 7. [*Purchase of school land for South Dakota and North Dakota — lieu lands.*] That sections sixteen and thirty-six of the land in each township within the tract described in section one of this Act shall not be subject to entry,

but shall be reserved for the use of the common schools and paid for by the United States at two dollars and fifty cents per acre, and the same are hereby granted to the States of South Dakota and North Dakota, respectively, for such purposes, and in case any of said sections or parts thereof are lost to either of the said States by reason of allotments thereof to any Indian or Indians or otherwise, the governor of each of said States, respectively, with the approval of the Secretary of the Interior, is hereby authorized, within the area described in section one of this Act, to locate other lands not otherwise appropriated, not exceeding two sections in any one township, which shall be paid for by the United States, as herein provided, in quantity equal to the loss, and such selections shall be made prior to the opening of such lands to settlement. [37 Stat. L. 677.]

SEC. 8. [*Prohibition of intoxicants.*] That the lands allotted, those retained or reserved, and the surplus lands sold, set aside for town-site purposes, or granted to the State, or otherwise disposed of, shall be subject for a period of twenty-five years to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country. [37 Stat. L. 678.]

SEC. 9. [*Appropriations for lands granted to States — surveys, etc. — reimbursement.*] That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of one hundred and eighty thousand dollars, or so much thereof as may be necessary, to pay for the lands granted to the States of South Dakota and North Dakota, as provided in section seven of this Act. And there is hereby appropriated the further sum of ten thousand dollars, or so much thereof as may be necessary, for the purpose of making the surveys and allotments provided for herein: *Provided*, That the said ten thousand dollars, or so much thereof as may be expended for the purpose of carrying out the provisions of this Act, shall be reimbursed to the United States from the proceeds received from the sale of the lands described herein or from any money in the Treasury belonging to said Indian tribe. [37 Stat. L. 678.]

SEC. 10. [*Nonresponsibility of United States — treaty rights not affected.*] That nothing in this Act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six, or the equivalent, in each township, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this Act that the United States shall act as trustee for said Indians to dispose of the said lands and to expend and pay over the proceeds received from the sale thereof only as received and as herein provided: *Provided*, That nothing in this Act shall be construed to deprive the said Indians of the Standing Rock Indian Reservation of any benefits to which they are entitled under existing treaties or agreements not inconsistent with the provisions of this Act. [37 Stat. L. 678.]

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[*Homestead entries — choice of prior entrymen to perfect proof under former law.*] \* \* \* That any person entitled to enter lands under the homestead laws, who may have established residence upon unsurveyed lands (which were subject to homestead entry) prior to the passage and approval of the

Act of June sixth, nineteen hundred and twelve, entitled "An Act to amend section twenty-two hundred and ninety-one and section twenty-two hundred and ninety-seven, of the Revised Statutes relating to homesteads," may perfect his proof for such lands under said Act of June sixth, nineteen hundred and twelve, or under the law existing at the time of the establishment of such residence, as he may elect, such election to be signified to the Department of the Interior in accordance with rules and regulations to be prescribed by the Secretary. [37 Stat. L. 925.]

This is from the Deficiencies Appropriation Act of March 4, 1913, ch. 149. For the Act of June 6, 1912, see *supra*, p. 336.

**An Act To authorize the sale of burnt timber on the public domain.**

[Act of March 4, 1913, ch. 165.]

[SEC. 1.] [*Sale of timber killed, etc., by forest fires.*] That the Secretary of the Interior is hereby authorized, under such rules as he may prescribe, to sell and dispose of to the highest bidder at public auction, or through sealed bids, the timber on any lands of the United States, outside the boundaries of national forests, including those embraced in unperfected claims under any of the public land laws, also upon the ceded Indian lands, that may have been killed or seriously and permanently damaged by forest fires prior to the passage of this Act, the proceeds of all such sales to be covered into the Treasury of the United States: *Provided*, That the damaged timber upon any lands embraced in an existing claim shall be disposed of only upon the application or with the written consent of such claimant, and the money received from the sale of damaged timber on any such lands shall be kept in a special fund to await the final determination of such claim. [37 Stat. L. 1015.]

SEC. 2. [*Disposal of fund.*] That upon the certification of the Secretary of the Interior that any such claim has been finally approved and patented the Secretary of the Treasury is hereby authorized and directed to pay to such claimant, his heirs or legal representatives, the money received from the sale of the damaged timber upon his land, after deducting therefrom the expenses of the sale; and upon the certification of the Secretary of the Interior that any such claim has been finally rejected and canceled the Secretary of the Treasury is hereby authorized and directed to transfer the money derived from the sale of the damaged timber upon the lands embraced in such claim to the general fund in the Treasury derived from the sale of public lands, unless by legislation the lands from which the timber had been removed had been theretofore appropriated to the benefit of an Indian tribe or otherwise, in which event the net proceeds derived from the sale of the timber shall be transferred to the fund of such tribe or otherwise credited or distributed as by law provided. [37 Stat. L. 1016.]

**An Act To authorize the President to provide a method for opening lands restored from reservation or withdrawal, and for other purposes.**

[Act of September 30, 1913, ch. 15.]

[SEC. 1.] [*Method authorized for opening, restored from reservations, etc.*] That hereafter when public lands are excluded from national forests or released from withdrawals the President may, whenever in his judgment it is

proper or necessary, provide for the opening of the lands by settlement in advance of entry, by drawing, or by such other method as he may deem advisable in the interest of equal opportunity and good administration, and in doing so may provide that lands so opened shall be subject only to homestead entry by actual settlers only or to entry under the desert-land laws for a period not exceeding ninety days, the unentered lands to be thereafter subject to disposition under the public-land laws applicable thereto. [38 Stat. L. 113.]

SEC. 2. [*Extended to previous restorations.*] That where under the law the Secretary of the Interior is authorized or directed to make restoration of lands previously withdrawn he may also restrict the restoration as prescribed in section one of this Act. [38 Stat. L. 114.]

**An Act To create an additional land district in the State of Nevada.**

[*Act of October 3, 1913, ch. 10.*]

[SEC. 1.] [*Elko land district, Nev., created.*] That an additional land district is hereby created for the State of Nevada to embrace the lands contained in the following-named counties, to wit: Churchill, Elko, Eureka, Humboldt, Lander, Lincoln, Nye, and White Pine, described as follows, to wit: Commencing at the common corner between townships thirty-eight and thirty-nine east, range forty-seven north, Mount Diablo base and meridian, being on the north boundary line of the State of Nevada; thence south on the dividing line between townships thirty-eight and thirty-nine east, to its intersection with the third standard parallel north, said parallel being the dividing line between ranges fifteen and sixteen north, of Mount Diablo base line; thence east along said third standard parallel north to the intersection of the Ruby Valley guide meridian, being the dividing line between townships fifty-five and fifty-six east; thence south along said Ruby Valley guide meridian to its intersection with the first standard parallel north, being the dividing line between ranges five and six north, of Mount Diablo base line; thence east along said first standard parallel north, between said ranges five and six, to the east boundary line of the State of Nevada; thence north along the east boundary line of the State of Nevada to the north boundary line of the State of Nevada; thence west along the north boundary line of the State of Nevada to the point of beginning. The city of Elko, in the county of Elko, is hereby designated as the site of said land office, and the district shall be known as the Elko land district. [38 Stat. L. 203.]

SEC. 2. [*Transfer of plats, etc.*] That the Secretary of the Interior shall cause all plats, maps, records, and papers in the Carson City land office, which relate to or form a necessary part of the records of the lands embraced in the district hereby created, to be transferred to the Elko land district. [38 Stat. L. 204.]

SEC. 3. [*Register and receiver authorized.*] That the President is authorized to appoint, by and with the advice and consent of the Senate, a register and a receiver for said land district, and they shall be subject to the same laws and be entitled to the same compensation as is or may be hereafter provided by law in relation to the existing land offices and officers of said State. [38 Stat. L. 204.]

An Act Authorizing the Secretary of the Interior to grant further extensions of time within which to comply with the law and make proof on desert-land entries in the counties of Grant and Franklin, State of Washington.

[Act of October 30, 1913, ch. 35.]

[Time extended for final proofs on certain desert-land entries in Washington.] That the Secretary of the Interior may, in his discretion, grant to any entryman under the desert-land laws in the counties of Grant and Franklin, in the State of Washington, a further extension of time within which he is required to comply with the law and make final proof: *Provided*, That such entryman shall, by his corroborated affidavit, filed in the land office of the district where such land is located, show to the satisfaction of the Secretary that because of unavoidable delay in the construction and operation of irrigation works intended to convey water to the land embraced in his entry he is, without fault on his part, unable to make proof of the reclamation and cultivation of said lands, as required by law, within the time limited therefor; but such extension shall not be granted for a period of more than three years, and this Act shall not affect contests initiated for a valid existing reason. [38 Stat. L. 234.]

## PUBLIC OFFICERS.

Act of August 24, 1912, Ch. 355, 349.

*Sec. 8. Oaths to Expense Accounts — Additional Officers Authorized to Administer — No Charges Allowed — No Reimbursement Hereafter, 349.*

SEC. 8. [Oaths to expense accounts — additional officers authorized to administer — no charges allowed — no reimbursement hereafter.] After June thirtieth, nineteen hundred and twelve, postmasters, assistant postmasters, collectors of customs, collectors of internal revenue, chief clerks of the various executive departments and bureaus, or clerks designated by them for the purpose, the superintendent, the acting superintendent, custodian, and principal clerks of the various national parks and other Government reservations, superintendent, acting superintendents, and principal clerks of the different Indian superintendencies or Indian agencies, and chiefs of field parties, are required, empowered, and authorized, when requested, to administer oaths, required by law or otherwise, to accounts for travel or other expenses against the United States, with like force and effect as officers having a seal; for such services when so rendered, or when rendered on demand after said date by notaries public, who at the time are also salaried officers or employees of the United States, no charge shall be made; and on and after July first, nineteen hundred and twelve, no fee or money paid for the services herein described shall be paid or reimbursed by the United States. [37 Stat. L. 487.]

This is from the Sundry Civil Appropriation Act of Aug. 24, 1912, ch. 355.

## PUBLIC PARKS.

Act of April 9, 1912, Ch. 74, 350.

*Sec. 1. Yosemite National Park — Exchange of Timber for Private Lands within — Preservation of Timber near Public Roads, 350.*

*2. Determination of Values — Payment for Timber in Excess of Value of Land — Lands Added to Park, 350.*

*3. Regulations for Cutting and Removal, 351.*

*4. Sale of Matured, etc., Timber in Park, 351.*

Act of June 15, 1912, Ch. 170, 351.

*Public Lands — Granted to California for Redwood Park — Existing Rights — Reversion for Non-user, 351.*

Act of August 24, 1912, Ch. 355, 351.

*National Zoölogical Park — Plans, etc., for Buildings and Bridges, 351.*

*National Military Park — Park Commissions — Vacancies Occurring in, Not to be Filled — Secretary of War to be Member of Commission, etc. 352.*

An Act To authorize the Secretary of the Interior to secure for the United States title to patented lands in the Yosemite National Park, and for other purposes.

[Act of April 9, 1912, ch. 74.]

[SEC. 1.] [*Yosemite National Park — exchange of timber for private lands within — preservation of timber near public roads.*] That the Secretary of the Interior for the purpose of eliminating private holdings within the Yosemite National Park and the preservation intact of the natural timber along the roads in the scenic portions of the park, both on patented and park lands, is hereby empowered, in his discretion, to obtain for the United States the complete title to any or all of the lands held in private ownership within the boundaries of said park, by the exchange of decayed or matured timber, that can be removed from such parts of the park as will not affect the scenic beauty thereof, for lands of equal value held in private ownership therein, and also, in his discretion, to exchange for timber standing near the public roads on patented lands timber of equal value on park lands in other parts of the park. [37 Stat. L. 80.]

SEC. 2. [*Determination of values — payment for timber in excess of value of land — lands added to park.*] That the value of patented lands within the park offered in exchange, and the value of the timber on park lands proposed to be given in exchange for such patented lands, shall be ascertained in such manner as the Secretary of the Interior may, in his discretion, direct, and all expenses incident to ascertaining such values shall be paid by the owners of said patented lands, and such owners shall, before any exchange is effective, furnish the Secretary of the Interior evidence satisfactory to him of title to the patented lands offered in exchange, and if the value of the timber on park lands exceeds the value of the patented lands deeded to the Government in

the exchange such excess shall be paid to the Secretary of the Interior by the owners of the patented lands before any of the timber is removed from the park, and shall be deposited and covered into the Treasury as miscellaneous receipts. The same course shall be pursued in relation to exchange for timber standing near public roads on patented lands for timber to be exchanged on park lands: *Provided*, That the lands conveyed to the Government under this Act shall become a part of the Yosemite National Park. [37 Stat. L. 80.]

SEC. 3. [*Regulations for cutting and removal.*] That all timber must be cut and removed from the park under regulations to be prescribed by the Secretary of the Interior, and any damage which may result to the roads or any part of the park in consequence of the cutting and removal of the timber from the reservation shall be borne by the owners of the patented lands, and bond satisfactory to the Secretary of the Interior must be given for the payment of such damages, if any, as shall be determined by the Secretary of the Interior. [37 Stat. L. 81.]

SEC. 4. [*Sale of matured, etc., timber in park.*] That the Secretary of the Interior may also sell and permit the removal of such matured or dead or down timber as he may deem necessary or advisable for the protection or improvement of the park, and the proceeds derived therefrom shall be deposited and covered into the Treasury as miscellaneous receipts. [37 Stat. L. 81.]

See 10 Fed. Stat. Annot. 369.

An Act Granting certain lands to the State of California to form a part of California Redwood Park in said State.

[Act of June 15, 1912, ch. 170.]

[*Public lands — granted to California for Redwood Park — existing rights — reversion for non-user.*] That the Secretary of the Interior be, and he hereby is, authorized and directed to transfer by patent all of the vacant lands owned by the United States in townships nine south, ranges three and four west, Mount Diablo meridian, in the State of California, to the said State of California, on condition that the said lands be added to and form a part of the California Redwood Park now owned and maintained by said State: *Provided*, That this Act shall not interfere with valid existing rights initiated by settlement on any of said lands under the public-land laws prior to February tenth, nineteen hundred and two, and maintained in accordance with the law under which initiated up to the date of the passage of this Act, if proper application to enter said lands be made within ninety days from date of approval hereof: *Provided further*, That whenever these lands cease to be used as a public park by the said State of California the same shall again revert to the United States. [37 Stat. L. 134.]

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[*National zoölogical park — plans, etc., for buildings and bridges.*]  
 \* \* \* Hereafter all plans and specifications for the construction of buildings in the National Zoological Park shall be prepared under the supervision of the municipal architect of the District of Columbia, and all plans and speci-

fications for bridges in said park shall be prepared under the supervision of the engineer of bridges of the District of Columbia. [37 Stat. L. 437.]

[*National military park — park commissions — vacancies occurring in, not to be filled — Secretary of War to be member of commission, etc.*] \* \* \* Hereafter vacancies occurring by death or resignation in the membership of the several commissions in charge of national military parks shall not be filled, and the duties of the offices thus vacated shall devolve upon the remaining commissioners or commissioner for each of said parks: *Provided*, That as vacancies occur hereunder the Secretary of War shall become ex officio a member of the commission effected with full authority to act with the remaining commissioners or commissioner, and in case of the vacation of all the offices of commissioner in any one park hereunder the duties of such commission shall thereafter be performed under the direction of the Secretary of War. [37 Stat. L. 442.]

The two paragraphs above are from the Sundry Civil Appropriation Act of Aug. 24, 1912, ch. 355.

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## PUBLIC PRINTING.

Act of July 25, 1912, Ch. 253, 352.

*Printing Reports During Recess*, 352.

Act of August 24, 1912, Ch. 355, 352.

*Hand-roller Presses — Checks, and Backs and Tints of Notes, etc., Not Required to be Printed from — Checks and Tints — Backs of Notes, and Faces of Internal Revenue Stamps — Restriction on Substitution of Power for Hand-roller Presses — Motors to Hand-roller Presses*, 352.

*Pay of Pressmen*, 353.

Act of August 26, 1912, Ch. 408, 353.

*Paper-money Laundering Machines — Employees, etc.*, 353.

### CROSS-REFERENCES.

*Distribution of Publications*, see EXECUTIVE DEPARTMENTS.  
See also PUBLIC DOCUMENTS.

[*Printing reports during recess.*] \* \* \* All reports on examinations and surveys which may be prepared during the recess of Congress shall, in the discretion of the Secretary of War, be printed by the Public Printer as documents of the following session of Congress. [37 Stat. L. 231.]

This is from the River and Harbor Appropriation Act of July 25, 1912, ch. 253.

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[*Hand-roller presses — checks, and backs and tints of notes, etc., not required to be printed from — checks and tints — backs of notes, and faces of internal-*



*revenue stamps — restriction on substitution of power for hand-roller presses — motors to hand-roller presses.*] \* \* \* Hereafter the proviso of the Act of July first, eighteen hundred and ninety-eight (Thirtieth Statutes at Large, page six hundred and four), directing that all bonds, notes, and checks shall be printed on hand-roller presses shall not apply to checks, the backs and tints of all United States bonds, the backs and tints of all United States paper money, and the backs and tints of bonds and paper money issued by any of the insular possessions of the United States, any or all of which shall be printed from intaglio plates and on such plate printing presses as may be directed by the Secretary of the Treasury, said presses to be operated by plate printers, except that checks and tints may be printed by any desired process: *Provided*, That the backs of all United States paper money shall be printed from four-subject plates, and the faces of all internal-revenue stamps now printed from intaglio plates on hand-roller or power plate printing presses shall continue to be printed from intaglio plates on hand-roller or power plate printing presses, as the Secretary of the Treasury may determine, said presses to be operated by plate printers: *Provided further*, That should the Secretary of the Treasury decide to print on the aforesaid power plate printing presses any of the classes of work hereinbefore permitted to be printed on such presses, not more than one-fifth of the total number of hand-roller presses required to produce the estimated quantity of such work in any fiscal year shall be displaced in such fiscal year: *Provided further*, That the Secretary of the Treasury may, in his discretion, apply motors to hand-roller presses that are now, or may hereafter be, operated in the Bureau of Engraving and Printing, but such presses, if equipped with motors, shall be regarded as hand-roller presses within the meaning of this Act. [37 Stat. L. 430.]

The provision from the Act of July 1, 1898, above referred to, is given in 6 Fed. Stat. Annot. 671.

[*Pay of pressmen.*] \* \* \* Hereafter pressmen shall be paid at the rate of 55 cents per hour. [37 Stat. L. 482.]

The two paragraphs above are from the Sundry Civil Appropriation Act of Aug. 24, 1912, ch. 355.

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[*Paper-money laundering machines — employees, etc.*] \* \* \* The Secretary of the Treasury may employ such number of expert money sorters, feeders, and other employees, and expend such sums for contingent and miscellaneous items and for the purchase or construction and installation of paper-money laundering machines as may be necessary, in his judgment, to install, maintain, and operate such laundering machines in the Treasury at Washington and at the sub-treasuries: *Provided*, That the money required to pay for such purpose shall not exceed \$60,000, which sum is hereby appropriated, the same to continue available during the fiscal year nineteen hundred and thirteen: *Provided further*, That estimates hereunder shall be submitted in detail for the fiscal year nineteen hundred and fourteen, and annually thereafter. [37 Stat. L. 595.]

## PUBLIC PROPERTY, BUILDINGS, AND GROUNDS.

Act of August 24, 1912, Ch. 355, 354.

*Architectural Competitions — Tarsney Act Providing for, Repealed — Existing Contracts Not Affected, 354.*

*Public Buildings — Care of Temporary Quarters, 354.*

*Express Authority for Buildings in Parks, etc. 355.*

Act of March 4, 1913, Ch. 147, 355.

*Sec. 28. Supervising Architect's Office — Technical Experts Authorized for Standardizing Construction and Equipment, 355.*

Act of June 23, 1913, Ch. 3, 355.

*Public Building Service — Temporary Details of Field Force, 355.*

*Temporary Quarters for Use of Government Officials, 355.*

### CROSS-REFERENCE.

*Statement of Buildings Rented, see ESTIMATES, APPROPRIATIONS, AND REPORTS.*

[*Architectural competitions — Tarsney Act providing for, repealed — existing contracts not affected.*] \* \* \* The Act entitled "An Act authorizing the Secretary of the Treasury to obtain plans and specifications for public buildings to be erected under the supervision of the Treasury Department, and providing for local supervision of the construction of the same," approved February twentieth, eighteen hundred and ninety-three, commonly known as the "Tarsney Act" is repealed: *Provided*, That contracts heretofore entered into under said Act shall not be affected by this repeal, and architectural services rendered under such contracts shall be paid for from the appropriation for "Architectural competitions, public buildings," available at the time payment for the particular service rendered is due. [37 Stat. L. 428.]

This and the next two paragraphs following are from the Sundry Civil Appropriation Act of Aug. 24, 1912, ch. 355.

For the Act of Feb. 20, 1893, here repealed, see 6 Fed. Stat. Annot. 706.

[*Public buildings — care of temporary quarters.*] \* \* \* That hereafter, unless otherwise specifically provided by law, whenever the Secretary of the Treasury is authorized to secure temporary quarters for the use of the Government officials pending the alteration, improvement, or repairs to, or the remodeling, reconstruction, or enlargement of, any public building belonging to the United States under the control of the Treasury Department, including the customhouse, Washington, District of Columbia, but exclusive of any other buildings in the District of Columbia, the appropriation for "Operating force

for public buildings" shall be available, if necessary, in connection with certain portions of the premises as may be rented for, or occupied by, such officials, in the same manner, for the same purpose, and to the same extent as if the title to such premises were vested in the United States. [37 Stat. L. 432.]

[*Express authority for buildings in parks, etc.*] \* \* \* Hereafter there shall not be erected on any reservation, park, or public grounds, of the United States within the District of Columbia, any building or structure without express authority of Congress. [37 Stat. L. 444.]

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SEC. 28. [*Supervising Architect's Office — technical experts authorized for standardizing construction and equipment.*] That the employment is hereby authorized of an architectural designer at a compensation of \$6,000 per annum, a structural engineering expert at \$5,000 per annum, and a heating, lighting, and ventilating engineering expert at \$5,000 per annum, to serve in the office of the Supervising Architect of the Treasury Department, to assist the Supervising Architect in connection with the designing and standardizing of public buildings authorized to be erected under the control of the Treasury Department and the mechanical equipment thereof, and in connection with architectural and engineering work of said office of unusual magnitude or complication: *Provided*, That such services may be employed without regard to civil-service laws, rules, or regulations, and no person now in the employ of the Supervising Architect's office shall be eligible to such employment: *And provided further*, That the foregoing authorization for the employment of technical experts to assist the Supervising Architect shall be in addition to and independent of the authorizations and appropriations for personal services for the office of the Supervising Architect otherwise made. [37 Stat. L. 388.]

The above sec. 28 is from the Public Buildings Appropriation Act of March 4, 1913, ch. 147.

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[*Public building service — temporary details of field force.*] \* \* \* That hereafter members of the field force of the public-building service, such as supervising superintendents, superintendents, junior superintendents, and inspectors of the several classes, may be detailed to the District of Columbia, in the discretion of the Secretary of the Treasury, for temporary duty for periods not exceeding thirty days in any one case, in the Office of the Supervising Architect, but no subsistence or other expenses of like character shall be allowed such employees while on duty in Washington serving under such details. [38 Stat. L. 17.]

This and the following paragraph are from the Sundry Civil Appropriation Act of June 23, 1913, ch. 3.

[*Temporary quarters for use of government officials.*] \* \* \* That hereafter, unless otherwise specifically provided by law, whenever the Secretary of the Treasury is authorized to secure temporary quarters for the use of the Government officials pending the alteration, improvement, or repairs to, or the remodeling, reconstruction, or enlargement of any public building under the control of the Treasury Department not hereinbefore excluded, appropriations

for the foregoing purposes shall be available, if necessary, in connection with such portions of the premises as may be rented for or occupied by such officials in the same manner, for the same purpose, and to the same extent as if the title to such premises were vested in the United States. [38 Stat. L. 22.]

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## **PUBLIC WORKS.**

See *LABOR; RIVERS, HARBORS, AND CANALS.*

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## **PURE FOOD ACT.**

See *FOOD AND DRUGS.*

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## **QUARANTINE.**

*Live Stock Quarantine*, see *ANIMALS.*

*Plant Diseases and Insect Pests, Quarantine Districts for*, see *AGRICULTURE.*

See also *HEALTH AND QUARANTINE.*

## RADIO COMMUNICATION.

Act of August 13, 1912, Ch. 287, 357.

*Sec. 1. License Required for Operating in United States, 357.*

- 2. Form of License — Limited to Citizens, etc. — Details to be Specified — Subject to Regulations — Action by Government in Time of War, etc. 358.*
- 3. Licensed Operator Required — Suspension of Operator — Punishment for Use, etc., of Unlicensed Operators, 358.*
- 4. Stations Subject to Regulations — Enforcement — Authority to Waive Regulations — Temporary Licenses for Experiments, etc. — Government Land Stations, 359.*
- 5. Wilful Interference by Operators Forbidden — Punishment for, 363.*
- 6. "Radio Communication" — Term Construed, 363.*
- 7. Uttering False Signals, etc. Forbidden — Punishment for False Distress Calls — Other Signals, 363.*
- 8. Restriction on Foreign Ships, 363.*
- 9. Trial of Offenses, 364.*
- 10. Not Applicable to Philippines, 364.*
- 11. In Effect in Four Months, 364.*

### CROSS-REFERENCES.

*Apparatus on Ships, see SHIPPING AND NAVIGATION.*

*At Panama Canal, see RIVERS, HARBORS, AND CANALS.*

**An Act To regulate radio communication.**

**[Act of August 13, 1912, ch. 287.]**

[SEC. 1.] [*License required for operating, in United States.*] That a person, company, or corporation within the jurisdiction of the United States shall not use or operate any apparatus for radio communication as a means of commercial intercourse among the several States, or with foreign nations, or upon any vessel of the United States engaged in interstate or foreign commerce, or for the transmission of radiograms or signals the effect of which extends beyond the jurisdiction of the State or Territory in which the same are made, or where interference would be caused thereby with the receipt of messages or signals from beyond the jurisdiction of the said State or Territory, except under and in accordance with a license, revocable for cause, in that behalf granted by the Secretary of Commerce and Labor upon application therefor; but nothing in this Act shall be construed to apply to the transmission and exchange of radiograms or signals between points situated in the same State: *Provided*, That the effect thereof shall not extend beyond the jurisdiction of the said State or interfere with the reception of radiograms or signals from beyond said jurisdiction; and a license shall not be required for the transmission or

exchange of radiograms or signals by or on behalf of the Government of the United States, but every Government station on land or sea shall have special call letters designated and published in the list of radio stations of the United States by the Department of Commerce and Labor. Any person, company, or corporation that shall use or operate any apparatus for radio communication in violation of this section, or knowingly aid or abet another person, company, or corporation in so doing, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five hundred dollars, and the apparatus or device so unlawfully used and operated may be adjudged forfeited to the United States. [37 Stat. L. 302.]

SEC. 2. [*Form of license — limited to citizens, etc. — details to be specified — subject to regulations — action by Government in time of war, etc.*] That every such license shall be in such form as the Secretary of Commerce and Labor shall determine and shall contain the restrictions, pursuant to this Act, on and subject to which the license is granted; that every such license shall be issued only to citizens of the United States or Porto Rico or to a company incorporated under the laws of some State or Territory or of the United States or Porto Rico, and shall specify the ownership and location of the station in which said apparatus shall be used and other particulars for its identification and to enable its range to be estimated; shall state the purpose of the station, and, in case of a station in actual operation at the date of passage of this Act, shall contain the statement that satisfactory proof has been furnished that it was actually operating on the above-mentioned date; shall state the wave length or the wave lengths authorized for use by the station for the prevention of interference and the hours for which the station is licensed for work; and shall not be construed to authorize the use of any apparatus for radio communication in any other station than that specified. Every such license shall be subject to the regulations contained herein and such regulations as may be established from time to time by authority of this Act or subsequent Acts and treaties of the United States. Every such license shall provide that the President of the United States in time of war or public peril or disaster may cause the closing of any station for radio communication and the removal therefrom of all radio apparatus, or may authorize the use or control of any such station or apparatus by any department of the Government, upon just compensation to the owners. [37 Stat. L. 303.]

SEC. 3. [*Licensed operator required — suspension of operator — punishment for use, etc., of unlicensed operators.*] That every such apparatus shall at all times while in use and operation as aforesaid be in charge or under the supervision of a person or persons licensed for that purpose by the Secretary of Commerce and Labor. Every person so licensed who in the operation of any radio apparatus shall fail to observe and obey regulations contained in or made pursuant to this Act or subsequent Acts or treaties of the United States, or any one of them, or who shall fail to enforce obedience thereto by an unlicensed person while serving under his supervision, in addition to the punishments and penalties herein prescribed, may suffer the suspension of the said license for a period to be fixed by the Secretary of Commerce and Labor not exceeding one year. It shall be unlawful to employ any unlicensed person or for any unlicensed person to serve in charge or in supervision of the use and operation of such apparatus, and any person violating this provision shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine

of not more than one hundred dollars or imprisonment for not more than two months, or both, in the discretion of the court, for each and every such offense: *Provided*, That in case of emergency the Secretary of Commerce and Labor may authorize a collector of customs to issue a temporary permit, in lieu of a license, to the operator on a vessel subject to the radio ship Act of June twenty-fourth, nineteen hundred and ten. [*§7 Stat. L. 303.*]

SEC. 4. [*Stations subject to regulations — enforcement — authority to waive regulations — temporary licenses for experiments, etc. — Government land stations.*] That for the purpose of preventing or minimizing interference with communication between stations in which such apparatus is operated, to facilitate radio communication, and to further the prompt receipt of distress signals, said private and commercial stations shall be subject to the regulations of this section. These regulations shall be enforced by the Secretary of Commerce and Labor through the collectors of customs and other officers of the Government as other regulations herein provided for.

The Secretary of Commerce and Labor may, in his discretion, waive the provisions of any or all of these regulations when no interference of the character above mentioned can ensue.

The Secretary of Commerce and Labor may grant special temporary licenses to stations actually engaged in conducting experiments for the development of the science of radio communication, or the apparatus pertaining thereto, to carry on special tests, using any amount of power or any wave lengths, at such hours and under such conditions as will insure the least interference with the sending or receipt of commercial or Government radiograms, of distress signals and radiograms, or with the work of other stations.

In these regulations the naval and military stations shall be understood to be stations on land.

## REGULATIONS.

### NORMAL WAVE LENGTH.

First. Every station shall be required to designate a certain definite wave length as the normal sending and receiving wave length of the station. This wave length shall not exceed six hundred meters or it shall exceed one thousand six hundred meters. Every coastal station open to general public service shall at all times be ready to receive messages of such wave lengths as are required by the Berlin convention. Every ship station, except as hereinafter provided, and every coast station open to general public service shall be prepared to use two sending wave lengths, one of three hundred meters and one of six hundred meters, as required by the international convention in force: *Provided*, That the Secretary of Commerce and Labor may, in his discretion, change the limit of wave length reservation made by regulations first and second to accord with any international agreement to which the United States is a party.

### OTHER WAVE LENGTHS.

Second. In addition to the normal sending wave length all stations, except as provided hereinafter in these regulations, may use other sending wave lengths: *Provided*, That they do not exceed six hundred meters or that they do exceed one thousand six hundred meters: *Provided further*, That the character

of the waves emitted conforms to the requirements of regulations third and fourth following.

USE OF A "PURE WAVE."

Third. At all stations if the sending apparatus, to be referred to hereinafter as the "transmitter," is of such a character that the energy is radiated in two or more wave lengths, more or less sharply defined, as indicated by a sensitive wave meter, the energy in no one of the lesser waves shall exceed ten per centum of that in the greatest.

USE OF A "SHARP WAVE."

Fourth. At all stations the logarithmic decrement per complete oscillation in the wave trains emitted by the transmitter shall not exceed two-tenths, except when sending distress signals or signals and messages relating thereto.

USE OF "STANDARD DISTRESS WAVE."

Fifth. Every station on shipboard shall be prepared to send distress calls on the normal wave length designated by the international convention in force, except on vessels of small tonnage unable to have plants insuring that wave length.

SIGNAL OF DISTRESS.

Sixth. The distress call used shall be the international signal of distress

. . . — — — . . .

USE OF "BROAD INTERFERING WAVE" FOR DISTRESS SIGNALS.

Seventh. When sending distress signals, the transmitter of a station on shipboard may be tuned in such a manner as to create a maximum of interference with a maximum of radiation.

DISTANCE REQUIREMENT FOR DISTRESS SIGNALS.

Eighth. Every station on shipboard, wherever practicable, shall be prepared to send distress signals of the character specified in regulations fifth and sixth with sufficient power to enable them to be received by day over sea a distance of one hundred nautical miles by a shipboard station equipped with apparatus for both sending and receiving equal in all essential particulars to that of the station first mentioned.

"RIGHT OF WAY" FOR DISTRESS SIGNALS.

Ninth. All stations are required to give absolute priority to signals and radiograms relating to ships in distress; to cease all sending on hearing a distress signal; and, except when engaged in answering or aiding the ship in distress, to refrain from sending until all signals and radiograms relating thereto are completed.

REDUCED POWER FOR SHIPS NEAR A GOVERNMENT STATION.

Tenth. No station on shipboard, when within fifteen nautical miles of a naval or military station, shall use a transformer input exceeding one kilowatt, nor, when within five nautical miles of such a station, a transformer input exceeding one-half kilowatt, except for sending signals of distress, or signals or radiograms relating thereto.



## INTERCOMMUNICATION.

Eleventh. Each shore station open to general public service between the coast and vessels at sea shall be bound to exchange radiograms with any similar shore station and with any ship station without distinction of the radio systems adopted by such stations, respectively, and each station on shipboard shall be bound to exchange radiograms with any other station on shipboard without distinction of the radio systems adopted by each station, respectively.

It shall be the duty of each such shore station, during the hours it is in operation, to listen in at intervals of not less than fifteen minutes and for a period not less than two minutes, with the receiver tuned to receive messages of three hundred meter wave lengths.

## DIVISION OF TIME.

Twelfth. At important seaports and at all other places where naval or military and private or commercial shore stations operate in such close proximity that interference with the work of naval and military stations can not be avoided by the enforcement of the regulations contained in the foregoing regulations concerning wave lengths and character of signals emitted, such private or commercial shore stations as do interfere with the reception of signals by the naval and military stations concerned shall not use their transmitters during the first fifteen minutes of each hour, local standard time. The Secretary of Commerce and Labor may, on the recommendation of the department concerned, designate the station or stations which may be required to observe this division of time.

## GOVERNMENT STATIONS TO OBSERVE DIVISIONS OF TIME.

Thirteenth. The naval or military stations for which the above-mentioned division of time may be established shall transmit signals or radiograms only during the first fifteen minutes of each hour, local standard time, except in case of signals or radiograms relating to vessels in distress, as hereinbefore provided.

## USE OF UNNECESSARY POWER.

Fourteenth. In all circumstances, except in case of signals or radiograms relating to vessels in distress, all stations shall use the minimum amount of energy necessary to carry out any communication desired.

## GENERAL RESTRICTIONS ON PRIVATE STATIONS.

Fifteenth. No private or commercial station not engaged in the transaction of bona fide commercial business by radio communication or in experimentation in connection with the development and manufacture of radio apparatus for commercial purposes shall use a transmitting wave length exceeding two hundred meters, or a transformer input exceeding one kilowatt, except by special authority of the Secretary of Commerce and Labor contained in the license of the station: *Provided*, That the owner or operator of a station of the character mentioned in this regulation shall not be liable for a violation of the requirements of the third or fourth regulations to the penalties of one hundred dollars or twenty-five dollars, respectively, provided in this section unless the person maintaining or operating such station shall have been notified in writing that the said transmitter has been found, upon tests conducted by the Government, to be so adjusted as to violate the said third and fourth regulations; and

opportunity has been given to said owner or operator to adjust said transmitter in conformity with said regulations.

**SPECIAL RESTRICTIONS IN THE VICINITIES OF GOVERNMENT STATIONS.**

Sixteenth. No station of the character mentioned in regulation fifteenth situated within five nautical miles of a naval or military station shall use a transmitting wave length exceeding two hundred meters or a transformer input exceeding one-half kilowatt.

**SHIP STATIONS TO COMMUNICATE WITH NEAREST SHORE STATIONS.**

Seventeenth. In general, the shipboard stations shall transmit their radiograms to the nearest shore station. A sender on board a vessel shall, however, have the right to designate the shore station through which he desires to have his radiograms transmitted. If this can not be done, the wishes of the sender are to be complied with only if the transmission can be effected without interfering with the service of other stations.

**LIMITATIONS FOR FUTURE INSTALLATIONS IN VICINITIES OF GOVERNMENT STATIONS.**

Eighteenth. No station on shore not in actual operation at the date of the passage of this Act shall be licensed for the transaction of commercial business by radio communication within fifteen nautical miles of the following naval or military stations, to wit: Arlington, Virginia; Key West, Florida; San Juan, Porto Rico; North Head and Tatoosh Island, Washington; San Diego, California; and those established or which may be established in Alaska and in the Canal Zone; and the head of the department having control of such Government stations shall, so far as is consistent with the transaction of governmental business, arrange for the transmission and receipt of commercial radiograms under the provisions of the Berlin convention of nineteen hundred and six and future international conventions or treaties to which the United States may be a party, at each of the stations above referred to, and shall fix the rates therefor, subject to control of such rates by Congress. At such stations and wherever and whenever shore stations open for general public business between the coast and vessels at sea under the provisions of the Berlin convention of nineteen hundred and six and future international conventions and treaties to which the United States may be a party shall not be so established as to insure a constant service day and night without interruption, and in all localities wherever or whenever such service shall not be maintained by a commercial shore station within one hundred nautical miles of a naval radio station, the Secretary of the Navy shall, so far as is consistent with the transaction of governmental business, open naval radio stations to the general public business described above, and shall fix rates for such service, subject to control of such rates by Congress. The receipts from such radiograms shall be covered into the Treasury as miscellaneous receipts.

**SECRECY OF MESSAGES.**

Nineteenth. No person or persons engaged in or having knowledge of the operation of any station or stations, shall divulge or publish the contents of any messages transmitted or received by such station, except to the person or persons to whom the same may be directed, or their authorized agent, or to another station employed to forward such message to its destination, unless legally

required so to do by the court of competent jurisdiction or other competent authority. Any person guilty of divulging or publishing any message, except as herein provided, shall, on conviction thereof, be punishable by a fine of not more than two hundred and fifty dollars or imprisonment for a period of not exceeding three months, or both fine and imprisonment, in the discretion of the court.

#### PENALTIES.

For violation of any of these regulations, subject to which a license under sections one and two of this Act may be issued, the owner of the apparatus shall be liable to a penalty of one hundred dollars, which may be reduced or remitted by the Secretary of Commerce and Labor, and for repeated violations of any of such regulations, the license may be revoked.

For violation of any of these regulations, except as provided in regulation nineteenth, subject to which a license under section three of this Act may be issued, the operator shall be subject to a penalty of twenty-five dollars, which may be reduced or remitted by the Secretary of Commerce and Labor, and for repeated violations of any such regulations, the license shall be suspended or revoked. [37 Stat. L. 304.]

SEC. 5. [*Willful interference by operators forbidden — punishment for.*] That every license granted under the provisions of this Act for the operation or use of apparatus for radio communication shall prescribe that the operator thereof shall not willfully or maliciously interfere with any other radio communication. Such interference shall be deemed a misdemeanor, and upon conviction thereof the owner or operator, or both, shall be punishable by a fine of not to exceed five hundred dollars or imprisonment for not to exceed one year, or both. [37 Stat. L. 308.]

SEC. 6. [*"Radio communication" — term construed.*] That the expression "radio communication" as used in this Act means any system of electrical communication by telegraphy or telephony without the aid of any wire connecting the points from and at which the radiograms, signals, or other communications are sent or received. [37 Stat. L. 308.]

SEC. 7. [*Uttering false signals, etc., forbidden — punishment for false distress calls — other signals.*] That a person, company, or corporation within the jurisdiction of the United States shall not knowingly utter or transmit, or cause to be uttered or transmitted, any false or fraudulent distress signal or call or false or fraudulent signal, call, or other radiogram of any kind. The penalty for so uttering or transmitting a false or fraudulent distress signal or call shall be a fine of not more than two thousand five hundred dollars or imprisonment for not more than five years, or both, in the discretion of the court, for each and every such offense, and the penalty for so uttering or transmitting, or causing to be uttered or transmitted, any other false or fraudulent signal, call, or other radiogram shall be a fine of not more than one thousand dollars or imprisonment for not more than two years, or both, in the discretion of the court, for each and every such offense. [37 Stat. L. 308.]

SEC. 8. [*Restriction on foreign ships.*] That a person, company, or corporation shall not use or operate any apparatus for radio communication on a foreign ship in territorial waters of the United States otherwise than in accordance with the provisions of sections four and seven of this Act and so

much of section five as imposes a penalty for interference. Save as aforesaid, nothing in this Act shall apply to apparatus for radio communication on any foreign ship. [37 Stat. L. 308.]

SEC. 9. [*Trial of offenses.*] That the trial of any offense under this Act shall be in the district in which it is committed, or if the offense is committed upon the high seas or out of the jurisdiction of any particular State or district the trial shall be in the district where the offender may be found or into which he shall be first brought. [37 Stat. L. 308.]

SEC. 10. [*Not applicable to Philippines.*] That this Act shall not apply to the Philippine Islands. [37 Stat. L. 308.]

SEC. 11. [*In effect in four months.*] That this Act shall take effect and be in force on and after four months from its passage. [37 Stat. L. 308.]

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## RAILROADS.

*Arbitration with Employees*, see *LABOR*.

*Detention of Aliens*, see *IMMIGRATION*.

*Encroachments by*, see *CEMETERIES*.

*Larceny of Goods in Interstate Commerce*, see *INTERSTATE COMMERCE*.

*Live Stock Quarantine Regulations*, see *ANIMALS*.

*Physical Valuation of Property*, see *INTERSTATE COMMERCE*.

*Railway Mail Service*, see *POSTAL SERVICE*.

*Shipment of Liquors into Prohibition States*, see *INTOXICATING LIQUORS*.

See also *CARRIERS*.

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## RECIPROCITY.

See *CUSTOMS DUTIES*.

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## RECLAMATION ACT.

See *WATERS*.

## **RECORDS.**

*Records of Interior Department, see INTERIOR DEPARTMENT.*

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## **RED CROSS.**

*See CHARITIES.*

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## **REDWOOD PARK.**

*See PUBLIC PARKS.*

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## **RENOVATED BUTTER.**

*See FOOD AND DRUGS.*

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## **REPORTS.**

*See ESTIMATES, APPROPRIATIONS AND REPORTS.*

## RESERVATIONS.

See *INDIANS; PUBLIC LANDS; TIMBER LANDS AND FOREST RESERVES*,

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## REVENUE CUTTER SERVICE.

Act of August 24, 1912, Ch. 355, 366.

*Cadets — Appointments Restricted*, 366.

Act of March 4, 1913, Ch. 142, 366.

*Skilled Draftsmen, etc.* 366.

[*Cadets — appointments restricted.*] \* \* \* No additional appointments as cadets or cadet engineers shall be made in the Revenue-Cutter Service unless hereafter authorized by Congress. [37 Stat. L. 429.]

This is from the Sundry Civil Appropriation Act of Aug. 24, 1912, ch. 355.

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[*Skilled draftsmen, etc.*] \* \* \* The services of skilled draftsmen, and such other technical services as the Secretary of the Treasury may deem necessary, may be employed only in the Division of Revenue-Cutter Service in connection with the construction and repair of revenue cutters, to be paid from the appropriation "Repairs to revenue cutters": *Provided*, That the expenditures on this account for the fiscal year nineteen hundred and fourteen shall not exceed \$3,400. A statement of the persons employed hereunder, their duties, and the compensation paid to each shall be made to Congress each year in the annual estimates. [37 Stat. L. 752.]

This is from the Legislative, Executive, and Judicial Appropriation Act of March 4, 1913, ch. 142.

## RIVERS, HARBORS, AND CANALS.

**Act of July 25, 1912, Ch. 253, 368.**

*Sec. 1. Removal of Temporary Obstructions—Limit—Surveys, etc. Paid for from Amount for Projects—Work by Contract or Otherwise—Allotment of Consolidated Works—Balances Carried to Authorized Works—Classification of Freight Statistics, 368.*

*2-7. (Temporary), 369.*

*8. Combining Contracts for River and Harbor Works—Use of Insufficient Appropriations, 369.*

*9. Hire of Transportation by Officers, 369.*

*10. Additional Office Force for Emergencies, 369.*

*11. Engineer School, D. C.—Appropriation for Building for River and Harbor Instruction, 369.*

*12. Dams—To Provide for Development of Water Power, 369.*

*13. Reports, etc.—Payment for Printing, 369.*

**Act of August 24, 1912, Ch. 355, 369.**

*Sec. 1. Isthmian Canal—Expenditures from Sale of Bonds—Fortifications Excluded, 369.*

*2. Canal Zone—Distribution of Revenues—Statement to Congress, 370.*

*3. Funds from Services, Sales, etc., Appropriated for Construction—Unserviceable Equipment, etc. May be Sold without Advertising—Administration Building in Panama—Sale Authorized, 370.*

*4. Toro Point Light—No Moneys to be Used for, 371.*

*5. Division of Records, Authorized for Preservation of Papers, etc., 371.*

**Act of August 24, 1912, Ch. 390, 371.**

*Sec. 1. Panama Canal Act—Territory Included in Canal Zone, 371.*

*2. Former Laws, Regulations, etc., Continued—Courts Continued, 372.*

*3. Title to all Lands within Canal Zone to be Secured—Disposal of Adverse Claims, 372.*

*4. President May Discontinue Canal Commission, etc.—Completion, Operation, etc., by Governor, etc.—Salaries of Army or Navy Officials—Appointment of Governor—Other Officials—Formal Opening—Commission on Fine Arts—Report, etc. 372.*

*5. Tolls, etc. 373.*

*6. Erection of Radio-Communication Installations—Docks, Storehouses, etc. for Coal and Other Supplies May Be Established, 375.*

*7. Canal Zone Civil Government, 375.*

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[SEC. 1.] [*Removal of temporary obstructions — limit — surveys, etc., paid for from amount for projects — work by contract or otherwise — allotment of consolidated works — balances carried to authorized works — classification of freight statistics.*] \* \* \* The Chief of Engineers, in his discretion, and after approval by the Secretary of War, is hereby authorized to make preliminary examinations and minor surveys and to remove snags and other temporary or readily removable obstructions from tributaries of waterways already under Federal improvement or in general use by navigation, to be paid from the appropriations for the adjoining waterways: *Provided*, That the cost of such work in any single year shall not exceed five hundred dollars per tributary.

Surveys and examinations provided for in this section shall, unless otherwise expressed, be paid for from the appropriations made for the respective improvements or projects to which they pertain or in connection with which they are mentioned.

All works of improvement herein or hereafter authorized to be prosecuted or completed under contracts may, in the discretion of the Secretary of War, be carried on by contract or otherwise, as may be most economical or advantageous to the United States.

Where separate works or items are consolidated in this Act and an aggregate amount is appropriated therefor, the amounts herein appropriated shall, unless otherwise expressed, be expended in securing maintenance and improvement according to the respective projects herein or heretofore adopted by Congress, after giving due regard to the respective needs of traffic. The allotments to the respective works herein consolidated shall be made by the Secretary of War upon recommendations by the Chief of Engineers. In case such works or items are consolidated and separate amounts are given with each project, the amounts so named shall be expended upon such separate projects unless, in the discretion of the Secretary of War, another allotment or division should be made of the same. Any balances now remaining to the credit of the consolidated items in this Act shall be carried to the credit of the respective aggregate amounts appropriated for the consolidated items herein contained.

In the collection of statistics relating to traffic, the Corps of Engineers is directed to adopt a uniform system of classification for freight, and upon rivers



or inland waterways to collate ton-mileage statistics as far as practicable. [37 Stat. L. 222.]

This and the following sections 8-13 are from the River and Harbor Appropriation Act of July 25, 1912, ch. 253.

SECS. 2-7. [*Temporary.*]

SEC. 8. [*Combining contracts for river and harbor works—use of insufficient appropriations.*] Whenever the appropriations made by Congress for river and harbor works can be more advantageously expended by combining in one contract two or more works, such combinations shall be made. And whenever the appropriations made, or authorized to be made, for the completion of any river and harbor work shall prove insufficient therefor, the Secretary of War may, in his discretion, on the recommendation of the Chief of Engineers, apply the funds so appropriated or authorized to the prosecution of such work. [37 Stat. L. 233.]

SEC. 9. [*Hire of transportation by officers.*] In their execution and inspection of river and harbor improvement work, at points beyond easy reach of ordinary regular transportation lines, Engineer officers are authorized to hire and use such transportation as they may consider desirable and advantageous to the progress of work. [37 Stat. L. 233.]

SEC. 10. [*Additional office force for emergencies.*] The Chief of Engineers is authorized in case of emergencies during the preparation for and the consideration of river and harbor estimates and bills to employ such additional office force as he may find necessary for that purpose, to be paid from the appropriation for examinations, surveys, and contingencies of rivers and harbors. [37 Stat. L. 233.]

SEC. 11. [*Engineer School, D. C. — appropriation for building for river and harbor instruction.*] For the construction at the Engineer School of a building with library accommodations and other facilities for the instruction of officers of the Corps of Engineers in duties pertaining to the improvement of rivers and harbors, one hundred thousand dollars. [37 Stat. L. 233.]

SEC. 12. [*Dams — to provide for development of water power.*] In order to make possible the economical future development of water power the Secretary of War, upon recommendation of the Chief of Engineers, is hereby authorized, in his discretion, to provide in the permanent parts of any dam authorized at any time by Congress for the improvement of navigation such foundations, sluices, and other works, as may be considered desirable for the future development of its water power. [37 Stat. L. 233.]

SEC. 13. [*Reports, etc. — payment for printing.*] The printing of matter relating to river and harbor works, including all reports, compilations, regulations, and so forth, whose preparation is allowable under War Department regulations, may, upon recommendation of the Chief of Engineers and approval by the Secretary of War, be paid for from river and harbor appropriations. [37 Stat. L. 234.]

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[SEC. 1.] [*Isthmian Canal — expenditures from sale of bonds — fortifications excluded.*] \* \* \* That all expenditures from the appropriations here-  
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tofore, herein, and hereafter made for the construction of the Isthmian Canal, including any portion of such appropriations which may be used for the construction of the necessary dry dock, coaling plant, shops, and other facilities for repairing and supplying vessels, and all necessary wharves, sheds, and other terminal facilities, exclusive of fortifications, shall be paid from or reimbursed to the Treasury of the United States out of the proceeds of the sale of bonds authorized in section eight of the said Act approved June twenty-eighth, nineteen hundred and two, and section thirty-nine of the tariff Act approved August fifth, nineteen hundred and nine. [37 Stat. L. 485.]

This and the following secs. 2-5 are from the Sundry Civil Appropriation Act of Aug. 24, 1912, ch. 355.

1909 Supp. Fed. Stat. Annot. 834. For the Act of June 28, 1902, sec. 8, see 6 Fed. Stat. Annot. 838.

For sec. 39 of the Act of Aug. 5, 1909, see

SEC. 2. [*Canal Zone — distribution of revenues — statement to Congress.*] All funds collected by the government of the Canal Zone from rentals of public lands and buildings in the Canal Zone and the cities of Panama and Colon, and from the zone postal service, and from court fees and fines, and collected or raised by taxation in whatever form under the laws of the government of the Canal Zone, are hereby appropriated until and including June thirtieth, nineteen hundred and thirteen, as follows: The revenues derived from the postal service to the maintenance of that service; the remaining revenues, including any balances unexpended in prior years, after setting aside a miscellaneous and contingent fund of not exceeding ten thousand dollars, to the maintenance of the public-school system in the zone; to the construction and maintenance of public improvements within the zone; to the maintenance of the administrative districts; to the maintenance of Canal Zone charity patients in the hospitals of the Isthmian Canal Commission, and to the maintenance of administrative district prisoners. A detailed and classified statement of all receipts and expenditures without the duplication of items under this paragraph shall be submitted to Congress after the close of the fiscal year nineteen hundred and thirteen. [37 Stat. L. 486.]

SEC. 3. [*Funds from services, sales, etc., appropriated for construction — unserviceable equipment, etc., may be sold without advertising — Administration Building in Panama — sale authorized.*] All funds realized during the fiscal year nineteen hundred and thirteen by the Isthmian Canal Commission from the performance of services by the commission, or from rentals, or from the sale of materials and supplies under the custody or control of the commission, are appropriated for expenditure under any of the foregoing classified appropriations for the department of construction and engineering, and a full and separate report in detail of all transactions under this section shall be made to Congress.

That until the close of the fiscal year nineteen hundred and thirteen, when any material, supplies, and equipment heretofore or hereafter purchased or acquired for the construction of the Isthmian Canal is no longer needed, or is no longer serviceable, it may be sold in such manner as the President may direct, and without advertising in such classes of cases as may be authorized by him; and the President is authorized, in his discretion, to sell and convey to the Republic of Panama the building situated in the city of Panama known as "the Administration Building," together with the ground on which the same is located, for a sum of not less than \$80,000, and the proceeds of such sale, if

made, shall be covered into the Treasury of the United States. [*37 Stat. L. 486.*]

SEC. 4. [*Toro Point Light — no moneys to be used for.*] That hereafter no payments shall be made for maintenance or other charge in connection with the Toro Point Light, Isthmus of Panama, out of moneys of the United States or of the Panama Railroad Company. [*37 Stat. L. 486.*]

SEC. 5. [*Division of records, authorized for preservation of papers, etc.*] The chairman of the Isthmian Canal Commission is authorized to establish a division of records and, as the requirements of the service permit, to consolidate in the custody thereof the files of papers and other records which have accumulated or which may accumulate during the period of the construction of the Isthmian Canal; and he is directed to carefully preserve, properly index, and arrange for use all papers needed or useful in the transaction of current business or having a permanent value or historical interest; and he is authorized to destroy or otherwise dispose of duplications in the files and other papers which are not needed or useful in the transaction of current business and have no permanent value or historical interest and which have been recommended to him for destruction or other disposition by a committee of three competent persons who have personally examined the papers and in connection with their recommendation have submitted a concise statement of the condition and character thereof. [*37 Stat. L. 486.*]

An Act To provide for the opening, maintenance, protection, and operation of the Panama Canal, and the sanitation and government of the Canal Zone.

[*Act of August 24, 1912, ch. 390.*]

[SEC. 1.] [*Panama Canal Act — territory included in Canal Zone.*] That the zone of land and land under water of the width of ten miles extending to the distance of five miles on each side of the center line of the route of the canal now being constructed thereon, which zone begins in the Caribbean Sea three marine miles from mean low-water mark and extends to and across the Isthmus of Panama into the Pacific Ocean to the distance of three marine miles from mean low-water mark, excluding therefrom the cities of Panama and Colon and their adjacent harbors located within said zone, as excepted in the treaty with the Republic of Panama dated November eighteenth, nineteen hundred and three, but including all islands within said described zone, and in addition thereto the group of islands in the Bay of Panama named Perico, Naos, Culebra, and Flamenco, and any lands and waters outside of said limits above described which are necessary or convenient or from time to time may become necessary or convenient for the construction, maintenance, operation, sanitation, or protection of the said canal or of any auxiliary canals, lakes, or other works necessary or convenient for the construction, maintenance, operation, sanitation, or protection of said canal, the use, occupancy, or control whereof were granted to the United States by the treaty between the United States and the Republic of Panama, the ratifications of which were exchanged on the twenty-sixth day of February, nineteen hundred and four, shall be known and designated as the Canal Zone, and the canal now being constructed thereon shall hereafter be known and designated as the Panama Canal. The President is authorized, by treaty with the Republic of Panama, to acquire any addition-

al land or land under water not already granted, or which was excepted from the grant, that he may deem necessary for the operation, maintenance, sanitation, or protection of the Panama Canal, and to exchange any land or land under water not deemed necessary for such purposes for other land or land under water which may be deemed necessary for such purposes, which additional land or land under water so acquired shall become part of the Canal Zone. [37 Stat. L. 560.]

SEC. 2. [*Former laws, regulations, etc., confirmed — courts continued.*] That all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide. The existing courts established in the Canal Zone by Executive order are recognized and confirmed to continue in operation until the courts provided for in this Act shall be established. [37 Stat. L. 561.]

SEC. 3. [*Title to all lands within Canal Zone to be secured — disposal of adverse claims.*] That the President is authorized to declare by Executive order that all land and land under water within the limits of the Canal Zone is necessary for the construction, maintenance, operation, sanitation, or protection of the Panama Canal, and to extinguish, by agreement when advisable, all claims and titles of adverse claimants and occupants. Upon failure to secure by agreement title to any such parcel of land or land under water the adverse claim or occupancy shall be disposed of and title thereto secured in the United States and compensation therefor fixed and paid in the manner provided in the aforesaid treaty with the Republic of Panama, or such modification of such treaty as may hereafter be made. [37 Stat. L. 561.]

SEC. 4. [*President may discontinue Canal Commission, etc. — completion, operation, etc., by governor, etc. — salaries of Army or Navy officials — appointment of governor — other officials — formal opening — Commission on Fine Arts — report, etc.*] That when in the judgment of the President the construction of the Panama Canal shall be sufficiently advanced toward completion to render the further services of the Isthmian Canal Commission unnecessary the President is authorized by Executive order to discontinue the Isthmian Canal Commission, which, together with the present organization, shall then cease to exist; and the President is authorized thereafter to complete, govern, and operate the Panama Canal and govern the Canal Zone, or cause them to be completed, governed, and operated, through a governor of the Panama Canal and such other persons as he may deem competent to discharge the various duties connected with the completion, care, maintenance, sanitation, operation, government, and protection of the canal and Canal Zone. If any of the persons appointed or employed as aforesaid shall be persons in the military or naval service of the United States, the amount of the official salary paid to any such person shall be deducted from the amount of salary or compensation provided by or which shall be fixed under the terms of this Act. The governor of the Panama Canal shall be appointed by the President, by and with the advice and consent of the Senate, commissioned for a term of four years, and until his successor shall be appointed and qualified. He shall receive a salary of ten thousand dollars a year. All other persons necessary for the completion, care, management, maintenance, sanitation, government,

operation, and protection of the Panama Canal and Canal Zone shall be appointed by the President, or by his authority, removable at his pleasure, and the compensation of such persons shall be fixed by the President, or by his authority, until such time as Congress may by law regulate the same, but salaries or compensation fixed hereunder by the President shall in no instance exceed by more than twenty-five per centum the salary or compensation paid for the same or similar services to persons employed by the Government in continental United States. That upon the completion of the Panama Canal the President shall cause the same to be officially and formally opened for use and operation.

Before the completion of the canal, the Commission of Arts may make report to the President of their recommendation regarding the artistic character of the structures of the canal, such report to be transmitted to Congress. [37 Stat. L. 561.]

SEC. 5. [*Tolls, etc.*] That the President is hereby authorized to prescribe and from time to time change the tolls that shall be levied by the Government of the United States for the use of the Panama Canal: *Provided*, That no tolls, when prescribed as above, shall be changed, unless six months' notice thereof shall have been given by the President by proclamation. No tolls shall be levied upon vessels engaged in the coastwise trade of the United States. That section forty-one hundred and thirty-two of the Revised Statutes is hereby amended to read as follows:

**"Sec. 4132.** Vessels built within the United States and belonging wholly to citizens thereof; and vessels which may be captured in war by citizens of the United States and lawfully condemned as prize, or which may be adjudged to be forfeited for a breach of the laws of the United States; and seagoing vessels, whether steam or sail, which have been certified by the Steamboat-Inspection Service as safe to carry dry and perishable cargo, not more than five years old at the time they apply for registry, wherever built, which are to engage only in trade with foreign countries or with the Philippine Islands and the islands of Guam and Tutuila, being wholly owned by citizens of the United States or corporations organized and chartered under the laws of the United States or of any State thereof, the president and managing directors of which shall be citizens of the United States or corporations organized and chartered under the laws of the United States or of any State thereof, the President and managing directors of which shall be citizens of the United States, and no others, may be registered as directed in this title. Foreign-built vessels registered pursuant to this Act shall not engage in the coastwise trade: *Provided*, That a foreign-built yacht, pleasure boat, or vessel not used or intended to be used for trade admitted to American registry pursuant to this section shall not be exempt from the collection of ad valorem duty provided in section thirty-seven of the Act approved August fifth, nineteen hundred and nine, entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes.' That all materials of foreign production which may be necessary for the construction or repair of vessels built in the United States and all such materials necessary for the building or repair of their machinery and all articles necessary for their outfit and equipment may be imported into the United States free of duty under such regulations as the Secretary of the Treasury may prescribe: *Provided further*, That such vessels so admitted under the provisions of this section may contract with the Postmaster General under the Act of March

third, eighteen hundred and ninety-one, entitled 'An Act to provide for ocean mail service between the United States and foreign ports, and to promote commerce,' so long as such vessels shall in all respects comply with the provisions and requirements of said Act."

Tolls may be based upon gross or net registered tonnage, displacement tonnage, or otherwise, and may be based on one form of tonnage for warships and another for ships of commerce. The rate of tolls may be lower upon vessels in ballast than upon vessels carrying passengers or cargo. When based upon net registered tonnage for ships of commerce the tolls shall not exceed one dollar and twenty-five cents per net registered ton, nor be less, other than for vessels of the United States and its citizens, than the estimated proportionate cost of the actual maintenance and operation of the canal, subject, however, to the provisions of article nineteen of the convention between the United States and the Republic of Panama, entered into November eighteenth, nineteen hundred and three. If the tolls shall not be based upon net registered tonnage, they shall not exceed the equivalent of one dollar and twenty-five cents per net registered ton as nearly as the same may be determined, nor be less than the equivalent of seventy-five cents per net registered ton. The toll for each passenger shall not be more than one dollar and fifty cents. The President is authorized to make and from time to time amend regulations governing the operation of the Panama Canal, and the passage and control of vessels through the same or any part thereof, including the locks and approaches thereto, and all rules and regulations affecting pilots and pilotage in the canal or the approaches thereto through the adjacent waters.

Such regulations shall provide for prompt adjustment by agreement and immediate payment of claims for damages which may arise from injury to vessels, cargo, or passengers from the passing of vessels through the locks under the control of those operating them under such rules and regulations. In case of disagreement suit may be brought in the district court of the Canal Zone against the governor of the Panama Canal. The hearing and disposition of such cases shall be expedited and the judgment shall be immediately paid out of any moneys appropriated or allotted for canal operation.

The President shall provide a method for the determination and adjustment of all claims arising out of personal injuries to employees thereafter occurring while directly engaged in actual work in connection with the construction, maintenance, operation, or sanitation of the canal or of the Panama Railroad, or of any auxiliary canals, locks, or other works necessary and convenient for the construction, maintenance, operation, or sanitation of the canal, whether such injuries result in death or not, and prescribe a schedule of compensation therefor, and may revise and modify such method and schedule at any time; and such claims, to the extent they shall be allowed on such adjustment, if allowed at all, shall be paid out of the moneys hereafter appropriated for that purpose or out of the funds of the Panama Railroad Company, if said company was responsible for said injury, as the case may require. And after such method and schedule shall be provided by the President, the provisions of the Act entitled "An Act granting to certain employees of the United States the right to receive from it compensation for injuries sustained in the course of their employment," approved May thirtieth, nineteen hundred and eight, and of the Act entitled "An Act relating to injured employees on the Isthmian Canal," approved February twenty-fourth, nineteen hundred and nine, shall not apply

to personal injuries thereafter received and claims for which are subject to determination and adjustment as provided in this section. [*37 Stat. L. 562.*]

For R. S. sec. 4132, see 7 Fed. Stat. Annot. of Feb. 24, 1909, see 1909 Supp. Fed. Stat. Annot. 615.  
12. For the Act of May 30, 1908, see 1909 Supp. Fed. Stat. Annot. 330. For the Act

SEC. 6. [*Erection of radio-communication installations — docks, storehouses, etc., for coal and other supplies may be established.*] That the President is authorized to cause to be erected, maintained, and operated, subject to the International Convention and the Act of Congress to regulate radio-communication, at suitable places along the Panama Canal and the coast adjacent to its two terminals, in connection with the operation of said canal, such wireless telegraphic installations as he may deem necessary for the operation, maintenance, sanitation, and protection of said canal, and for other purposes. If it is found necessary to locate such installations upon territory of the Republic of Panama, the President is authorized to make such agreement with said Government as may be necessary, and also to provide for the acceptance and transmission, by said system, of all private and commercial messages, and those of the Government of Panama, on such terms and for such tolls as the President may prescribe: *Provided*, That the messages of the Government of the United States and the departments thereof, and the management of the Panama Canal, shall always be given precedence over all other messages. The President is also authorized, in his discretion, to enter into such operating agreements or leases with any private wireless company or companies\* as may best insure freedom from interference with the wireless telegraphic installations established by the United States. The President is also authorized to establish, maintain, and operate, through the Panama Railroad Company or otherwise, dry docks, repair shops, yards, docks, wharves, warehouses, storehouses, and other necessary facilities and appurtenances for the purpose of providing coal and other materials, labor, repairs, and supplies for vessels of the Government of the United States and, incidentally, for supplying such at reasonable prices to passing vessels, in accordance with appropriations hereby authorized to be made from time to time by Congress as a part of the maintenance and operation of the said canal. Moneys received from the conduct of said business may be expended and reinvested for such purposes without being covered into the Treasury of the United States; and such moneys are hereby appropriated for such purposes, but all deposits of such funds shall be subject to the provisions of existing law relating to the deposit of other public funds of the United States, and any net profits accruing from such business shall annually be covered into the Treasury of the United States. Monthly reports of such receipts and expenditures shall be made to the President by the persons in charge, and annual reports shall be made to the Congress. [*37 Stat. L. 564.*]

SEC. 7. [*Canal Zone civil government.*] That the governor of the Panama Canal shall, in connection with the operation of such canal, have official control and jurisdiction over the Canal Zone and shall perform all duties in connection with the civil government of the Canal Zone, which is to be held, treated, and governed as an adjunct of such Panama Canal. Unless in this Act otherwise provided all existing laws of the Canal Zone referring to the civil governor or the civil administration of the Canal Zone shall be applicable to the governor of the Panama Canal, who shall perform all such executive and administrative duties required by existing law. The President is authorized to determine

or cause to be determined what towns shall exist in the Canal Zone and subdivide and from time to time resubdivide said Canal Zone into subdivisions, to be designated by name or number, so that there shall be situated one town in each subdivision, and the boundaries of each subdivision shall be clearly defined. In each town there shall be a magistrate's court with exclusive original jurisdiction coextensive with the subdivision in which it is situated of all civil cases in which the principal sum claimed does not exceed three hundred dollars, and all criminal cases wherein the punishment that may be imposed shall not exceed a fine of one hundred dollars, or imprisonment not exceeding thirty days, or both, and all violations of police regulations and ordinances and all actions involving possession or title to personal property or the forcible entry and detainer of real estate. Such magistrates shall also hold preliminary investigations in charges of felony and offenses under section ten of this Act, and commit or bail in bailable cases to the district court. A sufficient number of magistrates and constables, who must be citizens of the United States, to conduct the business of such courts, shall be appointed by the governor of the Panama Canal for terms of four years and until their successors are appointed and qualified, and the compensation of such persons shall be fixed by the President, or by his authority, until such time as Congress may by law regulate the same. The rules governing said courts and prescribing the duties of said magistrates and constables, oaths and bonds, the times and places of holding such courts, the disposition of fines, costs, forfeitures, enforcements of judgments, providing for appeals therefrom to the district court, and the disposition, treatment, and pardon of convicts shall be established by order of the President. The governor of the Panama Canal shall appoint all notaries public, prescribe their powers and duties, their official seal, and the fees to be charged and collected by them. [37 Stat. L. 564.]

SEC. 8. [*District court established.*] That there shall be in the Canal Zone one district court with two divisions, one including Balboa and the other including Cristobal; and one district judge of the said district, who shall hold his court in both divisions at such time as he may designate by order, at least once a month in each division. The rules of practice in such district court shall be prescribed or amended by order of the President. The said district court shall have original jurisdiction of all felony cases, of offenses arising under section ten of this Act, all causes in equity; admiralty and all cases at law involving principal sums exceeding three hundred dollars and all appeals from judgments rendered in magistrates' courts. The jurisdiction in admiralty herein conferred upon the district judge and the district court shall be the same that is exercised by the United States district judges and the United States district courts, and the pre[o]cedure and practice shall also be the same. The district court or the judge thereof shall also have jurisdiction of all other matters and proceedings not herein provided for which are now within the jurisdiction of the Supreme Court of the Canal Zone, of the Circuit Court of the Canal Zone, the District Court of the Canal Zone, or the judges thereof. Said judge shall provide for the selection, summoning, serving, and compensation of jurors from among the citizens of the United States, to be subject to jury duty in either division of such district, and a jury shall be had in any criminal case or civil case at law originating in said court on the demand of either party. There shall be a district attorney and a marshal for said district. It shall be the duty of the district attorney to conduct all business, civil and criminal, for the Government, and to advise the governor of the Panama Canal on all legal



questions touching the operation of the canal and the administration of civil affairs. It shall be the duty of the marshal to execute all process of the court, preserve order therein, and do all things incident to the office of marshal. The district judge, the district attorney, and the marshal shall be appointed by the President, by and with the advice and consent of the Senate, for terms of four years each, and until their successors are appointed and qualified, and during their terms of office shall reside within the Canal Zone, and shall hold no other office nor serve on any official board or commission nor receive any emoluments except their salaries. The district judge shall receive the same salary paid the district judges of the United States, and shall appoint the clerk of said court, and may appoint one assistant when necessary, who shall receive salaries to be fixed by the President. The district judge shall be entitled to six weeks' leave of absence each year with pay. During his absence or during any period of disability or disqualification from sickness or otherwise to discharge his duties the same shall be temporarily performed by any circuit or district judge of the United States who may be designated by the President, and who, during such service, shall receive the additional mileage and per diem allowed by law to district judges of the United States when holding court away from their homes. The district attorney and the marshal shall be paid each a salary of five thousand dollars per annum. [37 Stat. L. 565.]

SEC. 9. [*Transfer of records, etc., of existing courts — temporary continuance of supreme court — duties of court officers continued — practice and procedure continued—appeals to fifth circuit court of appeals—procedure.*] That the records of the existing courts and all causes, proceedings, and criminal prosecutions pending therein as shown by the dockets thereof, except as herein otherwise provided, shall immediately upon the organization of the courts created by this Act be transferred to such new courts having jurisdiction of like cases, be entered upon the dockets thereof, and proceed as if they had originally been brought therein, whereupon all the existing courts, except the supreme court of the Canal Zone, shall cease to exist. The President may continue the supreme court of the Canal Zone and retain the judges thereof in office for such time as to him may seem necessary to determine finally any causes and proceedings which may be pending therein. All laws of the Canal Zone imposing duties upon the clerks or ministerial officers of existing courts shall apply and impose such duties upon the clerks and ministerial officers of the new courts created by this Act having jurisdiction of like cases, matters, and duties.

All existing laws in the Canal Zone governing practice and procedure in existing courts shall be applicable and adapted to the practice and procedure in the new courts.

The Circuit Court of Appeals of the Fifth Circuit of the United States shall have jurisdiction to review, revise, modify, reverse, or affirm the final judgments and decrees of the District Court of the Canal Zone and to render such judgments as in the opinion of the said appellate court should have been rendered by the trial court in all actions and proceedings in which the Constitution, or any statute, treaty, title, right, or privilege of the United States, is involved and a right thereunder denied, and in cases in which the value in controversy exceeds one thousand dollars, to be ascertained by the oath of either party, or by other competent evidence, and also in criminal causes wherein the offense charged is punishable as a felony. And such appellate jurisdiction, subject to the right of review by or appeal to the Supreme Court of the United States as in other cases authorized by law, may be exercised by said circuit court of

appeals in the same manner, under the same regulations, and by the same procedure as nearly as practicable as is done in reviewing the final judgments and decrees of the district courts of the United States. [37 Stat. L. 565.]

SEC. 10. [*Regulating right to remain upon Canal Zone, etc. — punishment for violations — injuries to Canal, etc., unlawful — punishment.*] That after the Panama Canal shall have been completed and opened for operation the governor of the Panama Canal shall have the right to make such rules and regulations, subject to the approval of the President, touching the right of any person to remain upon or pass over any part of the Canal Zone as may be necessary. Any person violating any of such rules or regulations shall be guilty of a misdemeanor, and on conviction in the District Court of the Canal Zone shall be punished by a fine not exceeding five hundred dollars or by imprisonment not exceeding a year, or both, in the discretion of the court. It shall be unlawful for any person, by any means or in any way, to injure or obstruct, or attempt to injure or obstruct, any part of the Panama Canal or the locks thereof or the approaches thereto. Any person violating this provision shall be guilty of a felony, and on conviction in the District Court of the Canal Zone shall be punished by a fine not exceeding ten thousand dollars or by imprisonment not exceeding twenty years, or both, in the discretion of the court. If the act shall cause the death of any person within a year and a day thereafter, the person so convicted shall be guilty of murder and shall be punished accordingly. [37 Stat. L. 566.]

SEC. 11. [*Interstate commerce regulations.*] That section five of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, is hereby amended by adding thereto a new paragraph at the end thereof, as follows:

"From and after the first day of July, nineteen hundred and fourteen, it shall be unlawful for any railroad company or other common carrier subject to the Act to regulate commerce to own, lease, operate, control, or have any interest whatsoever (by stock ownership or otherwise, either directly, indirectly, through any holding company, or by stockholders or directors in common, or in any other manner) in any common carrier by water operated through the Panama Canal or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic or any vessel carrying freight or passengers upon said water route or elsewhere with which said railroad or other carrier aforesaid does or may compete for traffic; and in case of the violation of this provision each day in which such violation continues shall be deemed a separate offense."

Jurisdiction is hereby conferred on the Interstate Commerce Commission to determine questions of fact as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation of this section and pray for an order permitting the continuance of any vessel or vessels already in operation, or for the purpose of asking an order to install new service not in conflict with the provisions of this paragraph. The commission may on its own motion or the application of any shipper institute proceedings to inquire into the operation of any vessel in use by any railroad or other carrier which has not applied to the commission and had the question of competition or the possibility of competition determined as herein provided. In all such cases the order of said commission shall be final.

If the Interstate Commerce Commission shall be of the opinion that any such existing specified service by water other than through the Panama Canal is being operated in the interest of the public and is of advantage to the convenience and commerce of the people, and that such extension will neither exclude, prevent, nor reduce competition on the route by water under consideration, the Interstate Commerce Commission may, by order, extend the time during which such service by water may continue to be operated beyond July first, nineteen hundred and fourteen. In every case of such extension the rates, schedules, and practices of such water carrier shall be filed with the Interstate Commerce Commission and shall be subject to the act to regulate commerce and all amendments thereto in the same manner and to the same extent as is the railroad or other common carrier controlling such water carrier or interested in any manner in its operation: *Provided*, Any application for extension under the terms of this provision filed with the Interstate Commerce Commission prior to July first, nineteen hundred and fourteen, but for any reason not heard and disposed of before said date, may be considered and granted thereafter.

No vessel permitted to engage in the coastwise or foreign trade of the United States shall be permitted to enter or pass through said canal if such ship is owned, chartered, operated, or controlled by any person or company which is doing business in violation of the provisions of the Act of Congress approved July second, eighteen hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," or the provisions of sections seventy-three to seventy-seven, both inclusive, of an Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," or the provisions of any other Act of Congress amending or supplementing the said Act of July second, eighteen hundred and ninety, commonly known as the Sherman Antitrust Act, and amendments thereto, or said sections of the Act of August twenty-seventh, eighteen hundred and ninety-four. The question of fact may be determined by the judgment of any court of the United States of competent jurisdiction in any cause pending before it to which the owners or operators of such ship are parties. Suit may be brought by any shipper or by the Attorney General of the United States.

That section six of said Act to regulate commerce, as heretofore amended, is hereby amended by adding a new paragraph at the end thereof, as follows:

"When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten:

"(a) To establish physical connection between the lines of the rail carrier and the dock of the water carrier by directing the rail carrier to make suitable connection between its line and a track or tracks which have been constructed from the dock to the limits of its right of way, or by directing either or both the rail and water carrier, individually or in connection with one another, to construct and connect with the lines of the rail carrier a spur track or tracks to the dock. This provision shall only apply where such connection is reasonably practicable, can be made with safety to the public, and where the amount of business to be handled is sufficient to justify the outlay.

"The commission shall have full authority to determine the terms and conditions upon which these connecting tracks, when constructed, shall be operated, and it may, either in the construction or the operation of such tracks, determine what sum shall be paid to or by either carrier. The provisions of this paragraph shall extend to cases where the dock is owned by other parties than the carrier involved.

"(b) To establish through routes and maximum joint rates between and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced.

"(c) To establish maximum proportional rates by rail to and from the ports to which the traffic is brought, or from which it is taken by the water carrier, and to determine to what traffic and in connection with what vessels and upon what terms and conditions such rates shall apply. By proportional rates are port and which apply only to traffic which has been brought to the port or is meant those which differ from the corresponding local rates to and from the carried from the port by a common carrier by water.

"(d) If any rail carrier subject to the Act to regulate commerce enters into arrangements with any water carrier operating from a port in the United States to a foreign country, through the Panama Canal or otherwise, for the handling of through business between interior points of the United States and such foreign country, the Interstate Commerce Commission may require such railway to enter into similar arrangements with any or all other lines of steamships operating from said port to the same foreign country."

The orders of the Interstate Commerce Commission relating to this section shall only be made upon formal complaint or in proceedings instituted by the commission of its own motion and after full hearing. The orders provided for in the two amendments to the Act to regulate commerce enacted in this section shall be served in the same manner and enforced by the same penalties and proceedings as are the orders of the commission made under the provisions of section fifteen of the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten, and they may be conditioned for the payment of any sum or the giving of security for the payment of any sum or the discharge of any obligation which may be required by the terms of said order.

For the acts amended and referred to in this section see the titles *INTERSTATE COMMERCE; TRADE UNIONS, COMBINATIONS AND TRUSTS*, in preceding volumes of this work.

SEC. 12. [*Extradition laws, etc., enforced.*] That all laws and treaties relating to the extradition of persons accused of crime in force in the United States, to the extent that they may not be in conflict with or superseded by any special treaty entered into between the United States and the Republic of Panama with respect to the Canal Zone, and all laws relating to the rendition of fugitives from justice as between the several States and Territories of the United States, shall extend to and be considered in force in the Canal Zone, and for such purposes and such purposes only the Canal Zone shall be considered and treated as an organized Territory of the United States. [37 Stat. L. 566.]

SEC. 13. [*Army officer to have exclusive authority in time of war.*] That in time of war in which the United States shall be engaged, or when, in the opinion of the President, war is imminent, such officer of the Army as the President may designate shall, upon the order of the President, assume and have exclusive authority and jurisdiction over the operation of the Panama Canal

and all of its adjuncts, appendants, and appurtenances, including the entire control and government of the Canal Zone, and during a continuance of such condition the governor of the Panama Canal shall, in all respects and particulars as to the operation of the Panama Canal, and all duties, matters, and transactions affecting the Canal Zone, be subject to the order and direction of such officer of the Army. [37 Stat. L. 569.]

SEC. 14. [*Title, etc.*] That this Act shall be known as, and referred to as, the Panama Canal Act, and the right to alter, amend, or repeal any or all of its provisions or to extend, modify, or annul any rule or regulation made under its authority is expressly reserved. [37 Stat. L. 569.]

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SEC. 3. [*Report on advisability of improvement.*] That in all cases where preliminary examinations and surveys are authorized a preliminary examination of the river, harbor, or other proposed improvement mentioned shall first be made and a report as to the advisability of its improvement shall be submitted unless a survey or estimate is expressly directed. If upon such preliminary examination the proposed improvement is not deemed advisable, no further action shall be taken thereon without the further direction of Congress; but in case the report shall be favorable to such proposed improvement, or that a survey and estimate should be made to determine the advisability of improvement, the Secretary of War is authorized, in his discretion, to cause surveys to be made, and the cost and advisability to be reported to Congress. And such reports containing plans and estimates shall also contain a statement as to the rate at which the work should be prosecuted: *Provided*, That every report submitted to Congress, in addition to full information regarding the present and prospective commercial importance of the project covered by the report and the benefit to commerce likely to result from any proposed plan of improvement, shall also contain such data as it may be practicable to secure in regard to the following subjects:

(a) The existence and establishment of both private and public terminal and transfer facilities contiguous to the navigable water proposed to be improved, and, if water terminals have been constructed, the general location, description, and use made of the same, with an opinion as to their adequacy and efficiency, whether private or public. If no public terminals have been constructed, or if they are inadequate in number, there shall be included in the report an opinion in general terms as to the necessity, number, and appropriate location of the same, and also the necessary relations of such proposed terminals to the development of commerce.

(b) The development and utilization of water power for industrial and commercial purposes.

(c) Such other subjects as may be properly connected with such project: *Provided*, That in the investigation and study of these questions consideration shall be given only to their bearing upon the improvement of navigation, to the possibility and desirability of their being coordinated in a logical and proper manner with improvements for navigation to lessen the cost of such improvements and to compensate the Government for expenditures made in the interest of navigation, and to their relation to the development and regulation of commerce: *Provided further*, That the investigation and study of these questions may, upon review by the Board of Engineers for Rivers and Harbors when

called for as provided by law, be extended to any work of improvement under way and to any locality the examination and survey of which has heretofore been, or may hereafter be, authorized by Congress.

All reports on examinations and surveys which may be prepared during the recess of Congress shall, in the discretion of the Secretary of War, be printed by the Public Printer as documents of the following session of Congress. [37 Stat. L. 825.]

SEC. 4. [*Review of reports by board of engineers for rivers and harbors — examinations for senate and house committees, etc.*] That all reports on examinations and surveys authorized by law shall be reviewed by the Board of Engineers for Rivers and Harbors as provided for in section three of the river and harbor Act approved June thirteenth, nineteen hundred and two, and all special reports ordered by Congress shall, in the discretion of the Chief of Engineers, be reviewed in like manner by said board; and the said board shall also, on request by resolution of the Committee on Commerce of the Senate or the Committee on Rivers and Harbors of the House of Representatives, submitted to the Chief of Engineers, examine and review the report of any examination or survey made pursuant to any Act or resolution of Congress, and report thereon through the Chief of Engineers, United States Army, who shall submit his conclusions thereon as in other cases: *Provided*, That in no case shall the board, in its report thus called for by committee resolution, extend the scope of the project contemplated in the original report upon which its examination and review has been requested, or in the provision of law authorizing the original examination or survey: *Provided further*, That said board shall consist of seven members, a majority of whom shall be of rank not less than lieutenant colonel. [37 Stat. L. 826.]

SECS. 5, 6. [*Temporary.*]

SEC. 7. [*Allotment of consolidated works — balances carried to authorized works.*] That where separate works or items are consolidated in this or subsequent river and harbor Acts and an aggregate amount is appropriated therefor the amounts appropriated shall, unless otherwise expressed, be expended in securing maintenance and improvement according to the respective projects adopted by Congress, after giving due regard to the respective needs of traffic. The allotments to the respective works consolidated shall be made by the Secretary of War upon recommendations by the Chief of Engineers. In case such works or items are consolidated and separate amounts are given with each project, the amounts so named shall be expended upon such separate projects unless, in the discretion of the Secretary of War, another allotment or division should be made of the same. Any balances remaining to the credit of the consolidated items shall be carried to the credit of the respective aggregate amounts appropriated for the consolidated items. [37 Stat. L. 827.]

SEC. 8. [*Contributions in furtherance of projects authorized.*] That the Secretary of War is hereby authorized to receive from private parties such funds as may be contributed by them to be expended in connection with funds appropriated by the United States for any authorized work of public improvement of rivers and harbors, whenever such work and expenditure may be considered by the Chief of Engineers as advantageous to the interests of navigation. [37 Stat. L. 827.]

SEC. 9. [*Channel depths and dimensions defined.*] That in the preparation of projects under this and subsequent river and harbor acts, unless otherwise expressed, the channel depths referred to shall be understood to signify the depth at mean lower low water in tidal waters, and the mean depth during the month of lowest water in the navigation season in rivers and nontidal channels, and the channel dimensions specified shall be understood to admit of such increase at the entrances, bends, sidings, and turning places as may be necessary to allow of the free movement of boats. [*37 Stat. L. 827.*]

The above sections 3, 4, 7, 8, 9, are from the River and Harbor Appropriation Act of March 4, 1913, ch. 144.

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[SEC. 1.] [*Panama canal — expenditures to be reimbursed from proceeds of bonds.*] \* \* \* That all expenditures from the appropriations heretofore, herein, and hereafter made for the construction of the Panama Canal, including any portion of such appropriations which may be used for the construction of dry docks, repair shops, yards, docks, wharves, warehouses, storehouses, and other necessary facilities and appurtenances, for the purpose of providing coal and other materials, labor, repairs, and supplies, for the construction of office buildings and quarters, and other necessary buildings, exclusive of fortifications, and exclusive of the amount used for operating the canal and for the permanent organization after the canal is opened for use and operation, shall be paid from or reimbursed to the Treasury of the United States out of the proceeds of the sale of bonds authorized in section eight of the said Act approved June twenty-eighth, nineteen hundred and two, and section thirty-nine of the tariff Act approved August fifth, nineteen hundred and nine. [*38 Stat. L. 73.*]

This and sec. 2 following are from the Sundry Civil Appropriation Act of June 23, 1913, ch. 3.

appendix 1909 Supp. Fed. Stat. Annot. For sec. 8 of the Act of June 28, 1902, see 6 Fed. Stat. Annot. 838.

For the Tariff Act of Aug. 5, 1909, see

SEC. 2. [*Distribution of Canal Zone revenues — expenses of subdivisions — statement to Congress.*] That all funds collected by the government of the Canal Zone from rentals of public lands and buildings in the Canal Zone and the cities of Panama and Colon, and from the zone postal service, and from court fees and fines, and collected or raised by taxation in whatever form under the laws of the government of the Canal Zone, are hereby appropriated until and including June thirtieth, nineteen hundred and fourteen, as follows: The revenues derived from the postal service to the maintenance of that service; the remaining revenues, including any balances unexpended in prior years, after setting aside a miscellaneous and contingent fund of not exceeding ten thousand dollars, to the maintenance of the public-school system in the zone; to the construction and maintenance of public improvements within the zone; to the maintenance of the administrative districts; and for the expenses of the subdivisions of the Canal Zone after they are established under section seven of the Panama Canal Act; to the maintenance of Canal Zone charity patients in the hospitals of the Isthmian Canal Commission, and to the maintenance of administrative district prisoners. A detailed and classified statement of all re-

ceipts and expenditures without the duplication of items under this paragraph shall be submitted to Congress after the close of the fiscal year nineteen hundred and fourteen. [38 Stat. L. 74.]

For the Panama Canal Act see *supra*, p. 371.

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## RURAL DELIVERY.

See *POSTAL SERVICE*.

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## SALVAGE.

Act of August 1, 1912, Ch. 268, 384.

- Sec. 1. Remuneration Not Affected by Ownership of Vessel, 384.*
- 2. Assistance to be Rendered by Master — Punishment for Failure, 384.*
- 3. Salvors of Life, to Share in Property Saved, 384.*
- 4. Time Limit for Salvage Suits, 384.*
- 5. Not Applicable to Ships of War, etc. 385.*
- 6. In Effect July 1, 1912, 385.*

An Act To harmonize the national law of salvage with the provisions of the international convention for the unification of certain rules with respect to assistance and salvage at sea, and for other purposes.

[Act of August 1, 1912, ch. 268.]

[SEC. 1.] [*Remuneration not affected by ownership of vessel.*] That the right to remuneration for assistance or salvage services shall not be affected by common ownership of the vessels rendering and receiving such assistance or salvage services. [37 Stat. L. 242.]

SEC. 2. [*Assistance to be rendered by master — punishment for failure.*] That the master or person in charge of a vessel shall, so far as he can do so without serious danger to his own vessel, crew, or passengers, render assistance to every person who is found at sea in danger of being lost; and if he fails to do so, he shall, upon conviction, be liable to a penalty of not exceeding one thousand dollars or imprisonment for a term not exceeding two years, or both. [37 Stat. L. 242.]

SEC. 3. [*Salvors of life, to share in property saved.*] That salvors of human life, who have taken part in the services rendered on the occasion of the accident giving rise to salvage, are entitled to a fair share of the remuneration awarded to the salvors of the vessel, her cargo, and accessories. [37 Stat. L. 242.]

SEC. 4. [*Time limit for salvage suits.*] That a suit for the recovery or remuneration for rendering assistance or salvage services shall not be main-



tainable if brought later than two years from the date when such assistance or salvage was rendered, unless the court in which the suit is brought shall be satisfied that during such period there had not been any reasonable opportunity of arresting the assisted or salvaged vessel within the jurisdiction of the court or within the territorial waters of the country in which the libellant resides or has his principal place of business. [37 Stat. L. 242.]

SEC. 5. [*Not applicable to ships of war, etc.*] That nothing in this Act shall be construed as applying to ships of war or to Government ships appropriated exclusively to a public service. [37 Stat. L. 242.]

SEC. 6. [*In effect July 1, 1912.*] That this Act shall take effect and be in force on and after July first, nineteen hundred and twelve. [37 Stat. L. 242.]

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## SANITARY REGULATIONS.

See *FOOD AND DRUGS*.

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## SAVINGS DEPOSITORY.

See *POSTAL SERVICE*.

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## SCHOOL LANDS.

See *PUBLIC LANDS*.

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## SCHOOLS.

*Indian Schools, see INDIANS.*

## **SEAL FISHERIES.**

*See ALASKA.*

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## **SEEDS.**

*See AGRICULTURE.*

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## **SEIZURE.**

*See CUSTOMS DUTIES.*

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## **SERUMS.**

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## **SHERMAN LAW.**

*See TRADE UNIONS AND COMBINATIONS AND TRUSTS.*

## SHIPPING AND NAVIGATION.

Act of July 9, 1912, Ch. 220, 387.

*Unrigged Wooden Vessels — Notation of Rebuilding on List of Merchant Vessels, 387.*

Act of July 23, 1912, Ch. 250, 387.

*Sec. 1. Radio Communication — Apparatus Required on Ocean or Great Lakes Steamers — Auxiliary Power Supply, etc. — Operators on Duty — Control of Master — Penalty for Nonenforcement — Steamers Excepted, 387.*

*2. In Effect on Great Lakes — Cargo Steamers — Substitute for Second Operator on Cargo Steamers, 388.*

Act of February 29, 1912, Ch. 47, 388.

*Vessels in Domestic Commerce — Consolidation of Enrollment and Licenses — Small Vessels Included, 388.*

### CROSS-REFERENCES.

*Pleasure Yachts, see YACHTS.*  
*See also STEAM VESSELS.*

**An Act Concerning unrigged vessels.**

**[Act of July 9, 1912, ch. 220.]**

[*Unrigged wooden vessels — notation of rebuilding, on List of Merchant Vessels.*] That upon affidavit by a reputable shipbuilder of the United States that an unrigged wooden vessel of the United States has been rebuilt, giving the date and place of such rebuilding, is sound and free from rotten or doted wood in structural parts, properly fastened and calked and in strength and seaworthiness as good as new, the Commissioner of Navigation shall include in the List of Merchant Vessels a notation to that effect. [37 Stat. L. 189.]

**An Act To amend an Act entitled "An Act to require apparatus and operators for radio communication on certain ocean steamers," approved June twenty-fourth, nineteen hundred and ten.**

**[Act of July 23, 1912, ch. 250.]**

[SEC. 1. ] [*Radio communication — apparatus required on ocean or Great Lakes steamers — auxiliary power supply, etc. — operators on duty — control of master — penalty for nonenforcement — steamers excepted.*] That section one of an Act entitled "An Act to require apparatus and operators for radio communication on certain ocean steamers," approved June twenty-fourth, nineteen hundred and ten, be amended so that it will read as follows:

"SECTION 1. That from and after October first, nineteen hundred and twelve, it shall be unlawful for any steamer of the United States or of any foreign country navigating the ocean or the Great Lakes and licensed to carry, or carrying, fifty or more persons, including passengers or crew or both, to leave or attempt to leave any port of the United States unless such steamer shall be equipped with an efficient apparatus for radio communication, in good working order, capable of transmitting and receiving messages over a distance of at least one hundred miles, day or night. An auxiliary power supply, independent of the vessel's main electric power plant, must be provided which will enable the sending set for at least four hours to send messages over a distance of at least one hundred miles, day or night, and efficient communication between the operator in the radio room and the bridge shall be maintained at all times.

"The radio equipment must be in charge of two or more persons skilled in the use of such apparatus, one or the other of whom shall be on duty at all times while the vessel is being navigated. Such equipment, operators, the regulation of their watches, and the transmission and receipt of messages, except as may be regulated by law or international agreement, shall be under the control of the master, in the case of a vessel of the United States; and every willful failure on the part of the master to enforce at sea the provisions of this paragraph as to equipment, operators, and watches shall subject him to a penalty of one hundred dollars.

"That the provisions of this section shall not apply to steamers plying between ports, or places, less than two hundred miles apart." [37 Stat. L. 199.]

For sec. 1 of the Act of June 24, 1910, as originally enacted see 1912 Supp. Fed. Stat. Annot. 353.

SEC. 2. [In effect, on Great Lakes — cargo steamers — substitute for second operator on cargo steamers.] That this Act, so far as it relates to the Great Lakes, shall take effect on and after April first, nineteen hundred and thirteen, and so far as it relates to ocean cargo steamers shall take effect on and after July first, nineteen hundred and thirteen: *Provided*, That on cargo steamers, in lieu of the second operator provided for in this Act, there may be substituted a member of the crew or other person who shall be duly certified and entered in the ship's log as competent to receive and understand distress calls or other usual calls indicating danger, and to aid in maintaining a constant wireless watch so far as required for the safety of life. [37 Stat. L. 200.]

An Act To amend an Act entitled "An Act to simplify the issue of enrollments and licenses of vessels of the United States."

[Act of Feb. 29, 1912, ch. 47.]

[Vessels in domestic commerce — consolidation of enrollment and licenses — small vessels included.] That section one of the Act entitled "An Act to simplify the issue of enrollments and licenses of vessels of the United States," approved April twenty-fourth, nineteen hundred and six, is hereby amended by striking out the words "of twenty net register tons or over," so that it will read as follows:

"That under the direction of the Secretary of Commerce and Labor the Commissioner of Navigation is hereby authorized and directed from time to time to consolidate into one document in the case of any vessel of the United States

the form of enrollment prescribed by section forty-three hundred and nineteen of the Revised Statutes and the form of license prescribed by section forty-three hundred and twenty-one of the Revised Statutes, and such consolidated form shall hereafter be issued to a vessel of the United States in lieu of the separate enrollment and license now prescribed by law, and shall be deemed sufficient compliance with the requirements of laws relating to the subject." [37 Stat. L. 70.]

The above sec. 1 of the Act of April 24, 1906, in its original form is given in 1909 Supp. Fed. Stat. Annot. 623. For R. S. secs. 4319, 4321, see 7 Fed. Stat. Annot. 58, 59.

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## SHIPS AND SHIPPING.

*Imports Restricted to American Vessels*, see *CUSTOMS DUTIES*.

*Vessels for Sealing, etc.*, see *ALASKA*.

*Wireless Telegraphy*, see *RADIO COMMUNICATION*.

See also *SALVAGE*; *SHIPPING AND NAVIGATION*; *STEAM VESSELS*; *YACHTS*.

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## SHOOTING.

See *GAME ANIMALS AND BIRDS*.

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## SIGNAL SERVICE.

See *WAR DEPARTMENT AND MILITARY ESTABLISHMENT*.

## **SMELTING WAREHOUSES.**

*See CUSTOMS DUTIES.*

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## **SOLDIERS' HOMES.**

*See HOSPITALS AND ASYLUMS.*

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## **STATISTICS.**

*Census Statistics as to Tobacco and Cotton, see CENSUS.  
Cotton Reports, see AGRICULTURE.*

## STEAM VESSELS.

**Act of May 22, 1912, Ch. 130, 391.**

*Sec. 1. Steamboat Inspection Service — Supervising Inspector's Reports — To be Made at End of Fiscal Year — Examination by General Board, 391.*

*2. Effect, 392.*

**Act of January 24, 1913, Ch. 10, 392.**

*Passenger Steamers — Dangerous Articles Not to Be Carried On, 392.*

**Act of March 3, 1912, Ch. 118, 392.**

*Sec. 1. Licensed Officers and Crew, 392.*

*2. Record of Minimum Deck Officers — Licensed Officers Required — Master — Mates — Vessels over 1000 Tons — Smaller Vessels — Increase Authorized, 393.*

*3. Limitation of Watch Duty of Deck Officers, 393.*

*4. Conflicting Laws Repealed, 394.*

**Act of March 4, 1913, Ch. 159, 394.**

*Steamboat Inspection Service — Inspectors of Hulls and Boilers for Los Angeles, Cal. 394.*

**Act of October 22, 1913, Ch. 32, 394.**

*Travel Expenses Restricted, 394.*

**An Act To require supervising inspectors, Steamboat-Inspection Service, to submit their annual reports at the end of each fiscal year.**

[Act of May 22, 1912, ch. 130.]

[SEC. 1.] [*Steamboat Inspection Service — supervising inspector's reports — to be made at end of fiscal year — examination by general board.*] That section forty-four hundred and ten, Revised Statutes of the United States, be, and it is hereby, amended to read as follows:

**"Sec. 4410.** Each supervising inspector shall report, in writing, at the end of each fiscal year to the Supervising Inspector General the general business transacted in his district during the year, embracing all violations of the laws regulating vessels, and the action taken in relation to the same; all investigations and decisions by local inspectors; and all cases of appeal and the result thereof. The board shall examine into all the acts of each supervising inspector and local board, and all complaints made against same, in relation to the performance of their duties under the law, and the judgment of the board in each case shall

be entered upon their journal; and the board shall, as far as possible, correct mistakes where they exist." [37 Stat. L. 116.]

For R. S. sec. 4410 as it read prior to this amendment see 7 Fed. Stat. Annot. 165.

SEC. 2. [Effect.] That this Act shall take effect and be in force on and after the first day of July, nineteen hundred and twelve. [37 Stat. L. 116.]

**An Act To amend section forty-four hundred and seventy-two of the Revised Statutes of the United States, relating to the carrying of dangerous articles on passenger steamers.**

[Act of January 24, 1918, ch. 10.]

[Passenger steamers — dangerous articles not to be carried on.] That section forty-four hundred and seventy-two of the Revised Statutes of the United States, as amended by the Act of March third, nineteen hundred and five, and by the Act of May twenty-eight, nineteen hundred and six, be further amended by substituting a colon for the period at the end of said section as amended and adding thereto the following proviso: "*Provided further*, That nothing in the foregoing or following sections of this Act shall prohibit the use, by steam vessels carrying passengers for hire, of lifeboats equipped with gasoline motors, and tanks containing gasoline for the operation of said motor-driven lifeboats: *Provided, however*, That no gasoline shall be carried other than that in the tanks of the lifeboats: *Provided further*, That the use of such lifeboats equipped with gasoline motors shall be under such regulations as shall be prescribed by the board of supervising inspectors with the approval of the Secretary of Commerce and Labor." [37 Stat. L. 650.]

For R. S. sec. 4472 as it read prior to this amendment see 1909 Supp. Fed. Stat. Annot. 651.

**An Act To regulate the officering and manning of vessels subject to the inspection laws of the United States.**

[Act of March 3, 1912, ch. 118.]

[SEC. 1.] [Licensed officers and crew.] That section forty-four hundred and sixty-three of the Revised Statutes of the United States, be, and is hereby, amended to read as follows:

"Sec. 4463. Any vessel of the United States subject to the provisions of this title or to the inspection laws of the United States shall not be navigated unless she shall have in her service and on board such complement of licensed officers and crew as may, in the judgment of the local inspectors who inspect the vessel, be necessary for her safe navigation. The local inspectors shall make in the certificate of inspection of the vessel an entry of such complement of officers and crew, which may be changed from time to time by indorsement on such certificate by local inspectors by reason of change of conditions or employment. Such entry or indorsement shall be subject to a right of appeal, under regulations to be made by the Secretary of Commerce and Labor, to the supervising inspector and from him to the Supervising Inspector General, who shall have the power to revise, set aside, or affirm the said determination of the local inspectors.

"If any such vessel is deprived of the services of any number of the crew without the consent, fault, or collusion of the master, owner, or any person interested in the vessel, the vessel may proceed on her voyage if, in the judg-



ment of the master, she is sufficiently manned for such voyage: *Provided*, That the master shall ship, if obtainable, a number equal to the number of those whose services he has been deprived of by desertion or casualty, who must be of the same grade or of a higher rating with those whose places they fill. If the master shall fail to explain in writing the cause of such deficiency in the crew to the local inspectors within twelve hours of the time of the arrival of the vessel at her destination, he shall be liable to a penalty of fifty dollars. If the vessel shall not be manned as provided in this Act, the owner shall be liable to a penalty of one hundred dollars, or, in case of an insufficient number of licensed officers, to a penalty of five hundred dollars." [37 Stat. L. 732.]

R. S. sec. 4463 as it read prior to this amendment is given in 7 Fed. Stat. Annot. 181.

SEC. 2. [*Record of minimum deck officers — licensed officers required — master — mates — vessels over 1,000 tons — smaller vessels — increase authorized.*] That the board of local inspectors shall make an entry in the certificate of inspection of every ocean and coastwise sea-going merchant vessel of the United States propelled by machinery, and every ocean-going vessel carrying passengers, the minimum number of licensed deck officers required for her safe navigation according to the following scale:

That no such vessel shall be navigated unless she shall have on board and in her service one duly licensed master.

That every such vessel of one thousand gross tons and over, propelled by machinery, shall have in her service and on board three licensed mates, who shall stand in three watches while such vessel is being navigated, unless such vessel is engaged in a run of less than four hundred miles from the port of departure to the port of final destination, then such vessel shall have two licensed mates; and every vessel of two hundred gross tons and less than one thousand gross tons, propelled by machinery, shall have two licensed mates.

That every such vessel of one hundred gross tons and under two hundred gross tons, propelled by machinery, shall have on board and in her service one licensed mate; but if such vessel is engaged in a trade in which the time required to make the passage from the port of departure to the port of destination exceeds twenty-four hours, then such vessel shall have two licensed mates.

That nothing in this section shall be so construed as to prevent local inspectors from increasing the number of licensed officers on any vessel subject to the inspection laws of the United States if, in their judgment, such vessel is not sufficiently manned for her safe navigation: *Provided*, That this section shall not apply to fishing or whaling vessels, yachts, or motor boats as defined in the Act of June ninth, nineteen hundred and ten. [37 Stat. L. 733.]

For the Act of June 9, 1910, see 1912 Supp. Fed. Stat. Annot. 39.

SEC. 3. [*Limitation of watch duty of deck officers.*] That it shall be unlawful for the master, owner, agent, or other person having authority, to permit an officer of any vessel to take charge of the deck watch of the vessel upon leaving or immediately after leaving port, unless such officer shall have had at least six hours off duty within the twelve hours immediately preceding the time of sailing, and no licensed officer on any ocean or coastwise vessel shall be required to do duty to exceed nine hours of any twenty-four while in port, including the date of arrival, or more than twelve hours of any twenty-four at sea, except in a case of emergency when life or property is endangered. Any violation of this

section shall subject the person or persons guilty thereof to a penalty of one hundred dollars. [37 Stat. L. 733.]

SEC. 4. [*Conflicting laws repealed.*] That all laws or parts of laws in conflict with this Act are hereby repealed. [37 Stat. L. 733.]

An Act To create a board of local inspectors, Steamboat-Inspection Service, for the port of Los Angeles, California.

[Act of March 4, 1913, ch. 159.]

[*Steamboat Inspection Service — inspectors of hulls and boilers for Los Angeles, Cal.*] That section forty-four hundred and fourteen of the Revised Statutes of the United States be amended by inserting in the first paragraph thereof, after the words "New Orleans, Louisiana," and before the words "Juneau, Alaska," the words "Los Angeles, California"; and that the said section be further amended by inserting in the fifth paragraph thereof, after the words "Portland, Maine," and before the words "Juneau, Alaska," the words "Los Angeles, California." [37 Stat. L. 1013.]

See 7 Fed. Stat. Annot. 166; 10 Fed. Stat. Annot. 390.

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[*Travel expenses restricted.*] \* \* \* Hereafter inspectors and other employees in the Steamboat-Inspection Service shall be allowed, in lieu of mileage, only their actual necessary traveling expenses while traveling on official business assigned them by competent authority. [38 Stat. L. 223.]

This is from the Deficiencies Appropriation Act of Oct. 22, 1913, ch. 32.

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## SURGEON GENERAL.

See HEALTH AND QUARANTINE.

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## TARIFF ACT.

See CUSTOMS DUTIES.

## **TAXATION.**

See *INTERNAL REVENUE.*

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## **TELEGRAPH.**

See *RADIO COMMUNICATION.*

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## **TERRITORIES.**

*Alaska Territory, see ALASKA.*

## TIMBER LANDS AND FOREST RESERVES.

Act of May 7, 1912, Ch. 105, 396.

*Sec. 1. Calaveras Big Tree National Forest, Cal. — Conveyance of Lands for, from Owners — Lands in Exchange — National Forest Lands Added, 396.*

*2. Appropriation for Expenses, 397.*

Act of August 10, 1912, Ch. 284, 397.

*Expenses of Surveying, etc. Agricultural Lands — Work by Forest Service Employees — Sales of Timber for Domestic Use — Free Timber to Settlers, 397.*

Act of August 22, 1912, Ch. 327, 398.

*Zuni National Forest — Exchange of National Forest Timber for Privately Owned Lands in, 398.*

Act of March 4, 1913, Ch. 145, 398.

*National Forests — Reimbursement for Losses in Fire Fighting, etc. — Leaves of Absence to Employees in Alaska, 398.*

*National Forests — Additional Expenditures from Receipts to Construct Roads and Trails — Coöperation with State Authorities, 399.*

*Timber, Mineral, etc. Rights — Rights of Way, etc. — Reservations by Owners, Subject to Regulations, etc. 399.*

### CROSS-REFERENCES.

*Animal Game Preserve, see GAME ANIMALS AND BIRDS.*

*Forest Service, Injury to Employees, see LABOR.*

*See also PUBLIC LANDS; PUBLIC PARKS.*

An Act To amend the Act of February eighteenth, nineteen hundred and nine (Thirty-fifth Statutes at Large, page six hundred and twenty-six), entitled "An Act to create the Calaveras Big Tree National Forest, and for other purposes."

[Act of May 7, 1912, ch. 105.]

[SEC. 1.] [*Calaveras Big Tree National Forest, Cal.—conveyance of lands for, from owners — lands in exchange — national forest lands added.*] That the Act of February eighteenth, nineteen hundred and nine (Thirty-fifth Statutes at Large, page six hundred and twenty-six), entitled "An act to create the Calaveras Big Tree National Forest, and for other purposes," be amended as follows:

Omit therefrom the portion of the Act beginning with the word "any" at the end of the twelfth line on page six hundred and twenty-seven thereof to and including the word "or" in the twentieth line of said page, and substitute therefor the following: "one or both of the following ways: (1) They may be

given the right to file with the Secretary of the Interior, within sixty days after such conveyance, selections of surveyed, unappropriated, nonmineral public lands or of nonmineral national forest lands, and if the lands so selected shall be found subject to selection and of the actual value in lands and stumpage substantially equal to that of the lands and stumpage conveyed they may be patented to said owners in lieu of the conveyed lands: *Provided, however,* That in any case where any part of the lands selected is national forest land, the approval of the Secretary of Agriculture shall first be secured with respect to such part, or (2)." [37 Stat. L. 108.]

SEC. 2. [*Appropriation for expenses.*] That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of ten thousand dollars, or so much thereof as may be necessary, for the purposes of fully carrying out the provisions of this Act. [37 Stat. L. 108.]

The Act of Feb. 18, 1909, ch. 143, above amended, reads as follows:

*An Act To create the Calaveras Bigtrees National Forest, and for other purposes.*

That the Secretary of Agriculture, to secure and protect for all time the big trees scientifically known as Sequoia washingtoniana, is hereby empowered, in his discretion, to obtain for the United States the complete title to any or all of the following-described lands in the State of California: In township four north, range fifteen east, Mount Diablo meridian, the northeast quarter of section one; in township four north, range sixteen east, Mount Diablo meridian, the north half of section six; in township five north, range fifteen east, Mount Diablo meridian, the southwest quarter of section fourteen, south half of section fifteen, north half of section twenty-two, northwest quarter of section twenty-three, and southeast quarter of section thirty-six, and in township five north, range sixteen east, Mount Diablo meridian, the west half of section twenty-eight, the east half and southwest quarter of section twenty-nine, the southeast quarter of section thirty, all of sections thirty-one, thirty-two, and the northwest quarter of section thirty-three. And such area or areas, as fast as complete title is acquired, shall be permanently held by the United States and shall be known as the Calaveras Bigtree National Forest and shall be administered, and protected, by the Secretary of Agriculture from

the funds appropriated for the administration of National Forest land to prolong the existence, growth, and promote the reproduction of said big trees: *Provided,* That the owners of land acquired hereunder shall convey to the United States full title to any of the above-described areas approved for said national forest by the Secretary of Agriculture, the completeness of such title to be determined by the Secretary of the Interior in each case, and shall be reimbursed therefor only in any of all of three ways: They may be given the right to file with the Secretary of the Interior, within sixty days after any such conveyance, selections for an equal area of surveyed, unreserved, unappropriated, nonmineral public lands which, if found subject to such lieu selection, and of a value substantially equal to that of the amounts conveyed, may be patented to said owners in lieu of the land conveyed, and if any selection is rejected other selections may be made under conditions applicable to the one rejected; or the Secretary of Agriculture may grant to any such conveying owner the right to cut from national forest land an amount of timber and wood, substantially equal to the amount of timber and wood on the land acquired by the United States under the provisions of this Act: *Provided,* That nothing contained in this Act shall warrant an appropriation from the Treasury to carry out the terms of this Act. [35 Stat. L. 626.]

[*Expenses of surveying, etc., agricultural lands — work by forest service employees — sales of timber for domestic use — free timber to settlers.*]

\* \* \* For the expenditure under the direction of the Secretary of Agriculture for survey and listing of lands within forest reserves chiefly valuable for agriculture and describing the same by metes and bounds, or otherwise, as required by the Act of June eleventh, nineteen hundred and six, and the Act of March third, eighteen hundred and ninety-nine, thirty-five thousand dollars: *Provided, however,* That any such survey and the plat and field notes thereof paid for out of this appropriation shall be made by an employee of the Forest Service under the direction of the United States surveyor general, but no land

listed under the Act of June eleventh, nineteen hundred and six, shall pass from the forest until patent issues; That the Secretary of Agriculture, under such rules and regulations as he shall establish, is hereby authorized and directed to sell at actual cost, to homestead settlers and farmers, for their domestic use, the mature, dead, and down timber in national forests, but it is not the intent of this provision to restrict the authority of the Secretary of Agriculture to permit the free use of timber as provided in the Act of June fourth, eighteen hundred and ninety-seven. [37 Stat. L. 287.]

This is from the Agricultural Department      Supp. Fed. Stat. Annot. 662.  
Appropriation Act of Aug. 10, 1912, ch. 284.      For the Act of June 4, 1897, above referred  
For the Act of June 11, 1906, see 1909      to, see 7 Fed. Stat. Annot. 311.

**An Act To provide for the exchange of national forest timber in New Mexico for private lands lying within the exterior limits of the Zuni National Forest.**

[Act of August 22, 1912, ch. 327.]

[*Zuni national forest — exchange of national forest timber for privately owned lands in.*] That the Secretary of Agriculture, for the purpose of increasing the area of the timberland included within the Zuni National Forest by the addition thereto of certain privately owned timberland lying within the exterior limits of the said national forest, be, and the same is hereby, authorized and empowered, in his discretion, in behalf of the United States, to exchange timber within the Pecos national forest in New Mexico for privately owned timberlands embraced in the odd-numbered sections of township eleven north, range twelve west, New Mexico principal meridian, which are now within the exterior limits of the Zuni National Forest, New Mexico: *Provided*, That such exchange shall be made under the following conditions: The saw timber on such private lands shall be exchanged for the saw timber on such national forest lands, thousand feet for thousand feet; cordwood and posts from piñon and cedar on such private lands shall, after estimate and appraisal by forest officers, be exchanged for an equivalent value of national forest timber at an appraisal of not less than two dollars and fifty cents per thousand feet board measure; and the privately owned land at a valuation of not more than sixty-two and one-half cents per acre shall be exchanged for an equivalent value of national forest timber at an appraisal of not less than two dollars and fifty cents per thousand feet board measure: *Provided*, That the Attorney General of the United States shall first pass upon the title of the privately owned land to be exchanged under the provisions of this bill: *Provided further*, That the national forest timber to be so exchanged shall be cut under the rules and regulations promulgated by the Secretary of Agriculture for the cutting of timber on the national forests, and that the time within which such timber shall be removed shall be determined by the said Secretary of Agriculture: *And provided further*, That the land deeded to the United States under the provisions of this Act shall forthwith become a part of the Zuni National Forest. [37 Stat. L. 323.]

[*National forests — reimbursement for losses in fire fighting, etc. — leaves of absence to employees in Alaska.*] That hereafter the Secretary of Agriculture is authorized to reimburse owners of horses, vehicles, and other equipment

lost, damaged, or destroyed while being used for necessary fire fighting, trail, or official business, such reimbursement to be made from any available funds in the appropriation to which the hire of such equipment is properly chargeable.

That hereafter the employees of the Forest Service who are assigned to permanent duty in Alaska may, in the discretion of the Secretary of Agriculture, without additional expense to the Government, be granted leave of absence not to exceed thirty days in any one year, which leave may, in exceptional and meritorious cases where such an employee is ill, be extended, in the discretion of the Secretary of Agriculture, not to exceed thirty days additional in any one year. [37 Stat. L. 843.]

This and the two paragraphs following are from the Agricultural Department Appropriation Act of March 4, 1913, ch. 145.

[*National forests — additional expenditures from receipts to construct roads and trails — coöperation with state authorities.*] \* \* \* That hereafter an additional ten per centum of all moneys received from the national forests during each fiscal year shall be available at the end thereof, to be expended by the Secretary of Agriculture for the construction and maintenance of roads and trails within the national forests in the States from which such proceeds are derived; but the Secretary of Agriculture may, whenever practicable, in the construction and maintenance of such roads, secure the cooperation or aid of the proper State or Territorial authorities in the furtherance of any system of highways of which such roads may be made a part. [37 Stat. L. 843.]

[*Timber, mineral, etc., rights — rights of way, etc. — reservations by owners, subject to regulations, etc.*] \* \* \* That section nine of the Act of March first, nineteen hundred and eleven (Thirty-sixth Statutes, page nine hundred and sixty-one), entitled "An Act to enable any State to cooperate with any other State or States, or with the United States, for the protection of the watersheds of navigable streams, and to appoint a commission for the acquisition of lands for the purpose of conserving the navigability of navigable rivers," be amended to read as follows:

"That such acquisition by the United States shall in no case be defeated because of located or defined rights of way, easements, and reservations, which, from their nature will, in the opinion of the National Forest Reservation Commission and the Secretary of Agriculture, in no manner interfere with the use of the lands so encumbered, for the purposes of the Act: *Provided*, That such rights of way, easements, and reservations retained by the owner from whom the United States receives title, shall be subject to the rules and regulations prescribed by the Secretary of Agriculture for their occupation, use, operation, protection, and administration, and that such rules and regulations shall be expressed in and made part of the written instrument conveying title to the lands to the United States; and the use, occupation, and operation of such rights of way, easements, and reservations shall be under, subject to, and in obedience with the rules and regulations so expressed." [37 Stat. L. 855.]

For sec. 9 of the Act of March 1, 1911, here amended, see 1912 Supp. Fed. Stat. Annot. 392.

## **TOBACCO.**

*Tobacco Statistics, see CENSUS.*

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## **TOXINS.**

See *HEALTH AND QUARANTINE.*

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## **TRADE AGREEMENTS.**

See *CUSTOMS DUTIES.*

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## **TRADEMARKS.**

Act of January 8, 1913, Ch. 7, 400.  
*Marks Permitted Registry, 400.*

An Act Amending an Act entitled "An Act to authorize the registration of trade-marks used in commerce with foreign nations or among the several States or with the Indian tribes, and to protect the same."

[*Act of January 8, 1913, ch. 7.*]

[*Marks permitted registry.*] That the Act approved February twentieth, nineteen hundred and five, as amended, be, and the same is hereby, further amended so that section five thereof shall read as follows:

"SEC. 5. That no mark by which the goods of the owner of the mark may be



distinguished from other goods of the same class shall be refused registration as a trade-mark on account of the nature of such mark unless such mark—

“(a) Consists of or comprises immoral or scandalous matter.

“(b) Consists of or comprises the flag or coat of arms or other insignia of the United States or any simulation thereof, or of any State or municipality or of any foreign nation, or of any design or picture that has been or may hereafter be adopted by any fraternal society as its emblem, or of any name, distinguishing mark, character, emblem, colors, flag, or banner adopted by any institution, organization, club, or society which was incorporated in any State in the United States prior to the date of the adoption and use by the applicant: *Provided*, That said name, distinguishing mark, character, emblem, colors, flag, or banner was adopted and publicly used by said institution, organization, club, or society prior to the date of adoption and use by the applicant: *Provided*, That trade-marks which are identical with a registered or known trade-mark owned and in use by another and appropriated to merchandise of the same descriptive properties, or which so nearly resemble a registered or known trade-mark owned and in use by another and appropriated to merchandise of the same descriptive properties as to be likely to cause confusion or mistake in the mind of the public or to deceive purchasers shall not be registered: *Provided*, That no mark which consists merely in the name of an individual, firm, corporation, or association not written, printed, impressed, or woven in some particular or distinctive manner, or in association with a portrait of the individual, or merely in words or devices which are descriptive of the goods with which they are used, or of the character or quality of such goods, or merely a geographical name or term, shall be registered under the terms of this Act: *Provided further*, That no portrait of a living individual may be registered as a trade-mark except by the consent of such individual, evidenced by an instrument in writing: *And provided further*, That nothing herein shall prevent the registration of any mark used by the applicant or his predecessors, or by those from whom title to the mark is derived, in commerce with foreign nations or among the several States or with Indian tribes which was in actual and exclusive use as a trade-mark of the applicant, or his predecessors from whom he derived title, for ten years next preceding February twentieth, nineteen hundred and five: *Provided further*, That nothing herein shall prevent the registration of a trade-mark otherwise registrable because of its being the name of the applicant or a portion thereof.” [37 Stat. L. 649.]

# TRADE UNIONS AND COMBINATIONS AND TRUSTS.

Act of February 12, 1913, Ch. 40, 402.

*Anti-trust Provisions—Trusts, etc., in Restraint of Import Trade Declared Void, 402.*

## CROSS-REFERENCE.

*Depositions in Anti-trust Cases to Be Taken in Public, see EVIDENCE.*

An Act To amend section seventy-three and section seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes."

[Act of February 12, 1913, ch. 40.]

[*Anti-trust provisions — trusts, etc., in restraint of import trade declared void.*] That section seventy-three and section seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," be, and the same are hereby, amended to read as follows:

"SEC. 73. That every combination, conspiracy, trust, agreement, or contract is hereby declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. Every person who is or shall hereafter be engaged in the importation of goods or any commodity from any foreign country in violation of this section of this Act, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and on conviction thereof in any court of the United States such person shall be fined in a sum not less than one hundred dollars and not exceeding five thousand dollars, and shall be further punished by imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months."

"SEC. 76. That any property owned under any contract or by any combination, or pursuant to any conspiracy, and being the subject thereof, mentioned in section seventy-three of this Act, imported into and being within the United States or being in the course of transportation from one State to another, or to or from a Territory or the District of Columbia, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law." [37 Stat. L. 667.]

For secs. 73, 76, of the Act of Aug. 27, 1894, as originally enacted, see 7 Fed. Stat. Annot. 346, 347.

## TREASURY DEPARTMENT.

Act of August 23, 1912, Ch. 350, 403.

*Supervising Architect of the Treasury — Estimates to be Submitted for Office Services, 403.*

*Administrative Examination of Accounts by Heads of Bureaus — Duties of Disbursing Clerks, 403.*

*Postal Savings System Accounts — Employees Authorized to Audit — Advances — Estimates to be Submitted, 404.*

*Postal Savings System — Advances — Estimates to be Submitted, 404.*

Act of August 24, 1912, Ch. 355, 404.

*Enforcing Laws Relating to the Treasury — Details Permitted, 404.*

Act of August 24, 1912, Ch. 374, 405.

*Auditor of Railroad Accounts — Office Abolished, 405.*

Act of March 4, 1913, Ch. 142, 405.

*Details from Offices of Assistant Treasurers, 405.*

Act of June 23, 1913, Ch. 3, 405.

*Enforcing Laws Relating to the Treasury — Details Permitted, 405.*

### CROSS-REFERENCES.

See COINAGE, MINTS, AND ASSAY OFFICES; CUSTOMS DUTIES; REVENUE CUTTER SERVICE.

[*Supervising architect of the treasury — estimates to be submitted for office services.*] \* \* \* For the fiscal year nineteen hundred and fourteen and annually thereafter specific estimates shall be submitted for salaries for all personal services of the foregoing character required in the office of the Supervising Architect of the Treasury, and except as appropriations may be made thereunder no such personal services shall be employed in said office at Washington, District of Columbia. [*§7 Stat. L. 375.*]

"Services of the foregoing character" relate to services of employees paid from general expenses of public buildings. See 37 Stat. L. 375.

[*Administrative examination of accounts by heads of bureaus — duties of disbursing clerks.*] \* \* \* Hereafter the administrative examination of all public accounts, preliminary to their audit by the accounting officers of the Treasury, shall be made as contemplated by the so-called Dockery Act, approved July thirty-first, eighteen hundred and ninety-four, and all vouchers and pay rolls shall be prepared and examined by and through the administrative heads of divisions and bureaus in the executive departments and not by the disbursing clerks of said departments, except those vouchers heretofore prepared outside of Washington may continue to be so prepared and the disbursing

officers shall make only such examination of vouchers as may be necessary to ascertain whether they represent legal claims against the United States. [37 Stat. L. 375.]

For the Act of July 31, 1894, see 7 Fed. Stat. Annot. 332.

[*Postal Savings System accounts — employees authorized to audit — advances — estimates to be submitted.*] \* \* \* Postal Savings System, Audit of the Accounts of, Office of Auditor for the Post Office Department.—The Secretary of the Treasury may employ such number of clerks and employees of the several classes and at the several rates of compensation recognized by law, and expend such sums for contingent and miscellaneous items, as may be necessary, in his judgment, to audit the accounts of the postal savings system in the Office of the Auditor for the Post Office Department: *Provided*, That the money required to pay such clerks and employees, and contingent and miscellaneous items, not exceeding \$50,000 for the fiscal year nineteen hundred and thirteen, shall be advanced to the Secretary of the Treasury at regular intervals out of any available appropriation for the establishment, maintenance, and extension of postal-savings depositories: *Provided further*, That estimates hereunder shall be submitted in detail for the fiscal year nineteen hundred and fourteen and annually thereafter. [37 Stat. L. 376.]

[*Postal Savings System — advances — estimates to be submitted.*] \* \* \* Salaries, force employed on work of the Postal Savings System in the office of the Treasurer of the United States (reimbursable): The Secretary of the Treasury may employ such number of clerks and employees of the several classes and at the several rates of compensation recognized by law, and expend such sums for contingent and miscellaneous items, as may be necessary, in his judgment, to transact the business of the Postal Savings System in the office of the Treasurer of the United States: *Provided*, That the money required to pay such clerks and employees, and contingent and miscellaneous items, not exceeding \$18,000 for the fiscal year nineteen hundred and thirteen, shall be advanced to the Secretary of the Treasury at regular intervals out of any available appropriation for the establishment, maintenance, and extension of postal savings depositories: *Provided further*, That estimates hereunder shall be submitted in detail for the fiscal year nineteen hundred and fourteen, and annually thereafter. [37 Stat. L. 377.]

The four paragraphs above are from the Legislative, Executive, and Judicial Appropriation Act of Aug. 23, 1912, ch. 350.

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[*Enforcing laws relating to the Treasury — details permitted.*] \* \* \* The Secretary of the Treasury is authorized to use for, and in connection with; the enforcement of the laws relating to the Treasury Department and the several branches of the public service under its control, not exceeding at any one time four persons paid from the appropriation for the collection of customs, four persons paid from the appropriation for salaries and expenses of internal-revenue agents or from the appropriation for the foregoing purpose, and four persons paid from the appropriation for suppressing counterfeiting and other crimes, but not exceeding six persons so detailed shall be employed at any one time hereunder: *Provided*, That nothing herein contained shall be construed to

deprive the Secretary of the Treasury from making any detail now otherwise authorized by existing law. [37 Stat. L. 431.]

This is from the Sundry Civil Appropriation Act of Aug. 24, 1912, ch. 355.

An Act To amend "An Act to create an Auditor of Railroad Accounts, and for other purposes," approved June nineteenth, eighteen hundred and seventy-eight, as amended by the Acts of March third, eighteen hundred and eighty-one, and March third, nineteen hundred and three, and for other purposes.

[Act of August 24, 1912, ch. 374.]

[*Auditor of railroad accounts — office abolished.*] That the Act of Congress approved June nineteenth, eighteen hundred and seventy-eight (Twenty-second Statutes, page one hundred and sixty-nine), entitled "An Act to create an Auditor of Railroad Accounts, and for other purposes," as amended by the Act of Congress approved March third, eighteen hundred and eighty-seven (Twenty-first Statutes, page four hundred and nine), entitled "An Act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-two; and for other purposes," as amended by the Act of March third, nineteen hundred and three (Thirty-second Statutes, page eleven hundred and nineteen), entitled "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes," be, and it is hereby, repealed. [37 Stat. L. 503.]

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[*Details from offices of assistant treasurers.*] \* \* \* The Secretary of the Treasury is authorized, from the date of passage of this Act until June thirtieth, nineteen hundred and fourteen, to detail such employees in the offices of Assistant Treasurers as may be necessary for duty in the District of Columbia in the office of the Treasurer of the United States. [37 Stat. L. 755.]

This is from the Legislative, Executive, and Judicial Appropriation Act of March 4, 1913, ch. 142.

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[*Enforcing laws relating to the Treasury — details permitted.*] \* \* \* The Secretary of the Treasury is authorized to use for, and in connection with, the enforcement of the laws relating to the Treasury Department and the several branches of the public service under its control, not exceeding at any one time four persons paid from the appropriation for the collection of customs, four persons paid from the appropriation for salaries and expenses of internal-revenue agents or from the appropriation for the foregoing purpose, and four persons paid from the appropriation for suppressing counterfeiting and other crimes, but not exceeding six persons so detailed shall be employed at any one time hereunder: *Provided*, That nothing herein contained shall be construed to deprive the Secretary of the Treasury from making any detail now otherwise authorized by existing law. [38 Stat. L. 20.]

This is from the Sundry Civil Appropriation Act of June 23, 1913, ch. 3.

## **TREES.**

**See** *TIMBER LANDS AND FOREST RESERVES.*

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## **TRUSTS.**

**See** *TRADE UNIONS AND COMBINATIONS AND TRUSTS.*

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## **VESSELS.**

**See** *SHIPPING AND NAVIGATION.*

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## **VIRUSES.**

**See** *HEALTH AND QUARANTINE.*

## WAR DEPARTMENT AND MILITARY ESTABLISHMENT.

Act of March 4, 1912, Ch. 50, 408.

*Army—Female Nurse Corps Allowed Cumulative Leaves of Absence, 408.*

Act of May 29, 1912, Ch. 143, 408.

*Sec. 1. Fort Oglethorpe, Ga.—Made Army Brigade Post, 408.*

*2. Chickamauga and Chattanooga Military Park—Buildings for Troops Authorized in—Estimates to be Submitted, 408.*

Act of June 6, 1912, Ch. 157, 409.

*Board of Ordnance and Fortification—Right to Use Inventions, 409.*

Act of July 17, 1912, Ch. 236, 409.

*Ordnance Department Employees Offered Rewards for Suggestions of Improvements, etc. 409.*

Act of August 22, 1912, Ch. 329, 410.

*Discharges from Army and Navy—Issue in Real Name Authorized when Enlisted under Assumed—Restriction, 410.*

Act of August 23, 1912, Ch. 350, 410.

*Signal Service—Skilled Draftsmen, etc. 410.*

*Office of Chief of Engineers—Skilled Draftsmen, etc. 410.*

*Ordnance Bureau—Skilled Draftsmen, etc. 410.*

Act of August 24, 1912, Ch. 391, 411.

*Sec. 1. Restriction on Details of Officers Below Major, 411.*

*Duty in War Department Forbidden, 411.*

*Acting Commissaries—Additional Pay, 411.*

*Double Time for Foreign Service Abolished—Accrued Time Not Affected, 412.*

*Female Nurse Corps—Superintendent—Allowances, 412.*

*Mileage Allowance—Retirement Age for Paymasters' Clerks, 412.*

*Extra Pay to Enlisted Men for Reporting, 412.*

*Discharge of Enlisted Men—Transportation Allowed to Place of Original Enlistment—Selection of Other Place, etc. 412.*

*Increase of Pay for Foreign Service—Not Applicable to Canal Zone, etc. 412.*

*Checks to Indorsee of Pay Accounts Permitted—Effect of Payment, 412.*

*Annual Statement of Sales Not Required, 413.*

*Secretary of War to Adjust and Report on Claims, 413.*

*Payment for Sales, etc. to other Bureaus or Departments—Price, etc. 413.*

*2. Army Reserve, 413.*

*3. Quartermaster Corps, 415.*

*4. Civilian Employees to be Replaced by Enlisted Men in Quartermaster Corps, 417.*

5. *General Staff Corps*, 417.

6. *Service as Cadet Not to Be Counted as Officer's Service*, 418.

7. *Appropriations of Departments Available for Consolidated Corps*, 418.

8. *No Officer's Rank Diminished, etc.* 418.

Act of March 2, 1913, Ch. 93, 418.

*Aviation Duty — Increase of Pay — Detail Limited — Tour of Detail — Total of Officers Not Increased*, 418.

*Staff Service with Troop, etc., Deemed Line Duty — Performance of Quartermaster Corps Duty by Regimental, etc., Staff Officers*, 418.

*Judge Advocate General's Department — Number of Majors*, 419.

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#### CROSS-REFERENCES.

*American Red Cross*, see CHARITIES.

*Army Officer, Authority in Canal Zone*, see RIVERS, HARBORS AND CANALS.

*Export of War Material*, see IMPORTS AND EXPORTS.

*Forfeiture by Desertion*, see CITIZENSHIP.

*Improper Enlistments in Military Service*, see ARTICLES FOR THE GOVERNMENT OF THE NAVY.

*National Military Park*, see PUBLIC PARKS.

*Soldiers' Homes*, see HOSPITALS AND ASYLUMS.

And see generally, ARTICLES OF WAR; MILITARY ACADEMY.

An Act Relative to members of the Female Nurse Corps serving in Alaska or at places without the limits of the United States.

[Act of March 4, 1912, ch. 50.]

[*Army — Female Nurse Corps allowed cumulative leaves of absence.*] That the superintendent and members of the Female Nurse Corps when serving in Alaska or at places without the limits of the United States may be allowed the same privileges in regard to cumulative leaves of absence and method of computation of same as are now allowed by law to Army officers so serving. [37 Stat. L. 72.]

An Act Authorizing the Secretary of War to convert the regimental Army post at Fort Oglethorpe into a brigade post.

[Act of May 29, 1912, ch. 143.]

[SEC. 1.] [*Fort Oglethorpe, Ga. — made army brigade post.*] That the Secretary of War be, and he is hereby, authorized to convert the regimental Army post at Fort Oglethorpe, Georgia, into a brigade post. [37 Stat. L. 119.]

SEC. 2. [*Chickamauga and Chattanooga Military Park — buildings for troops authorized in — estimates to be submitted.*] That the Secretary of War, in his discretion, may locate and construct buildings necessary for the



use and accommodation of the troops of the brigade at any point in the Chickamaugua [*sic*] and Chattanooga National Military Park, whether the same be contiguous to Fort Oglethorpe or not, said buildings to be used for the accommodation of part of the brigade to be located at Fort Oglethorpe: *Provided*, That for the fiscal year nineteen hundred and fourteen and thereafter the Secretary of War shall submit detailed estimates of any buildings and improvements to be made at said post to Congress for its approval before proceeding further to the construction thereof. [37 Stat. L. 119.]

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[*Board of ordnance and fortification — right to use inventions.*] That before any money shall be expended in the construction or test of any gun, gun carriage, ammunition, or implements under the supervision of the said board, [of ordnance and fortification] the board shall be satisfied, after due inquiry, that the Government of the United States has a lawful right to use the inventions involved in the construction of such gun, gun carriage, ammunition, or implements, or that the construction or test is made at the request of a person either having such lawful right or authorized to convey the same to the Government. [37 Stat. L. 129.]

This is from the Fortifications Appropriation Act of June 6, 1912, ch. 157.

An Act Authorizing the Secretary of War to pay a cash reward for suggestions submitted by employees of certain establishments of the Ordnance Department for improvement or economy in manufacturing processes or plant.

[Act of July 17, 1912, ch. 236.]

[*Ordnance department employees offered rewards for suggestions of improvements, etc.*] That the Secretary of War is hereby authorized to offer periodically at such of the establishments of the Ordnance Department as he may select a cash reward for the suggestion, or series of suggestions, for an improvement or economy in manufacturing processes or plant, submitted within the period by one or more employees of the establishment which shall be deemed the most valuable of those submitted and adopted for use: *Provided*, That to obtain this reward the winning suggestion must be one that will clearly effect a material economy in production or increase efficiency or enhance the quality of the product in comparison with its cost and in the opinion of the Secretary shall be so worthy as to entitle the employee making the same to receive the reward: *Provided further*, That the sums awarded to employees in accordance with this Act shall be paid them in addition to their usual compensation and shall constitute part of the general or shop expense of the establishment: *Provided further*, That the total amount paid under the provisions of this Act shall not exceed one thousand dollars for any one month: *And provided further*, That no employee shall be paid a reward under this Act until he has properly executed an agreement to the effect that the use by the United States of the suggestion, or series of suggestions, made by him shall not form the basis of a further claim of any nature upon the United States by him, his heirs, or assigns, and that application for patent has not been made for the invention. [37 Stat. L. 193.]

An Act For the relief of soldiers and sailors who enlisted or served under assumed names, while minors or otherwise, in the Army or Navy of the United States during any war with any foreign nation or people.

[Act of August 22, 1912, ch. 329.]

[*Discharges from army and navy — issue in real name authorized when enlisted under assumed — restriction.*] That the Secretary of War and the Secretary of the Navy be, and they are hereby, authorized and required to issue certificates of discharge or orders of acceptance of resignation, upon application and proof of identity, in the true name of such persons as enlisted or served under assumed names, while minors or otherwise, in the Army or Navy during any war between the United States and any other nation or people and were honorably discharged therefrom. Applications for said certificates of discharge or amended orders of resignation may be made by or on behalf of persons entitled to them, but no such certificate or order shall be issued where a name was assumed to cover a crime or to avoid its consequence. [37 Stat. L. 324.]

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[*Signal service — skilled draftsmen, etc.*] \* \* \* The services of skilled draftsmen and such other services as the Secretary of War may deem necessary may be employed only in the Signal Office to carry into effect the various appropriations for fortifications and other works of defense and for the Signal Service of the Army, to be paid from such appropriations, in addition to the foregoing employees appropriated for in the Signal Office: *Provided*, That the entire expenditures for this purpose for the fiscal year ending June thirtieth, nineteen hundred and thirteen, shall not exceed \$25,000, and that the Secretary of War shall each year in the annual estimates report to Congress the number of persons so employed, their duties, and the amount paid to each. [37 Stat. L. 386.]

This and the two paragraphs following are from the Legislative, Executive, and Judicial Appropriation Act of Aug. 23, 1912, ch. 350.

[*Office of chief of engineers — skilled draftsmen, etc.*] \* \* \* And the services of skilled draftsmen, civil engineers, and such other services as the Secretary of War may deem necessary, may be employed only in the office of the Chief of Engineers, to carry into effect the various appropriations for rivers and harbors, fortifications, and surveys, to be paid from such appropriations: *Provided*, That the expenditures on this account for the fiscal year nineteen hundred and thirteen shall not exceed \$42,000; and that the Secretary of War shall each year, in the annual estimates, report to Congress the number of persons so employed, their duties, and the amount paid to each. [37 Stat. L. 387.]

[*Ordnance bureau — skilled draftsmen, etc.*] \* \* \* The services of skilled draftsmen and such other services, not clerical, as the Secretary of War may deem necessary, may be employed in the office of the Chief of Ordnance to carry into effect the various appropriations for the armament of fortifications and for the arming and equipping of the Organized Militia, to be paid from such appropriations, in addition to the amount specifically appropriated for draftsmen in the Army Ordnance Bureau: *Provided*, That the entire expenditures for this purpose for the fiscal year ending June thirtieth,

nineteen hundred and thirteen, shall not exceed \$45,000, and that the Secretary of War shall each year in the annual estimates report to Congress the number of persons so employed, their duties, and the amount paid to each. [37 Stat. L. 387.]

**An Act Making appropriation for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and thirteen, and for other purposes.**

[Act of Aug. 24, 1912, ch. 391.]

[SEC. 1.] [*Restriction on details of officers below major.*] \* \* \* That on and after December fifteenth, nineteen hundred and twelve in time of peace whenever any officer holding a permanent commission in the line of the Army with rank below that of major shall not have been actually present for duty for at least two of the last preceding six years with a troop, battery, or company, of that branch of the Army in which he shall hold said commission, such officer shall not be detached nor permitted to remain detached from such troop, battery, or company, for duty of any kind; and all pay and allowances shall be forfeited by any superior for any period during which, by his order, or his permission, or by reason of his failure or neglect to issue or cause to be issued the proper order or instructions at the proper time, any officer shall be detached or permitted to remain detached in violation of any of the terms of this proviso; but nothing in this proviso shall be held to apply in the case of any officer for such period as shall be actually necessary for him, after having been relieved from detached service, to join the troop, battery, or company, to which he shall belong in that branch in which he shall hold a permanent commission, nor shall anything in this proviso be held to apply to the detachment or detail of officers for duty in the Judge Advocate General's Department or in the Ordnance Department, or in connection with the construction of the Panama Canal until after such canal shall have been formally opened, or in the Philippine Constabulary until the first day of January, nineteen hundred and fourteen, or to any officer detailed, or who may be hereafter detailed, for aviation duty. And hereafter no officer holding a permanent commission in the Army with rank below that of major shall be detailed as assistant to the Chief of the Bureau of Insular Affairs with rank of colonel, or as commanding officer of the Porto Rico Regiment of Infantry, or as chief or assistant chief (Director or Assistant Director) of the Philippine Constabulary, and no other officers of the Army shall hereafter be detailed for duty with the said Constabulary except as specifically provided by law. [37 Stat. L. 571.]

The above provision was amended to read as here given by Res. No. 53 of Aug. 24, 1912. The amendment consisted in insert-

ing the words "on and after December fifteenth nineteen hundred and twelve" in the first line instead of the word "hereafter."

[*Duty in War Department forbidden.*] \* \* \* That no clerk, messenger, or laborer at headquarters of divisions, departments, posts commanded by general officers, or office of the Chief of Staff shall be assigned to duty with any bureau in the War Department. [37 Stat. L. 573.]

[*Acting commissaries — additional pay.*] \* \* \* That so much of section twelve hundred and sixty-one of the Revised Statutes as pertains to additional pay for acting commissaries be, and the same is hereby, repealed. [37 Stat. L. 574.]

[*Double time for foreign service abolished — accrued time not affected.*] \* \* \* That in computing length of service for retirement credit for double time for foreign service shall not be given to those who hereafter enlist: *And provided further*, That nothing in this provision shall be so construed as to forfeit credit for double time already accrued. [37 Stat. L. 575.]

[*Female Nurse Corps — superintendent — allowances.*] \* \* \* For pay of one Superintendent Nurse Corps, one thousand eight hundred dollars: *Provided*, That the superintendent shall receive such allowances of quarters, subsistence and medical care during illness as may be prescribed in regulations by the Secretary of War. [37 Stat. L. 575.]

[*Mileage allowance — retirement age for paymasters' clerks.*] \* \* \* That hereafter Army paymasters' clerks and the expert accountant, Inspector General's Department, shall receive mileage at the same rates and under the same conditions as is provided by law for officers of the Army: *Provided further*, That hereafter the age limit for the retirement of Army paymasters' clerks shall be the same as the age limit for the retirement of commissioned officers of the Army. [37 Stat. L. 575.]

[*Extra pay to enlisted men for reporting.*] \* \* \* That hereafter enlisted men may be detailed to serve as stenographic reporters for general courts-martial, courts of inquiry, military commissions, and retiring boards, and while so serving shall receive extra pay at the rate of not exceeding five cents for each one hundred words taken in shorthand and transcribed, such extra pay to be met from the annual appropriation for expenses of courts-martial, and so forth. [37 Stat. L. 575.]

[*Discharge of enlisted men — transportation allowed to place of original enlistment — selection of other place, etc.*] \* \* \* That hereafter when an enlisted man is discharged from the service, except by way of punishment for an offense, he shall be entitled to transportation in kind and subsistence from the place of his discharge to the place of his enlistment, or to such other place within the continental limits of the United States as he may select, to which the distance is no greater than from the place of discharge to place of enlistment; but if the distance be greater he may be furnished with transportation in kind and subsistence for a distance equal to that from place of discharge to place of enlistment, or, in lieu of such transportation and subsistence, he shall, if he so elects, receive two cents a mile, except for sea travel, from the place of his discharge to the place of his enlistment. [37 Stat. L. 576.]

[*Increase of pay for foreign service — not applicable to Canal Zone, etc.*] \* \* \* That hereafter the laws allowing increase of pay to officers and enlisted men for foreign service shall not apply to service in the Canal Zone, Panama, or Hawaii or Porto Rico. [37 Stat. L. 576.]

[*Checks to indorsee of pay accounts permitted — effect of payment.*] \* \* \* That section thirty-six hundred and twenty, Revised Statutes, as amended by the Act of Congress approved February twenty-seventh, eighteen hundred and seventy-seven, shall not be construed as precluding Army paymasters from drawing checks in favor of the person or institution designated by indorsement made on his monthly pay account by any officer of the Army if the pay account has been deposited for payment on maturity in conformity with such regula-

tions as the Secretary of War may prescribe: *Provided further*, That payment by the United States of a check on the indorsement of the indorsee specified on the pay account shall be a full acquittance for the amount due on the pay account. [37 Stat. L. 577.]

For R. S. sec. 3620, see 6 Fed. Stat. Annot. 550.

[*Annual statement of sales not required.*] \* \* \* That hereafter the provisions of section five of the Act of June thirtieth, nineteen hundred and six (Thirty-fourth Statutes, page seven hundred and sixty-three), shall not be construed to apply to the Subsistence Department. [37 Stat. L. 579.]

For sec. 5 of the Act of June 30, 1906, see 1909 Supp. Fed. Stat. Annot. 565.

[*Secretary of War to adjust and report on claims.*] \* \* \* That hereafter the Secretary of War is authorized to consider, ascertain, adjust, and determine the amounts due on all claims for damages to and loss of private property when the amount of the claim does not exceed the sum of one thousand dollars, occasioned by heavy gun fire and target practice of troops, and for damages to vessels, wharves, and other private property, found to be due to maneuvers or other military operations for which the Government is responsible, and report the amounts so ascertained and determined to be due the claimants to Congress at each session thereof through the Treasury Department for payment as legal claims out of appropriations that may be made by Congress therefor. [37 Stat. L. 586.]

[*Payment for sales, etc., to other bureaus or departments — price, etc.*] \* \* \* That hereafter when authorized transfers or sales of ordnance or ordnance stores are made to another bureau of the War Department, or to another executive department of the Government, payment therefor shall be made by the proper disbursing officer of the bureau, office, or department concerned. When the transaction is between two bureaus of the War Department, the price to be charged shall be the cost price of the stores, including the cost of inspection. When the transaction is between the Ordnance Department and another executive department of the Government, the price to be charged shall include the cost price of the stores and the costs of inspection and transportation. [37 Stat. L. 589.]

SEC. 2. [*Army Reserve.*] That, for the purpose of utilizing as an auxiliary to the Army Reserve hereinafter provided for the services of men who have had experience and training in the Regular Army, in time of war or when war is imminent, and after the President shall, by proclamation, have called upon honorably discharged soldiers of the Regular Army to present themselves for reenlistment therein within a specified period, subject to such conditions as may be prescribed in said proclamation, any person who shall have been discharged honorably from said Army, with character reported as at least good, and who having been found physically qualified for the duties of a soldier, if not over forty-five years of age, shall reenlist in the line of said Army or in the Signal or Hospital Corps thereof within the period that shall be specified in said proclamation, shall receive on so reenlisting a bounty which shall be computed at the rate of eight dollars for each month for the first year of the period that shall have elapsed since his last discharge from the Regular Army and the date of his reenlistment therein under the terms of said proclamation; at the rate of six dollars per month for the second year of such period; at the rate of four dollars

per month for the third year of such period; and at the rate of two dollars per month for any subsequent year of such period, but no bounty in excess of nine hundred dollars shall be paid to any person under the terms of this Act.

And that on and after November first, nineteen hundred and twelve, all enlistments in the Regular Army shall be for the term of seven years, the first four years in the service with the organizations of which those enlisting shall form a part, and, except as otherwise provided herein, the last three years in furlough and attached to the Army Reserve hereinafter provided for: *Provided*, That at the expiration of four years' continuous service with such organizations, either under a first or any subsequent enlistment, any soldier may be reenlisted for another period of seven years, as above provided for, in which event he shall receive his final discharge from his prior enlistment: *Provided further*, That any enlisted man, at the expiration of three years' continuous service with such organizations, either under a first or any subsequent enlistment, upon his written application, may be furloughed and transferred to the Army Reserve, in the discretion of the Secretary of War, in which event he shall not be entitled to reenlist in the service until the expiration of his term of seven years: *Provided further*, That for all enlistments hereafter accomplished under the provisions of this Act, four years shall be counted as an enlistment period in computing continuous-service pay: *Provided further*, That hereafter the Army Reserve shall consist of all enlisted men who, after having served not less than four years with the organizations of which they form a part, shall receive furloughs without pay or allowances until the expiration of their terms of enlistment, together with transportation in kind and subsistence as provided for by this Act in the case of discharged soldiers, but when any soldier is furloughed to the Reserve his accounts shall be closed and he shall be paid in full to the date such furlough becomes effective: *Provided further*, That any enlisted man, subject to good conduct and physical fitness for duty, upon his written application to that effect, shall have the right of remaining with the organization to which he belongs until the completion of his whole enlistment, without passing into the Reserve: *Provided further*, That except upon reenlistment after four years' service or as now otherwise provided for by law, no enlisted man shall receive a final discharge until the expiration of his seven-year term of enlistment, including his term of service in the Army Reserve, but any such enlisted man may be reenlisted for a further term of seven years under the same conditions in the Army at large, or, in the discretion of the Secretary of War, for a term of three years in the Army Reserve; and any person who may have been discharged honorably from the Regular Army, with character reported as at least good, and who has been found physically qualified for the duties of a soldier, if not over forty-five years of age, may be enlisted in the Army Reserve for a similar term of three years: *And provided further*, That in the event of actual or threatened hostilities the President, when so authorized by Congress, may summon all furloughed soldiers who belong to the Army Reserve to rejoin their respective organizations, and during the continuance of their service with such organizations they shall receive the pay and allowances authorized by law for soldiers serving therein, and any enlisted man who shall have reenlisted in the Army Reserve shall receive during such service the additional pay now provided by law for the soldiers of his arm of the service in their second enlistment period. Upon reporting for duty, and being found physically fit for service, they shall receive a sum equal to five dollars per month for each month during which they shall have belonged to the Reserve, as well as the actual cost of

transportation and subsistence from their homes to the places at which they may be ordered to report for duty under such summons. [37 Stat. L. 590.]

SEC. 3. [*Quartermaster Corps.*] That the office establishments of the Quartermaster General, the Commissary General, and the Paymaster General of the Army are hereby consolidated and shall hereafter constitute a single bureau of the War Department, which shall be known as the Quartermaster Corps, and of which the Chief of the Quartermaster Corps created by this Act shall be the head. The Quartermaster's, Subsistence, and Pay Departments of the Army are hereby consolidated into and shall hereafter be known as the Quartermaster Corps of the Army. The officers of said departments shall hereafter be known as officers of said corps and by the titles of the rank held by them therein, and, except as hereinafter specifically provided to the contrary, the provisions of sections twenty-six and twenty-seven of the Act of Congress approved February second, nineteen hundred and one, entitled "An Act to increase the efficiency of the permanent military establishment of the United States," are hereby extended so as to apply to the Quartermaster Corps in the manner and to the extent to which they now apply to the Quartermaster's, Subsistence, and Pay Departments, and the provision[s] of said sections of said Act relative to chiefs of staff corps and departments shall, so far as they are applicable, apply to all offices and officers of the Quartermaster Corps with rank above that of colonel. The officers now holding commissions as officers of the said departments shall hereafter have the same tenure of commission in the Quartermaster Corps, and as officers of said corps shall have rank of the same grades and dates as that now held by them, and, for the purpose of filling vacancies among them, shall constitute one list, on which they shall be arranged according to rank. So long as any officers shall remain on said list any vacancy occurring therein shall be filled, if possible, from among such officers, by selection if the vacancy occurs in a grade above that of colonel, and, if the vacancy occurs in a grade not above that of colonel, by the promotion of an officer who would have been entitled to promotion to that particular vacancy if the consolidation of departments hereby prescribed had never occurred: *Provided*, That on and after the first day of January, nineteen hundred and seventeen, any vacancies occurring among officers of the Quartermaster Corps with rank above that of colonel may, in the discretion of the President, be filled by selection from among officers who shall have served by detail in said corps for not less than four years: *Provided further*, That not to exceed six officers holding commissions with the rank of captain in the Quartermaster Corps and who have lost in relative rank through irregularities of promotion and the operation of separate promotion within the three departments hereby consolidated, may, in the discretion of the President and subject to examination for promotion as prescribed by law, be advanced to the grade of major in the Quartermaster Corps, and any officer who shall be advanced to said grade under the terms of this proviso shall be temporarily an additional officer of said grade but only until a vacancy shall occur for him on the list of officers of said grade as hereafter limited; and no officer shall be detailed to fill any vacancy on the list of majors of the Quartermaster Corps until after all additional officers authorized by the proviso shall have been absorbed. The noncommissioned officers now known as post quartermaster sergeants and post commissary sergeants shall hereafter be known as quartermaster sergeants; the Army paymaster's clerks shall be known as pay clerks, and each of said noncommissioned officers and pay clerks shall continue to have the pay, allowances, rights, and privileges now allowed him by law: *Provided further*,

That no details to fill vacancies in the grade of colonel in the Quartermaster Corps shall be made until the number of officers of that grade shall have been reduced by three, and thereafter the number of officers in that grade shall not exceed twelve; and no details to fill vacancies in the grade of lieutenant-colonel in the Quartermaster Corps shall be made until the number of officers of that grade shall have been reduced by three, and thereafter the number of officers of that grade shall not exceed eighteen; and no details to fill vacancies in the grade of major in the Quartermaster Corps shall be made until the number of officers of that grade shall have been reduced by nine, and thereafter the number of officers in said grade shall not exceed forty-eight; and no details to fill vacancies in the grade of captain in the Quartermaster Corps shall be made until after the number of officers of that grade shall be reduced by twenty-nine, and thereafter the number of officers of said grade shall not exceed one hundred and two; and whenever the separation of a line officer of any grade and arm from the Quartermaster Corps shall create therein a vacancy that, under the terms of this proviso, can not be filled by detail such separation shall operate to make a permanent reduction of one in the total number of officers of said grade and arm in the line of the Army as soon as such reduction can be made without depriving any officer of his commission: *Provided further*, That whenever the Secretary of War shall decide that it is necessary and practicable, regimental, battalion, and squadron quartermasters and commissaries shall be required to perform any duties that junior officers of the Quartermaster Corps may properly be required to perform, and regimental and battalion quartermaster and commissary sergeants shall be required to perform any duties that noncommissioned officers or pay clerks of the Quartermaster Corps may properly be required to perform, but such regimental, battalion and squadron quartermasters and commissaries shall not be required to receipt for any money or property which does not pertain to their respective regiments, battalions, or squadrons, and they shall not be separated from the organization to which they belong: *Provided further*, That such duty or duties as are now required by law to be performed by any officer or officers of the Quartermaster's, Subsistence, or Pay Departments shall hereafter be performed by such officer or officers of the Quartermaster Corps as the Secretary of War may designate for the purpose: *Provided further*, That there shall be a Chief of the Quartermaster Corps, who shall have the rank of major general while so serving, and who shall be appointed by the President, by and with the advice and consent of the Senate, from among the officers of said corps and in accordance with the requirements of section twenty-six of the Act of Congress approved February second, nineteen hundred and one, hereinbefore cited: *Provided further*, That when the first vacancy in the grade of brigadier general in the Quartermaster Corps, except a vacancy caused by the expiration of a limited term of appointment, shall hereafter occur that vacancy shall not be filled, but the office in which the vacancy occurs shall immediately cease and determine: *Provided further*, That the Quartermaster Corps shall be subject to the supervision of the Chief of Staff to the extent the departments hereby consolidated into said corps have heretofore been subject to such supervision under the terms of the existing law: *And provided further*, That for the purpose of carrying into effect the provisions of this section the President is hereby authorized to appoint, by and with the advice and consent of the Senate, the Chief of the Quartermaster Corps herein provided for immediately upon the passage of this Act, and it shall be the duty of the said chief, under the direction of the President and the



Secretary of War, to put into effect the provisions of this section not less than sixty days after the passage of this Act. [37 Stat. L. 591.]

SEC. 4. [*Civilian employees to be replaced by enlisted men in Quartermaster Corps.*] That as soon as practicable after the creation of a Quartermaster Corps in the Army not to exceed four thousand civilian employees of that corps, receiving a monthly compensation of not less than thirty dollars nor more than one hundred and seventy-five dollars each, not including civil engineers, superintendents of construction, inspectors of clothing, clothing examiners, inspectors of supplies, inspectors of animals, chemists, veterinarians, freight and passenger rate clerks, civil service employees, and employees of the classified service, employees of the Army transport service and harbor-boat service, and such other employees as may be required for technical work, shall be replaced permanently by not to exceed an equal number of enlisted men of said corps, and all enlisted men of the line of the Army detailed on extra duty in the Quartermaster Corps or as bakers or assistant bakers shall be replaced permanently by not to exceed two thousand enlisted men of said corps; and for the purposes of this Act the enlistment in the military service of not to exceed six thousand men, who shall be attached permanently to the Quartermaster Corps and who shall not be counted as a part of the enlisted force provided by law, is hereby authorized: *Provided*, That the enlisted force of the Quartermaster Corps shall consist of not to exceed fifteen master electricians, six hundred sergeants (first class), one thousand and five sergeants, six hundred and fifty corporals, two thousand five hundred privates (first class), one thousand one hundred and ninety privates, and forty-five cooks, all of whom shall receive the same pay and allowances as enlisted men of corresponding grades in the Signal Corps of the Army, and shall be assigned to such duties pertaining to the Quartermaster Corps as the Secretary of War may prescribe: *Provided further*, That the Secretary of War may fix the limits of age within which civilian employees who are actually employed by the Government when this Act takes effect and who are to be replaced by enlisted men under the terms of this Act may enlist in the Quartermaster Corps: *Provided further*, That nothing in this section shall be held or construed so as to prevent the employment of the class of civilian employees excepted from the provisions of this Act or the continued employment of civilians included in the Act until such latter employees have been replaced by enlisted men of the Quartermaster Corps. [37 Stat. L. 593.]

SEC. 5. [*General Staff Corps.*] That hereafter the General Staff Corps shall consist of two general officers, one of whom shall be the Chief of Staff, four colonels, six lieutenant colonels, twelve majors, and twelve captains or first lieutenants, all of whom shall be detailed from the Army at large in the manner and for the periods prescribed by law: *Provided*, That hereafter, except as otherwise provided herein, when any officer shall under the provisions of section twenty-six of the Act of Congress approved February second, nineteen hundred and one, be appointed to an office with rank above that of colonel, his appointment to said office and his acceptance of the appointment shall create a vacancy in the arm, staff corps, or staff department from which he shall be appointed, and said vacancy shall be filled in the manner prescribed by existing law, but he shall retain in said arm, staff corps, or staff department, the same relative position that he would have held if he had not been appointed to said office, and he shall return to said relative position upon the expiration of his appointment to said office unless he shall be reappointed thereto; and if

under the operation of this proviso the number of officers of any particular grade in any arm, staff corps, or staff department, shall at any time exceed the number authorized by law, no vacancy occurring in said grades shall be filled until after the total number of officers therein shall have been reduced below the number authorized by law; but nothing in this proviso shall be held to apply in the case of any officer who now holds a four-year appointment to an office with rank above that of colonel, and whose return to the relative position that he would have held if he had not been appointed to said office is not possible under existing law. [37 Stat. L. 594.]

SEC. 6. [*Service as cadet not to be counted as officer's service.*] That hereafter the service of a cadet who may hereafter be appointed to the United States Military Academy or to the Naval Academy shall not be counted in computing for any purpose the length of service of any officer of the Army. [37 Stat. L. 594.]

SEC. 7. [*Appropriations of departments available for consolidated corps.*] That the appropriations herein provided for the several departments consolidated under this Act shall be available for the consolidated corps herein created. [37 Stat. L. 594.]

SEC. 8. [*No officer's rank diminished, etc.*] That nothing in this Act shall be held or construed so as to separate any officer from the Army or to diminish the rank now held by him, and that all laws and parts of laws, so far as they are inconsistent with the terms of this Act, be, and they are hereby, repealed. [37 Stat. L. 594.]

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[*Aviation duty — increase of pay — detail limited — tour of detail — total of officers not increased.*] \* \* \* That from and after the passage and approval of this Act the pay and allowances that are now or may be hereafter fixed by law for officers of the Regular Army shall be increased thirty-five per centum for such officers as are now or may be hereafter detailed by the Secretary of War on aviation duty: *Provided*, That this increase of pay and allowances shall be given to such officers only as are actual flyers of heavier than air craft, and while so detailed: *Provided further*, That no more than thirty officers shall be detailed to the aviation service: *Provided further*, That paragraph two of section twenty-six of an Act of Congress approved February second, nineteen hundred and one, entitled "An Act to increase the efficiency of the permanent military establishment of the United States," shall not limit the tour of detail to aviation duty of officers below the grade of lieutenant colonel: *Provided further*, That nothing in this provision shall be construed to increase the total number of officers now in the Regular Army. [37 Stat. L. 705.]

This and the three paragraphs following are from the Army Appropriation Act of March 2, 1913, ch. 93.

[*Staff service with troop, etc., deemed line duty — performance of Quartermaster Corps duty by regimental, etc., staff officers.*] \* \* \* That hereafter, in determining the eligibility, under the provisions of the Act of Congress approved August twenty-fourth, nineteen hundred and twelve, of troop, battery, or company officers for detail as officers of the various staff corps and departments of the Army, except the General Staff Corps, service actually performed

by any such officer with troops prior to December fifteenth, nineteen hundred and twelve, as a regimental, battalion, or squadron staff officer, shall be deemed to have been duty with a battery, company, or troop: *Provided further*, That regimental, battalion, and squadron quartermasters and commissaries shall hereafter be required to perform the duties of officers of the Quartermaster Corps, including the receipting for any money or property pertaining to said corps, when no officer of the Quartermaster Corps is present for such duties, and nothing contained in the Army appropriation Act approved August twenty-fourth, nineteen hundred and twelve, shall hereafter be held or construed so as to prevent competent authority from requiring any officers of the Army to act temporarily as quartermasters wherever there shall be no officers of the Quartermaster Corps and no regimental, battalion, or squadron quartermasters or commissaries present for such duty. [37 Stat. L. 706.]

[*Judge Advocate General's Department — number of majors.*] JUDGE ADVOCATE GENERAL'S DEPARTMENT: \* \* \* That hereafter the number of majors in said department shall be seven: *Provided*, That this shall not be so construed as to increase the total number of officers now in the Regular Army. [37 Stat. L. 708.]

[*Checks to indorsees of pay accounts permitted — effect of payment.*] \* \* \* That hereafter section thirty-six hundred and twenty, Revised Statutes, as amended by the Act of Congress approved February twenty-seventh, eighteen hundred and seventy-seven, shall not be construed as precluding officers of the Quartermaster Corps from drawing checks in favor of the person or institution designated by indorsement made on his monthly pay account by any officer of the Army if the pay account has been deposited for payment on maturity in conformity with such regulations as the Secretary of War may prescribe: *Provided further*, That payment by the United States of a check on the indorsement of the indorsee specified on the pay account shall be a full acquittance for the amount due on the pay account. [37 Stat. L. 710.]

For R. S. sec. 3620 as amended, see 6 Fed. Stat. Annot. 550.

## WATERS (INCLUDING IRRIGATION).

Act of April 30, 1912, Ch. 100, 420.

*Irrigation Act—Homesteaders under, Allowed Time to Reestablish Residence after Water Available—Actual Residence Required, 420.*

Act of August 9, 1912, Ch. 278, 421.

*Sec. 1. Reclamation Act—Homesteaders under, to Receive Patent when Conditions Completed—Final Water-right Certificates—Payment in Full Required, 421.*

*2. Lien Reserved to United States—Forfeiture of Title on Default of Payment—Sale, etc. Authorized—Bidding in by United States, 421.*

*3. Certificate of Final Payment—Single Holdings Limited—Excess Acquired by Descent, etc.—Forfeiture of Prohibited Excess, 422.*

*4. Agents to Receive Payments—Record to be Kept—Copies of Records, etc. 422.*

*5. Enforcement in District Courts, 422.*

Act of August 24, 1912, Ch. 388, 423.

*Gila River Indian Reservation Irrigation Project—Repayment of Cost—Cost a Lien on Allotment Patents—Not Enforced against Original Allottee—Satisfaction of Lien, 423.*

### CROSS-REFERENCES.

See *PUBLIC LANDS; RIVERS, HARBORS AND CANALS.*

**An Act For the relief of homestead entrymen under the reclamation projects in the United States.**

**[Act of April 30, 1912, ch. 100.]**

[*Irrigation Act—homesteaders under, allowed time to reestablish residence after water available—actual residence required.*] That no qualified entryman who prior to June twenty-fifth, nineteen hundred and ten, made bona fide entry upon lands proposed to be irrigated under the provisions of the Act of June seventeenth, nineteen hundred and two, the national reclamation law, and who established residence in good faith upon the lands entered by him, shall be subject to contest for failure to maintain residence or make improvements upon his land prior to the time when water is available for the irrigation of the lands embraced in his entry, but all such entrymen shall, within ninety days after the issuance of the public notice required by section four of the reclamation Act, fixing the date when water will be available for irrigation, file in the local land

office a water-right application for the irrigable lands embraced in his entry, in conformity with the public notice and approved farm-unit plat for the township in which his entry lies, and shall also file an affidavit that he has reestablished his residence on the land with the intention of maintaining the same for a period sufficient to enable him to make final proof: *Provided*, That no such entryman shall be entitled to have counted as part of the required period of residence any period of time during which he was not actually upon the said land prior to the date of the notice aforesaid, and no application for the entry of said lands shall be received until after the expiration of the ninety days after the issuance of notice within which the entryman is hereby required to reestablish his residence and apply for water right. [37 Stat. L. 105.]

For the Act of June 17, 1902, above referred to, see 7 Fed. Stat. Annot. 1092.

**An Act Providing for patents on reclamation entries, and for other purposes.**

[Act of August 9, 1912, ch. 278.]

[**SEC. 1.**] [*Reclamation Act — homesteaders under, to receive patent when conditions completed — final water-right certificates — payment in full required.*] That any homestead entryman under the Act of June seventeenth, nineteen hundred and two, known as the reclamation Act, including entrymen on ceded Indian lands, may, at any time after having complied with the provisions of law applicable to such lands as to residence, reclamation and cultivation, submit proof of such residence, reclamation and cultivation, which proof, if found regular and satisfactory, shall entitle the entryman to a patent, and all purchasers of water-right certificates on reclamation projects shall be entitled to a final water-right certificate upon proof of the cultivation and reclamation of the land to which the certificate applies, to the extent required by the reclamation Act for homestead entrymen: *Provided*, That no such patent or certificate shall issue until all sums due the United States on account of such land or water right at the time of issuance of patent or certificate have been paid. [37 Stat. L. 265.]

For the Act of June 17, 1902, see 7 Fed. Stat. Annot. 1092.

**SEC. 2.** [*Lien reserved to United States — forfeiture of title on default of payment — sale, etc., authorized — bidding in by United States.*] That every patent and water-right certificate issued under this Act shall expressly reserve to the United States a prior lien on the land patented or for which water right is certified, together with all water rights appurtenant or belonging thereto, superior to all other liens, claims or demands whatsoever for the payment of all sums due or to become due to the United States or its successors in control of the irrigation project in connection with such lands and water rights.

Upon default of payment of any amount so due title to the land shall pass to the United States free of all encumbrance, subject to the right of the defaulting debtor or any mortgagee, lien holder, judgment debtor, or subsequent purchaser to redeem the land within one year after the notice of such default shall have been given by payment of all moneys due, with eight per centum interest and cost. And the United States, at its option, acting through the Secretary of the Interior, may cause land to be sold at any time after such failure to redeem, and from the proceeds of the sale there shall be paid into the reclamation fund all moneys due, with interest as herein provided, and costs. The balance of the

proceeds, if any, shall be the property of the defaulting debtor or his assignee: *Provided*, That in case of sale after failure to redeem under this section the United States shall be authorized to bid in such land at not more than the amount in default, including interest and costs. [37 Stat. L. 266.]

SEC. 3. [*Certificate of final payment — single holdings limited — excess acquired by descent, etc. — forfeiture of prohibited excess.*] That upon full and final payment being made of all amounts due on account of the building and betterment charges to the United States or its successors in control of the project, the United States or its successors, as the case may be, shall issue upon request a certificate certifying that payment of the building and betterment charges in full has been made and that the lien upon the land has been so far satisfied and is no longer of any force or effect except the lien for annual charges for operation and maintenance: *Provided*, That no person shall at any one time or in any manner, except as hereinafter otherwise provided, acquire, own, or hold irrigable land for which entry or water right application shall have been made under the said reclamation Act of June seventeenth, nineteen hundred and two, and Acts supplementary thereto and amendatory thereof, before final payment in full of all instalments of building and betterment charges shall have been made on account of such land in excess of one farm unit as fixed by the Secretary of the Interior as the limit of area per entry of public land or per single ownership of private land for which a water right may be purchased respectively, nor in any case in excess of one hundred and sixty acres, nor shall water be furnished under said Acts nor a water right sold or recognized for such excess; but any such excess land acquired at any time in good faith by descent, by will, or by foreclosure of any lien may be held for two years and no longer after its acquisition; and every excess holding prohibited as aforesaid shall be forfeited to the United States by proceedings instituted by the Attorney General for that purpose in any court of competent jurisdiction; and this proviso shall be recited in every patent and water-right certificate issued by the United States under the provisions of this Act. [37 Stat. L. 266.]

SEC. 4. [*Agents to receive payments — record to be kept — copies of records, etc.*] That the Secretary of the Interior is hereby authorized to designate such bonded fiscal agents or officers of the Reclamation Service as he may deem advisable on each reclamation project, to whom shall be paid all sums due on reclamation entries or water rights, and the officials so designated shall keep a record for the information of the public of the sums paid and the amount due at any time on account of any entry made or water right purchased under the reclamation Act; and the Secretary of the Interior shall make provision for furnishing copies of duly authenticated records of entries upon payment of reasonable fees, which copies shall be admissible in evidence, as are copies authenticated under section eight hundred and eighty-eight of the Revised Statutes. [37 Stat. L. 267.]

For R. S. sec. 888 see 3 Fed. Stat. Annot. 31.

SEC. 5. [*Enforcement in district courts.*] That jurisdiction of suits by the United States for the enforcement of the provisions of this Act is hereby conferred on the United States district courts of the districts in which the lands are situated. [37 Stat. L. 267.]

[*Gila River Indian Reservation irrigation project — repayment of cost — cost a lien on allotment patents — not enforced against original allottee — satisfaction of lien.*] \* \* \* That the proportion of the cost of the irrigation project on the Gila River Indian Reservation heretofore and herein authorized to be paid from the public funds shall be repaid into the Treasury of the United States as and when funds may be available therefor: *Provided further*, That in the event any allottee shall receive a patent in fee to an allotment of land irrigated under this project before the United States shall have been wholly reimbursed as herein provided, then the proportionate cost of the project, to be apportioned equitably by the Secretary of the Interior, shall become a first lien on such allotment, and the fact of such lien shall be recited on the face of each patent in fee issued and the amount of the lien set forth therein, which said lien, however, shall not be enforced so long as the original allottee or his heirs shall own the allotment; and the receipt of the Secretary of the Interior, or of the officer, agent, or employee duly authorized by him for that purpose, for the payment of the amount assessed against any allotment as herein provided shall, when duly recorded by the recorder of deeds in the county wherein the land is located, operate as a satisfaction of such lien. [37 Stat. L. 522.]

This is from the Indian Appropriation Act of Aug. 24, 1912, ch. 388.

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## WEATHER.

Act of March 4, 1913, Ch. 145, 423.

*Weather Bureau — Allowance for Travel when Transferred from Stations*, 423.

[*Weather Bureau — allowance for travel when transferred from stations.*] \* \* \* Hereafter officials and employees of the Weather Bureau, when transferred from one station to another for official duty, shall be allowed all traveling expenses authorized by existing laws applicable to said bureau, notwithstanding any changes in appointments that may be required by such transfers. [37 Stat. L. 830.]

This is from the Agricultural Department Appropriation Act of March 4, 1913, ch. 145.

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## WHITE PHOSPHORUS MATCHES.

See *INTERNAL REVENUE*.

## WILD FOWL.

See *GAME ANIMALS AND BIRDS*.

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## WIRELESS TELEGRAPHY.

See *RADIO COMMUNICATION*.

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## WITNESSES.

*Comparison of Handwriting*, see *EVIDENCE*.  
*Fees and Mileage*, see *JURIES*.

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## YACHTS.

Act of August 20, 1912, Ch. 307, 424.

*Sec. 1. Pleasure Yachts — Licenses to, Owned by American Citizens, etc. — Restrictions — Entry on Return from Foreign Countries — Manifest of Dutiable Articles Required*, 424.

*3. Inconsistent Laws Repealed*, 425.

An Act To amend sections forty-two hundred and fourteen and forty-two hundred and eighteen of the Revised Statutes.

[*Act of August 20, 1912, ch. 307.*]

[*SEC. 1.*] [*Pleasure yachts — licenses to, owned by American citizens, etc. — restrictions — entry on return from foreign countries — manifest of dutiable articles required.*] That sections forty-two hundred and fourteen and forty-two hundred and eighteen of the Revised Statutes be, and the same are hereby, amended to read as follows:



**"Sec. 4214.** The Secretary of Commerce and Labor may cause yachts used and employed exclusively as pleasure vessels or designed as models of naval architecture, if built and owned in compliance with the provisions of sections forty-one hundred and thirty-three to forty-one hundred and thirty-five, to be licensed on terms which will authorize them to proceed from port to port of the United States and to foreign ports without entering or clearing at the customhouse; such license shall be in such form as the Secretary of Commerce and Labor may prescribe. Such vessels, so enrolled and licensed, shall not be allowed to transport merchandise or carry passengers for pay. Such vessels shall have their name and port placed on some conspicuous portion of their hulls. Such vessels shall, in all respects, except as above, be subject to the laws of the United States, and shall be liable to seizure and forfeiture for any violation of the provisions of this title."

**"Sec. 4218.** Every yacht, except those of fifteen gross tons or under, visiting a foreign country under the provisions of sections forty-two hundred and fourteen, forty-two hundred and fifteen, and forty-two hundred and seventeen of the Revised Statutes shall, on her return to the United States, make due entry at the customhouse of the port at which, on such return, she shall arrive: *Provided*, That nothing in this act shall be so construed as to exempt the master or person in charge of a yacht or vessel arriving from a foreign port or place with dutiable articles on board from reporting to the customs officer of the United States at the port or place at which said yacht or vessel shall arrive, and deliver in to said officer a manifest of all dutiable articles brought from a foreign country in such yachts or vessels." [37 Stat. L. 315.]

For R. S. secs. 4214, 4218 as they read prior to this amendment see 7 Fed. Stat. Annot. 1133, 1135.

**SEC. 3.** [*Inconsistent laws repealed.*] That all acts and parts of acts not consistent herewith are hereby repealed. [37 Stat. L. 315.]

There is no sec. 2 in the original of this act.

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## YOSEMITE NATIONAL PARK.

See *PUBLIC PARKS*.

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## ZUNI FOREST.

See *TIMBER LANDS AND FOREST RESERVES*.







# SUPPLEMENTAL NOTES



## AGRICULTURE.

### 1912 Supp., p. 2, sec. 1.

**Food and Drugs Act contrasted.**—In *United States v. Thirty Dozen Packages of Roach Food*, (D. C. Md. 1913) 202 Fed. 271, the court contrasting this act with the Food and Drugs Act, enacted June 30, 1906, ch. 3915, Fed. Stat. Annot. 1909 Supp. 136, said: "The Insecticide Act contains 14 sections; the Food and Drugs Act, 13. The Insecticide Act contains a section providing that it shall be referred to as the Insecticide Act of 1910. There is no similar provision in the Food and Drugs Act. Otherwise the two enact-

ments contain the same number of sections, in precisely the same order, and in very large part in precisely the same words. Obviously the draftsman of the Insecticide Act took the Food and Drugs Act and copied it literally, except where alterations were necessary in order to adapt it to the purpose in view, or where he wished to make a definite change in a particular provision. From the changes which were so made, it is possible to gather something of the purpose of some of the new provisions in the later act."

### 1912 Supp., p. 5, sec. 8.

An "inert" substance as used in this section may include something which contributed to the effectiveness of insecticides, that is something which serves a useful purpose. *United States v. Thirty Dozen Packages of Roach Food* (D. C. Md. 1913) 202 Fed. 271, wherein the court said: "The claimant says that an inert substance within the meaning of the act is something which does not contribute to the effectiveness of insecticides—that is, something which serves no useful purpose therein. An insecticide containing such a substance, when compared volume for volume with another which did not, would be of inferior quality or strength. If the framer of the act had intended by the clause now under consideration to do nothing more than prevent the introduction of such valueless substances into insecticides, he had apt language before him in the model which he was using.

"Section 7 of the Food and Drugs Act declares that a food shall be deemed to be adulterated if any substance has been mixed and packed with it, so as to reduce or lower or injuriously affect its quality or strength. Such a provision would apparently accomplish all that the claimant says was intended to be accomplished by the clause, the construction of which is now in controversy. The lawmakers did not think it would in the case of insecticides, other than paris green and lead arsenates. They do provide in section 7 of the Insecticide Act that a paris green or a lead arsenate shall be deemed to be adulterated if any substance has been mixed and packed with it, so as to reduce or lower or injuriously affect its quality or strength. They do not make such provision with reference to insecticides other than paris green and lead arsenates. On the other hand,

they do not make applicable to the two latter any such clause as that now under discussion.

"The lawmakers did not think it expedient or possible to say that any substance which, when mixed and packed with an insecticide, reduced or lowered its strength, was an adulterant. The explanation why it was not expedient or possible so to say is given by the claimant itself. In many insecticides, other than paris green and lead arsenates, substances which do reduce and lower their strength are absolutely necessary, in order that they may effectively do the work for which they are intended. Such substances could not be declared adulterants. The problem is solved by requiring the shipper of such insecticides to tell the kinds and quantities of the substances therein contained which do not themselves prevent, destroy, repel, or mitigate insects. From the standpoint of the honest purchaser and shipper, there could be only one objection to this legislation. In some circumstances it might result in the revelation of a trade secret. This objection was obviously taken into consideration by Congress. For the purpose of rendering such disclosures less probable or frequent, Congress gives the shipper an alternative. He may, if he will, instead of stating the kinds and proportions of inert substances so defined, confine himself to telling the total percentage of all such substances in his preparation; but, if he does, he must tell the specific kinds and proportions of the active poisons or repellents. It may be that in some cases to do one or the other will give valuable information as to trade secrets. Claimant says that in its case such will be the result of the enforcement upon it of the construction for which the government contends. Such argu-

ments may well be addressed to Congress. They may, where it does not appear that the intention of Congress has been called to them, affect the construction which the courts may put upon the general language of an act. In this case, however, the clause in controversy itself shows that Congress had

actually considered the extent to which it would go in compelling disclosures which might result in the revelation of trade secrets. Under its power to regulate commerce among the states, Congress had power to do what the government says it sought to do, and which I think it did do."

## ALASKA.

### Vol. I, p. 51, sec. 10. [*Time for filing adverse claim — action to quiet title — patent not to issue until decree.*]

The statute has in purview, no doubt, adverse claimants who are seeking title from the government to the same parcel of government land, and it is incumbent upon the contestants to show by what right they respectively claim superiority each over his adversary. The final judgment of the court will determine the respective rights of the parties, and the final patent is made dependent upon the result of such adjudication. *Hinchman v. Ripinsky*, (C. C. A. 9th Cir. 1913) 202 Fed. 625, wherein the court said: "The statute has its prototype in the statutes providing for the acquisition of mineral lands. . . Section 2326 [5 Fed. Stat. Annot. 35] provides for an action, the kind in case of contest between applicants for the same

tract of mineral land. This section was amended March 3, 1881 (21 Stat. 505, c. 140), [5 Fed. Stat. Annot. 36] so that if, in any action brought in pursuance thereof, the title to the ground in controversy be not established by either party, the costs shall not be allowed to either party. While there exists no such amendment or provision with respect to the statute under which this suit is instituted, yet it would seem to be the reasonable course under like conditions. The reference to the courts of the controversy under the statute is in aid of the Land Department, and such form of suit or action may be adopted as would seem most appropriate to meet the exigencies of the case."

### Vol. I, p. 55, sec. 1.

Under this section all forms of procedure are expressly abolished, and it is simply necessary to state the facts out of which the cause of action arises. And when the plaintiff has stated the facts of his case he will

be entitled to recover thereon just what such facts will authorize. *Pioneer Min. Co. v. Mitchell*, (C. C. A. 9th Cir. 1911) 190 Fed. 937.

### Vol. I, p. 60, sec. 39.

Where a bond is made to two or more obligees jointly, and there is nothing in the instrument itself to show that the interest of such obligees is several, the rule is they must all join as plaintiffs in an action thereon. If one of the joint obligees be dead, the action must be brought in the name of the

survivor or survivors. But if the bond, while joint in form, expresses distinct obligations as to the different obligees, separate actions may be maintained by each. *Dashley v. Daniel*, (C. C. A. 9th Cir. 1913) 202 Fed. 426.

### Vol. I, p. 60, sec. 40.

This section is cited in *Dashley v. Daniel*, (C. C. A. 9th Cir. 1913) 202 Fed. 426.

### Vol. I, p. 69, sec. 91.

Failure to obtain leave to plead over. — In *Copper River & N. W. R. Co. v. Phillips*, (C. C. A. 9th Cir. 1912) 196 Fed. 328 the defendant did not ask or obtain leave to plead over, but answered the original and amended complaint without leave and pre-

sented the issues of fact upon which it asked the court to determine the case on the merits. It was held that this amounted to a waiver of the objection to the complaint. See also *Seatter v. Heid*, (C. C. A. 9th Cir. 1912) 196 Fed. 333.



## Vol. I, p. 69, sec. 92.

This section is cited in *Dashley v. Daniel*, (C. C. A. 9th Cir. 1913) 202 Fed. 426.

## Vol. I, p. 79, sec. 141.

This section is cited in *Cowden v. Wild Goose Mining & Trading Co.*, (C. C. A. 9th Cir. 1912) 199 Fed. 561.

## Vol. I, p. 80, sec. 145.

A special execution is not required to fix the liability of the obligors on the redelivery bond where a judgment has been entered directing the sale of the attached property and the execution follows the direction of the judgment. *Johnston v. Shaw*, (C. C. A. 9th Cir. 1911) 190 Fed. 466, wherein the court said: "It is next contended by the plaintiffs in error that the second amended complaint did not state facts sufficient to constitute a cause of action for the reason that defendants did not allege that after the rendition of the judgment in the attachment suit a special execution was issued thereon to the marshal authorizing and commanding him to sell the attached property. It is contended that until a valid order of sale had been made and incorporated in the judgment, and a special execution issued on such judgment and placed in the hands of the marshal, he was not lawfully authorized to demand of the plaintiffs in error the delivery of the attached property, or the payment of its value. The condition of the redelivery bond executed by Johnston and his sureties, and under which Johnston procured the release of the attached property, was that in consideration of such redelivery Johnston and his sureties, jointly and severally, undertook and promised 'to redeliver the said property or pay the value thereof to the United States

marshal, to whom execution upon a judgment obtained by the plaintiffs in said action may issue.'

"Section 145 of the Alaska Code Civ. Pro. (Carter's Ann. Codes, p. 175), under which this redelivery bond was given, provides that 'the marshal may deliver any of the property attached to the defendant, or to any other person claiming it upon his giving a written undertaking therefor, executed by two or more sufficient sureties, engaging to redeliver it or pay the value thereof to the marshal, to whom execution upon a judgment obtained by the plaintiff in that action may be issued.'

"There is no requirement here, either in the statute or in the bond, for a special execution. An execution was issued requiring the marshal to satisfy the judgment with interest out of the personal property of the judgment debtor, and to make sale thereof, according to law. The marshal levied upon the property ordered to be sold by the judgment, and on no other property, and so made return upon the execution, with the further return that 'said Johnston then and there neglected and refused to deliver said property or to pay the said value.' This was sufficient to fix the liability of the defendants on the redelivery bond. No further or other demand was necessary or required."

## Vol. I, p. 84, sec. 170.

**Qualification of trial juror.**—A person who testified that he had resided in Alaska for the past five years and that during each summer season of six or seven months he was a purser on a boat running on the Yukon river, but that during some of the

winter seasons he had been absent from Alaska while during other winters he had remained there, was held to be an inhabitant of the district so as to qualify him to act as a juror. *Rooney v. Barnette*, (C. C. A. 9th Cir. 1912) 200 Fed. 700.

## Vol. I, p. 99, sec. 260.

The lien attaches to property fraudulently conveyed by the judgment debtor before the entry of judgment. *Thompson v. Reed*, (C. C. A. 9th Cir. 1913) 202 Fed. 870.

## Vol. I, p. 142, sec. 475.

**In general.**—In *Pacific Coal & Transp. Co. v. Pioneer Min. Co.*, (C. C. A. 9th Cir. 1913) 205 Fed. 577, the court said:

"It has ever been held that a cause for removing cloud from title, or quieting title, or by way of bill of peace, is equitable, and appeals to a court of equitable cognizance.

Formerly, to maintain a suit for quieting title or removing cloud therefrom, it was essential for the plaintiff to show that he was in possession of the property, that he had been disturbed in possession by repeated actions at law, and that he had established his right by successive judgments in his

favor. Upon such facts appearing, the court would interpose to quiet the title of plaintiff by granting a perpetual injunction against further litigation from the same source. To maintain a bill of peace, it was generally necessary that the plaintiff should be in possession of the property, and, except where the defendants were numerous, that his title should have been established at law, or be founded upon undisputed evidence of long-continued possession. Local statutes in different states have interposed to relieve against the cumbersome requirements of the old law, and where the statute accords the plaintiff an action for quieting his title, he being in possession and proceeding under a claim of right founded upon title, legal or equitable, the action is regarded as proper for the cognizance of a court of equity, and equitable relief will be accordingly grant-

ed. In Oregon the statute has gone even further, and it is sufficient to maintain the suit if the lands in controversy are not in the actual possession of another, thus including lands vacant or unoccupied. That such a statute prescribes an equitable remedy, and that the suit is maintainable in equity, is practically held in *Holland v. Challen*, [110 U. S. 15]. Under the Alaska statute (section 475, Code of Civil Procedure), 'any person in possession, by himself or his tenant, of real property, may maintain an action of an equitable nature against another who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate, or interest.' The statute is not materially different from that which formerly obtained in Oregon. The suit in controversy is concededly brought under that statute."

### Vol. I, p. 147, sec. 504.

"Final order."—In *Mitchell v. Porter*, (C. C. A. 9th Cir. 1912) 194 Fed. 49, the order sought to be reviewed by the writ of error was entered after the rendition of the judgment in the action, and was a denial of the defendant's motion made to strike from that judgment the provision reciting his provisional arrest and refusing to discharge him from custody, and also directing that

execution issue against the person of the defendant after return of execution against his property unsatisfied in whole or in part. It was held that the order was a final one. The court said: "This was a final order. It, in effect, not only directed that he be kept a prisoner, but that execution be issued upon the judgment to enforce his imprisonment."

### Vol. I, p. 180, sec. 707.

Sufficiency of affidavit.—An affidavit for a change of place of trial for bias or prejudice which is a mere assertion of the affiant's belief with no reasons in its support is insufficient. *Pacific Coal & Transp. Co. v. Pioneer Min. Co.* (C. C. A. 9th Cir. 1913) 205 Fed. 577, wherein the court said:

"This leaves but one other question, which is predicated upon the court's refusal to assign the cause for trial before another judge. The motion for such assignment is based upon the affidavit of McCumber, to the effect that he 'believes that the said judge of the above-entitled court is biased, through friendship, in favor of the plaintiff, Pioneer Mining Company, and is prejudiced and biased against the defendants, and that by reason of said bias and prejudice the said judge refused to grant the defendants a jury

trial on the issues of fact prayed for, and also refused to grant a continuance of the trial of said action for a reasonable time to enable the defendants to prepare for trial, as prayed for by the defendants; that affiant believes that defendants cannot have a fair and impartial trial before the present judge of this court by reason of said prejudice and bias above alleged, and alleges that the said judge is disqualified from acting as trial judge in said cause by reason thereof.' Elwood Bruner, an attorney for defendants, also made an affidavit in support of the motion, but in no way does he assert that the judge is biased or prejudiced. Properly analyzed, McCumber's statement is a mere assertion of his belief, giving no reasons in its support. The showing made does not disqualify the judge."

### Vol. I, p. 250, sec. 98.

A "conveyance" includes a lease. *Waskey v. Chambers*, (1912) 224 U. S. 564, 32 S. Ct. 597, 56 U. S. (L. ed.) 885, Ann. Cas. 1913D 998, wherein the court said: "The Circuit Court of Appeals went on the ground that a lease creates only a chattel interest and is not a conveyance and therefore is not within the protection of the statute. But it is obvious that in principle the right of a lessee is the same as that of a purchaser in fee, and it would be a great misfortune,

especially to mining interests, if a man taking a lease from those whom the record showed and he believed to be the owners, were liable, after spending large sums of money on the faith of it, to be turned out by an undisclosed claimant on the strength of an unrecorded deed. We find no words in the statute that require such a result. On the contrary, the word 'conveyance' is defined, although for other purposes, as embracing every written instrument except a

will by which any interest in lands is created. Blackstone defines a lease as a conveyance, 2 Comm. 317, and in Sheppard's Touchstone, 267, leases are ranked under

the head of grants,—‘as in other grants.’ The point does not need authority except to exclude the notion that the statute uses the word in a narrower sense.”

## Vol. I, p. 282, sec. 262.

This statute limits the Men of the miner to work done in the development or improvement of a mine. It does not include the ordinary work of a miner in the operation of a placer claim, having no relation to the development or improvement of the mine. *Noble v. Gustafson*, (C. C. A. 9th Cir. 1913) 204 Fed. 69, wherein the court said: “While mechanic’s lien statutes are to be liberally construed, so that their purpose may not be frustrated, and with a view to effecting substantial justice, yet, unless the labor performed for which the lien is claimed is

such as comes within the contemplation of the statute, there can be no valid lien. The allegations of the complaint and the statements of lien show sufficient to bring the liens in question within the act, but the proofs wholly fail to support either, except as it pertains to a small amount of work done by some of the claimants upon the ditch or flume in the way of repairs. And as to this, the labor which is subject to lien is so commingled with that which is not that it cannot be satisfactorily segregated. The liens themselves are therefore void.”

## Vol. I, p. 302, sec. 367.

**Champerty.**—In *Northwestern Steamship Co. v. Cochran*, (C. C. A. 9th Cir. 1911) 191 Fed. 146, the court, having before it the question whether a certain Alaska contract was champertous, said: “When Congress enacted that the common law should be in force in

Alaska ‘whenever applicable,’ it should not be assumed that it was the intention to impose upon that territory a more rigid rule in regard to champerty than that which obtained in the states or than was recognized in the Supreme Court of the United States.”

## Vol. I, p. 328, sec. 142.

**An Indian who attempts to purchase liquor from another or solicits another to sell him liquor** is not guilty of any offense under this section. *Lott v. United States* (C. C. A. 9th Cir. 1913) 205 Fed. 28, 46 L.R.A.(N.S.) 409, wherein the court said: “That statute does not differ in its essential features from the ordinary state statutes prohibiting the sale of intoxicating liquors, except in the fact that it provides for punishment in the penitentiary for a term not to exceed two years, and therefore, under section 335 of the new Criminal Code, the offense is made a felony. It is uniformly held that statutes prohibiting the sale of intoxicating liquors are directed against the act of selling only, and that the offense is committed only by the vendor or some one who aids him in selling, and that the purchaser and those who aid him in the purchase are not guilty of aiding or abetting in the commission of the offense. . . . But it is urged that the authorities above cited are not applicable here for the reason that the offense is made a felony, and that section 218 of the Penal Code of Alaska [1 Fed. Stat. Annot. 341] adopts the common law of England as adopted and understood in the United States, and provides that it shall be in force in Alaska except as modified by statute, and that at common law it was an indictable offense to incite any one to the commission of any. We do not find that those authorities are conclusive of the question. . . . The offense of selling liquor in Alaska has been made a

in itself alone ground for holding the plaintiff in error indictable for soliciting a sale to himself. The nature of the principal offense, whether a felony or a misdemeanor, makes no difference as to the liability to indictment of one who solicits the commission thereof. At common law, he who solicits another to commit either a felony or a misdemeanor, is guilty of the misdemeanor of solicitation, and it was generally held immaterial whether the thing proposed was technically a felony or a misdemeanor. It may be conceded that the common law is extended to Alaska, and that Congress is clothed with full legislative power over that territory, and may provide for the punishment therein of those offenses which are punishable at common law, without specifically defining the nature thereof. But the question here is: What was the intention of Congress in enacting the law? Was it intended to make unlawful the act of purchasing intoxicating liquor? If the answer is in the negative, it follows that an Indian who attempts to purchase intoxicating liquor, or solicits another to sell it to him, is guilty of no offense.

“The meaning of the act should be found in the light of the anterior legislation on the same subject, legislation not of Congress only, but of the state, and the decisions of the courts, and the general understanding as to the meaning and scope of similar statutes, resulting, in a sense, in a common law of the states on that subject. Section 142 of the Criminal Code of Alaska, as it was

originally enacted, made the act of selling intoxicating liquor to Indians a misdemeanor only. In February, 1909 (Act Feb. 6, 1909, c. 80, § 9, 35 Stat. 603), [Fed. Stat. Annot. 1909 Supp. 33] it was so amended as to increase the severity of the punishment. The amendment did not declare the violation of the section to be a felony, but such is the effect of section 335 of the Criminal Code of 1910. Congress must have been aware of the universal ruling of the courts that under laws prohibiting the sale of intoxicating liquors the purchaser committed no offense. We are not justified in assuming that, in so amending the law and increasing the punishment for its violation, it was the inten-

tion to make criminal, and subject to punishment as a crime, the act of purchasing or attempting to purchase intoxicating liquors, which theretofore had been innocent acts. If such had been the intention of Congress, it is but reasonable to presume that it would have been expressed in such clear terms as to admit of no doubt. In the absence of such express legislation, we are authorized to presume that Congress deemed it of greater advantage to the government in enforcing the law to leave the Indian who might succeed in purchasing liquor in Alaska free to testify in the courts against the seller thereof, than to punish the Indian for purchasing or offering to purchase the same."

### Vol. I, p. 346, sec. 30.

**Prosecution by information.**—The requirements of this section as to witnesses' names have no application to prosecution by information. *Booth v. United States*, (C. C. A. 9th Cir. 1912) 197 Fed. 283, wherein the court said: "It is urged that the information was insufficient, in that no name of any witness was indorsed thereon, that the information does not state on its face a description of the intoxicating liquors alleged to have been sold, nor the quantity thereof, nor the name of the purchaser thereof or the price paid therefor, and that it fails to state that said liquor, if sold, was not sold for medicinal, mechanical, or scientific uses, and that it does not identify any particular act charged so as to enable the accused to meet the same. The case of *State v. Warren*, 41 Ore. 348, 69 Pac. 679, is cited to the proposition that the information is fatally defective for want of indorsement thereon of the names of witnesses. That decision, however, was based upon a statute enacted Feb. 17, 1899, which provided 'that the name of each

witness examined on oath or affirmation by a district attorney in support of any information shall be inserted at the foot of such information or endorsed thereon before the same is filed; otherwise the testimony of such witness cannot be heard against the defendant at the trial of such information.'

"There is no such provision in the Criminal Code of Alaska. It is true that it is therein provided that, when an indictment is found, the names of the witnesses examined before the grand jury must be inserted at the foot of the indictment or indorsed thereon, but there is no similar provision in the section of the Code which authorizes the prosecution of offenses by information. Section 270, c. 31, of the Criminal Code, [1 Fed. Stat. Annot. 380] declares 'that an information is the allegation or statement made before a magistrate and verified by the oath of the party making it that a person has been guilty of some designated crime.' The information in this case complies with that statute."

### Vol. I, p. 348, sec. 43.

Crimes and offenses not specifically defined in the Act are affected by this section, and therefore an indictment under Rev. Stat. sec. 5209, 5 Fed. Stat. Annot. 145, must con-

form to this section rather than to Rev. Stat. sec. 1024, 2 Fed. Stat. Annot. 337. *Summers v. United States*, (1913) 231 U. S. 92, 34 S. Ct. 38, reversing 202 Fed. 457.

### Vol. I, p. 354, sec. 97.

At common law, in cases of misdemeanor, there was no right to plead over, and in cases of felony such, also, was originally the common law, although in later years the rule has been relaxed in felony cases, so as to recognize the power of the court in its discretion to allow the defendant to plead over. The statute above given expresses the common-law rule, with the addition that the defendant shall have at his election the right

to plead over. *Summers v. United States*, (C. C. A. 9th Cir. 1913) 204 Fed. 976, reversed on other grounds 231 U. S. 92, 34 S. Ct. 38.

On a failure to plead over after the disallowance of a demurrer judgment must be given against the defendant. *Summers v. United States*, (C. C. A. 9th Cir. 1913) 204 Fed. 976, reversed on other grounds 231 U. S. 92, 34 S. Ct. 38.

## Vol. I, p. 369, sec. 192.

**Imprisonment for costs.**—"The general rule is that the defendant cannot be imprisoned for costs in the absence of express statutory authority therefor. The question here is whether the proviso contained in section 192 . . . should be construed to mean that legislative authority is given for such imprisonment for costs. The meaning of the proviso is somewhat obscure, but in view of the express terms of section 190 which authorizes imprisonment only until the fine shall be satisfied, and the first clause of the proviso, which refers to a judgment

'that the defendant shall be imprisoned until the fine or penalty imposed is paid,' we do not think that the last clause should be held to enlarge or change the prior clear and unambiguous provisions.

"The judgment, therefore, will be so modified as to strike therefrom that portion thereof which provides for imprisonments of the plaintiff in error until the costs be satisfied. Judgment is affirmed." *Booth v. United States*, (C. C. A. 9th Cir. 1912) 197 Fed. 283.

## Vol. I, p. 378, sec. 254.

The statute leaves it to the discretion of the court to decide upon the presentation of the acknowledgment therein referred to whether prosecution shall be stayed and the charge dismissed. *Noble v. United States*, (C. C. A. 9th Cir. 1911) 190 Fed. 538.

**Sufficiency of acknowledgment.**—In *Noble v. United States*, (C. C. A. 9th Cir. 1911) 190 Fed. 538, it appeared that the prosecuting witness presented an affidavit, which was filed, in which he said: "I do hereby ask and petition the court to dismiss the

said above-entitled case now pending in your court against the said Jesse Noble (the complaint having been sworn to as a matter of precaution to prevent further trouble, allowing the complainant to continue with his work)." It was held that the presentation of this paper was in no respect a compliance with the terms of the statute. The court said: "It was simply a request that the case be dismissed. It was no acknowledgment that the witness had received satisfaction for the injury."

## Vol. I, p. 380, sec. 270.

**Indorsement of names of witnesses.**—In a prosecution by information it is not essential that the names of the witnesses be en-

dorsed on the information. *Booth v. United States*, (C. C. A. 9th Cir. 1912) 197 Fed. 283.

## Vol. I, p. 412, sec. 472.

A civil action does not lie to recover a license fee in a case where a person is selling liquor without a license. *United States v. Jourden*, (C. C. A. 9th Cir. 1912) 193 Fed. 986, wherein the court said:

"Section 474 prescribes the method of procedure in prosecutions for violations of the act. It is the general rule, sustained by the authorities, without exception so far as we are advised, that where a statute provides for the payment of a license fee as the condition of doing any specified business, and also provides that a violator of the act shall, upon conviction, be punished by fine or imprisonment, the remedy by prosecution and punishment so prescribed by the statute is exclusive, unless there is some special provision of law which permits the prosecution of a civil action to recover the license fee."

**Sufficiency of information.**—As to the sufficiency of an information under this section,

the court in *Booth v. United States*, (C. C. A. 9th Cir. 1912) 197 Fed. 283, said: "It may be observed, first, that in describing the liquor sold it is generally sufficient to follow the language of the statute and that the information may describe the liquor as spirituous or intoxicating liquor without naming any particular liquor; second, an allegation as to the quantity sold is not necessary where the quantity of liquor sold is entirely immaterial to the particular offense charged; third, the allegation that liquor has been sold sufficiently imports the payment of a price therefor; fourth, it is the decided weight of authority than an indictment which is otherwise sufficiently certain will not be quashed merely because it fails to name the purchaser of the liquor, and fifth, it is not necessary to allege a scienter of a criminal intent."

## Vol. X, p. 25. [Act of March 3, 1903.]

"The intention of the amendment was to increase the quantity of land which might be

taken as a homestead in Alaska, to subject unsurveyed lands to homestead settlement

and patent, and to require that the boundaries of a homestead claim be plainly marked on the ground. That was substantially all that was accomplished by the amendment. There is no ground for the contention that by virtue of the provision requiring a homestead settler to furnish proof under the procedure for obtaining patents to surveyed lands of the United States as provided for by section 10 of the Act of May 14, 1898, one who has a mining location in conflict with a homestead claim is required to bring a suit to quiet title before the decision of his adverse claim which is filed and pending in the land office. The amendment makes section 10 of the prior act applicable to proof of homesteads on unsurveyed lands as well as those on surveyed lands, and with that exception

leaves its purport and meaning unchanged. In brief, the law under the amendment is what it was before, so far as it directs that a suit be brought to quiet title. If a person, association, or corporation in the occupation of land for the purpose of trade, manufacture, or productive industry claims by right of occupation land whether surveyed or unsurveyed which is included in a homestead settlement, he must at the appropriate time bring a suit to determine in a court the questions on which his right of occupation depends. The jurisdiction of the land office to determine contests between locators of mining claims and homestead settlers remains as it was before." *Nelson v. Brownell*, (C. C. A. 9th Cir. 1912) 193 Fed. 641.

## Vol. X, p. 27, sec. 1.

"The single object of Congress in the Act of 1904 was to provide for the sale of coal lands which had not been surveyed. The provisions for the sale of such coal lands, in or out of Alaska, which had been surveyed, so that entries could be made 'by legal subdivision,' had already been covered by the general law which had been extended to Alaska. The conditions in Alaska were but temporary. When the coal land there should be brought under the system of surveys which prevailed in the better settled parts of the country, the Act of 1904 would cease to be

operative, having nothing to which it could apply. The legislation, read in the light of the situation and of the uniform policy which had so long prevailed of prohibiting more than one entry to one person, makes it plain that Congress did not intend to except the unsurveyed coal lands of Alaska from the operation of the restrictions which attached to the sale of the surveyed coal lands in Alaska and elsewhere." *United States v. Munday*, (1911) 222 U. S. 175, 32 S. Ct. 53, 56 U. S. (L. ed.) 149.

## 1909 Supp., p. 19, sec. 1.

No treaty rights are affected by this act, but if they were the act would not be void as the power of Congress to enact laws for subsequent observance is not restricted by prior treaties with foreign nations. The *Tokai Maru*, (C. C. A. 9th Cir. 1911) 190 Fed. 450, wherein the court said: "The remaining defensive argument is that by the first and second articles of the treaty between Japan and the United States, concluded November 24, 1894, proclaimed March, 1895 (29 Stat. 848), the officers and crew of this schooner are given the same rights in Alaskan waters, with reference to fishing, as are given to our own citizens [and] that statutes which discriminate against aliens, in violation of their treaty rights, are void. In *re Ah Chong* [C. C.] 2 Fed. 733; In *re Tiburcio Parrott* [C. C.] 1 Fed. 481; *Yick Wo v. Hopkins*, 118 U. S. 356 [6 Sup. Ct. 1064] (30 L. Ed. 220)."

The authorities here cited do no more than affirm the fundamental principle that state laws and municipal ordinances may not override national treaties; and they give no sanction to an argument questioning the validity of a national law. The power of Congress to enact laws for subsequent observance is not restricted by prior treaties with foreign nations. The *Chinese Exclusion Case*, 130 U. S. 581, 9 Sup. Ct. 623, 32 L. Ed. 1068. Moreover, the articles of the treaty referred to contain no allusion to fishing privileges, and do not purport to grant any right to sea rovers to resort to American fishing grounds for the purpose of taking fish for their own consumption or for any purpose whatever."

Fishing by aliens to supply their personal need for food is prohibited by this section. The *Tokai Maru*, (C. C. A. 9th Cir. 1911) 190 Fed. 450.

## 1909 Supp., p. 19, sec. 2.

The ship's "company" includes the captain and crew, and the section authorizes the imposition of a single fine against the com-

pany in addition to the fine imposed against the vessel as a distinct entity. The *Tokai Maru*, (C. C. A. 9th Cir. 1911) 190 Fed. 450.

## 1909 Supp., p. 25, sec. 1.

Where provisions of this Act are irreconcilable with section 2324 of the Revised Statutes (see 5 Fed. Stat. Annot. 19), which was made applicable to Alaska by an Act passed June 6, 1900, 31 Stat. L. 321, sec. 26 (see 1 Fed. Stat. Annot. 32), section 2324 is necessarily repealed by implication. *Thatcher v. Brown*, (C. C. A. 9th Cir. 1911) 190 Fed. 708, wherein the court said: "It will be seen that by both the acts [R. S. 2324 and this section] the annual assessment work is required to be done 'during' the year. But by the former act a failure to complete such work within the year, while rendering the ground open to relocation, was not declared to work a forfeiture of the locator's rights; on the contrary, he, together with his heirs, assigns, or legal representatives, was expressly given the right to resume work upon the claim after such failure to complete it, provided no other location be made in the meantime. By its Act of March 2, 1907, however, Congress, while conferring upon locators in Alaska a privilege not given by section 2324 of the Revised Statutes, to wit, a provision permitting Alaskan locators to file for record an affidavit showing the performance of the required annual assessment work, which affidavit should be prima facie evidence of such performance, expressly declared that, upon the failure of the locator or owner of any such claim in Alaska to comply with the provisions of the act as to the performance of work and improvements, 'such claim shall become forfeited and open to location by others as if no location of the same had ever been made.'

"It is true that the Act of March 2, 1907, contains no express repeal of any previous provision of the statutes, and it is also true

that implied repeals are not favored. Still the courts are not at liberty to ignore a purpose to repeal clearly indicated by irreconcilable provisions. Here we have an old mining statute, made applicable to Alaska by the Act of June 6, 1900, expressly providing that while a failure on the part of the locator to complete the required annual assessment work would render the ground covered by the location open to relocation, yet such work might be resumed by the locator or his legal representatives, provided no other location had intervened, and then a later act to amend the law upon the subject in so far as mining claims in Alaska are concerned, which in terms declares that upon the failure of the locator to perform the required amount of work upon the claim within the year 'such claim shall become forfeited and open to location by others as if no location of the same had ever been made.'

"Both acts expressly require \$100 worth of work or improvements to be done or made on or for the benefit of each claim during each year. But the consequences of a failure to complete such work or improvements within the year are differently declared, and such differences are irreconcilable. In the earlier act such failure is not declared to end the locator's right; but he is thereby given the right to resume the work after the expiration of the year, provided there has been no other location meanwhile. By the later act no such permission is accorded, and there is therein an express declaration that such failure works a forfeiture of the claim. To that extent the prior law, so far as it affects claims in Alaska, was necessarily repealed by the later one."

## 1909 Supp., p. 36, sec. 2.

**Effect of amendment.** — "The Alaskan Code (June 6, 1900, 31 Stat. 321, 322, §§ 4 and 5, c. 786) created one District Court with three judges having general civil and criminal jurisdiction over the entire district, and authority to hold regular terms at Juneau, St. Michael's and Eagle City, and special terms at such times and places in the district as they or any of them might deem expedient. The Act of March 3, 1909 (35 Stat. 838, 839, c. 269), in providing for a fourth division did not contemplate an interruption of the functions of the judge throughout the entire district, nor did it destroy the unity of the District Court. But while preserving unimpaired the power of the court and judges, it fixed a new place, at which the same District Court must be held. It did not create a new tribunal, with new

officers, to be organized in a new political division, but it continued the jurisdiction and power of the judge to be exercised anywhere in Alaska. It did not revoke his authority to summon jurors to attend at any session of the District Court, whether permitted to be held at Fairbanks under the Act of 1900 or required there to be held after July 1, under the Act of 1909. The principle involved is, in some of its aspects, like that considered in *Rosencrans v. United States*, (1897) 165 U. S. 257, 17 S. Ct. 302, 41 U. S. (L. ed.) 708, where it was said that 'jurisdiction is co-extensive with district and no mere multiplication of places at which courts are to be held or mere creation of division nullifies it.' " *Matheson v. United States*, (1913) 227 U. S. 540, 33 S. Ct. 355, 57 U. S. (L. ed.) 631.

## ANIMALS.

### Vol. I, p. 444, sec. 4386.

Providing facilities for watering, feeding, and rest.—It is the duty of a railroad company in carrying on interstate shipment of animals, not only to unload the same within the periods mentioned in the statutes, but to provide facilities reasonably sufficient and suitable for watering and feeding the animals and for allowing them an opportunity for rest. *St. Louis & S. F. R. Co. v. Piburn*, (1911) 30 Okla. 262, 120 Pac. 923, wherein the court said: "And it has been held that, even where the owner or custodian undertakes the attention of the animals, yet, that if he, for any cause, neglects or fails to care for them as required by the statute, it is the duty of the carrier to do so, and collect all charges and expense therefor in the manner authorized in the statutes. There have been various reasons mentioned by different courts for the passage of this law. Some think it was passed for reasons of humanity; others that it was in aid of a healthful food supply for the nation, but, whatever the reason given, practically all unite in declaring it a wise and meritorious enactment."

Jurisdiction of state court.—This section gives to a shipper whose animals are injured by failure of the company to comply with the statute a cause of action enforceable in a state court. *St. Louis & S. F. R. Co. v. Piburn*, (1911) 30 Okla. 262, 120 Pac. 923.

Evidence.—In a suit based on failure of

a railroad company, in transporting an interstate shipment of animals, to comply with the duties imposed on it by this section, where the proof shows that the railroad was in possession of the animals about forty hours, and actually unloaded them within the period named in the statute, but unloaded them in pens so small that the animals were crowded and jammed in the pens as close together as in the cars, and could not lie down or move about, and where no troughs or other facilities were provided for watering or feeding them, and no water was provided, the proof justifies a finding that the railroad had not performed the duty required of it by the statute. *St. Louis & S. F. R. Co. v. Piburn*, (1911) 30 Okla. 262, 120 Pac. 923.

Measure of damages.—In a suit for damages to an interstate shipment of sheep, against a railroad company, based on its negligence in failing to unload the animals for water, food, and rest, the measure of damages is the difference, if any, in the fair market value of the sheep at the point of destination in the condition in which they were delivered and what it would have been at such point of destination if they had been properly unloaded and provided with food, water, and rest as required by statute. *St. Louis & S. F. R. Co. v. Piburn*, (1911) 30 Okla. 262, 120 Pac. 923.

### Vol. X, p. 35, sec. 2. [*Act of March 3, 1905.*]

A connecting carrier which receives live stock outside of the limits of a quarantined state is not liable under this section. *United States v. Baltimore & O. R. Co.*, (1911) 222 U. S. 8, 32 S. Ct. 6, 56 U. S. (L. Ed.) 68. In this case the quarantined state was Kentucky and the stock was received in Ohio. The court said: "The government urges an answer in the affirmative and contends that not only an initial carrier, but a connecting carrier, though it receive the stock in a state other than the quarantined state (in case at bar, Ohio) transports, within the meaning of the statute, stock 'from' one state 'into' another. The argument is that necessarily such connecting carrier is instrumental in the transportation of the stock from the place of shipment to its ultimate destination, and therefore within the reason and purpose of the law.

"The contention is untenable. To receive a thing in Ohio is not receiving it in Kentucky, nor is transporting it in Ohio trans-

porting it from Kentucky into Ohio. To sustain the indictment, therefore, we must disregard the plain and only direct signification of the words of the statute. Such extreme liberty with the words of a penal statute may not be taken. We are not unmindful that our function is to seek the intention of the lawmaker and that illustrations may be found where the literal meaning of words has been extended beyond their absolute sense. But the general rule is that penal statutes must be strictly construed. It is a familiar rule and need not be illustrated. The words of the statute, certainly when they have a sensible meaning and a definite and unmistakable signification, as the words of the statute under review have, mark its extent. We do not mean to say that ambiguity in words may not be resolved by the clear purpose of the statute.

"If, however, there be no ambiguity, the words of the statute are the measure of its meaning. If there be ambiguity, the char-



acter of the statute determines for a strict or liberal construction. A criminal statute is strictly construed. Courts are not inclined to make 'constructive crimes.' We therefore might have to decide against the indictment, even if there were more ambiguity in the statute under review than we find in it. It manifests care and a studied purpose to define the extent of the quarantine and of what shall constitute violations of it. Within its limits there shall be no delivery of stock for transportation beyond them 'into any other state or territory' by public or private conveyance or by driving. There is no obscurity whatever. A sensible, definite meaning is expressed. There must be a delivery for or a receiving for transportation 'from the quarantined portion of any state or territory . . . into any other state or territory . . .'. That reception and that transportation are the elements of the crime and must exist to constitute it. None of these elements are charged against the defendant. It did not receive the sheep for transportation in Kentucky or transport them 'from' Kentucky 'into' Ohio. It received them in Ohio and transported them in Ohio, and the statute thus construed adapts the remedy to the mischief. In other words, if the breaking of quarantine is prevented, the purpose of the statute is fulfilled without subjecting to criminal accusation and penalties distant carriers who, it may be, are

ignorant of the existence of the quarantine; and ignorant they may be, for the statute (sec. 1) requires the Secretary of Agriculture to give notice of the establishment of quarantine only to the 'transportation companies doing business in or through' the quarantined state. It would be strange indeed if the statute intends to confound unwilling with willful acts by uniting in criminality and penalties the companies to which no notice of quarantine is required to be given with those to which notice is required.

"We do not, of course, mean to say that the movement of sheep in Ohio did not tend to spread contagion, but it is certain there could have been no movement of them in Ohio if they had not been transported 'from' Kentucky 'into' Ohio.

"In *United States v. El Paso & N. E. Railroad Co.* 178 Fed. Rep. 846, and in *United States v. Chicago, Burlington & Quincy R. R.*, 181 Fed. Rep. 882, the same construction was given to the statute that we have given it. 'Also by the Circuit Court of Appeals for the Eighth Circuit in *St. Louis. St. Louis Merchants' Bridge Terminal Ry. Co. v. United States*, 188 Fed. Rep. 191. In *United States v. Southern Railway Co.* (Circuit Court Dist. S. C.), 187 Fed. Rep. 209, a contrary ruling was made, and a connecting carrier which received stock outside of the limits of the quarantined states was held to be liable."

## 1909 Supp., p. 43, sec. 1.

**Carrier as an insurer.**—If the pens provided by the carrier are properly equipped, so that the sheep may be properly fed, watered, and rested, he has discharged his full duty, unless it is made to appear that the surrounding conditions were such that the carrier should have anticipated that the sheep would probably be molested, and thus not afforded proper rest. If such is not the law, then the carrier is made an absolute insurer of the safety of the sheep while unloaded for food, rest, and water, regardless of the fact that by the exercise of reasonable diligence he did not know, and could not have discovered, the threatened danger to which the sheep might be exposed. *Beckman v. Southern Pac. Co.* (1911) 39 Utah 472, 118 Pac. 118.

**Part of period elapsing in foreign country.**—The law is applicable to a shipment originating in one state and ending in another, when the deprivation of food, water and rest for the statutory period is shown, even though part of such period elapsed while the animals were in a foreign country. *Grand Trunk Ry. Co. of Canada v. United States*, (C. C. A. 2d Cir. 1911) 191 Fed. 803.

**Due diligence and foresight.**—The measure of due diligence and foresight required by this section is that diligence and foresight which persons of ordinary prudence and care commonly exercise under similar circumstances. And the due diligence and

foresight which condition the anticipation and avoidance of the other accidental or unavoidable causes described in this law is that degree of diligence and foresight which reasonably prudent and careful men ordinarily exercise under similar circumstances. *Chicago, B. & Q. R. Co. v. United States*, (C. C. A. 8th Cir. 1912) 194 Fed. 342.

**Waiver of statutory provisions by control or otherwise.**—The statute imposes upon the carrier the primary duty of seeing that the stock is not confined in cars longer than the prescribed period, for the command of the statute is, "Thou shalt not" fail to do the thing required; and, while the carrier may arrange with the shipper or the person in charge for unloading, the company cannot thereby shift the burden, and the responsibility for unloading in time still rests with it. *Oregon-Washington R. & Nav. Co. v. United States*, (C. C. A. 9th Cir. 1913) 205 Fed. 337.

This law positively prohibits the confinement of animals for a period longer than 28 consecutive hours, save only that by special agreement and written request of the owner the time of confinement may be extended to 36 hours. The extreme limit, therefore, to which the wishes of the owner become relevant, is 36 hours. An agreement, therefore, for a confinement beyond that time, is a contract to do that which the law says may not be done, and is void and nonenforceable as a defense to the action for damages to

animals transported. *Webster v. Union Pac. R. Co.* (D. C. Colo. 1912) 200 Fed. 597.

The Twenty-eight Hour Act is for the prevention of cruelty to animals, and not primarily for the benefit of the owners, but is restrictive of their rights, and cannot be waived, except in the manner and upon the contingencies provided in the act. *Cleveland, C., C. & St. L. Ry. Co. v. Hayes*, (Ind. 1913) 102 N. E. 34.

"Storm or other accidental or unavoidable cause."—The statute renders the carrier excusable for confining the stock in cars more than the prescribed period of time, if prevented from unloading "by storm or other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight." *Oregon-Washington R. & Nav. Co. v. United States*, (C. C. A. 9th Cir. 1913) 205 Fed. 337.

An "accidental or unavoidable cause" which cannot be avoided by the exercise of due diligence and foresight within the meaning of this law is a cause which reasonably prudent and careful men, under like circumstances, do not and would not ordinarily anticipate, and the effects of which under similar circumstances they do not and would not ordinarily avoid. *Chicago, B. & Q. R. Co. v. United States*, (C. C. A. 8th Cir. 1912) 194 Fed. 342.

In *Chicago, B. & Q. R. Co. v. United States*, (C. C. A. 8th Cir. 1912) 194 Fed. 342, it appeared that a train load of 17 cars of sheep started at 5 in the morning to make a run which ordinarily requires 11 hours. This train and its drawbars were inspected and found in good condition on the morning it started. In order to unload the sheep in time, it was necessary that the train should make the run in 12 hours. It was delayed about two hours by the breaking of a drawbar and chain of a train which met and passed it, by the slipping of a knuckle in the coupler which separated it into two parts and by the pulling out of two drawbars in its cars which made it necessary to draw the two parts of the train upon a side track and recouple them. Upon its arrival the company dragged the sheep out of two of the cars in the dark within the 36 hours, but left 15 of the cars unloaded until the next morning after the expiration of the 36 hours. It was held there was no substantial evidence that the company willfully violated the law, and there was substantial evidence that it was prevented from unloading the sheep within the 36 hours by accidental or unavoidable causes which could not be anticipated or avoided by the exercise of due diligence and foresight.

Compliance with statute as defense to delay in delivery.—"Stopping a shipment of cattle to feed them in compliance with the Interstate Commerce Act excuses delay in delivery caused thereby; but, if negligent delay causes the unloading of the cattle to comply with said law, then it would not excuse." *Lay v. Chicago, B. & Q. R. Co.*, (1911) 157 Mo. App. 467, 138 S. W. 884.

A delay caused solely by defendant's compliance with the provisions of the Twenty-eight Hour Law cannot be actionable, since it should be regarded as the result of the performance of a duty imposed by law. *Hickey v. Chicago, B. & Q. R. Co.*, (1913) 174 Mo. App. 408, 160 S. W. 24.

In an action by a shipper against an interstate carrier for damages for delay in a shipment of cattle the defendant has the right to have the jury instructed that in determining the matter of delay complained of the period required by this section for the purpose of feeding and watering and resting the cattle in pens should not be included. *Kansas City, M. & O. Ry. Co. v. Moore*, (Tex. 1912) 149 S. W. 302.

Another carrier partly in fault.—It is no excuse to a defendant, which knowingly and willfully fails to comply with the provisions of this act, that the loading took place on a connecting road and that such road had already kept the animals in confinement without rest, food, and water beyond the 28-hour period when the car came to the hands of the other company. That is, if the corporation receiving the cattle from a connecting line receives same with knowledge that such connecting company had already offended against the law with respect to such cattle, it does not thereby and from that fact alone become responsible for the offending of the connecting corporation; but if it, the receiving company, then continues such confinement without unloading for rest, water, and food, and is not prevented from so unloading by storm, or other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight, it becomes liable to the penalty, even if such detention of such cattle without unloading is but for an hour. *United States v. Delaware, L. & W. R. Co.* (N. D. N. Y. 1913) 206 Fed. 513.

When a connecting railroad company receives a car of cattle in interstate commerce or movement knowing that the cattle have already been confined without rest, food, or water for more than the statutory time, and such cattle are not promptly unloaded by such receiving company, and prima facie the delay in unloading appears unreasonable and unnecessary, the burden is on such receiving company to excuse the delay by showing storm, accident, or some unavoidable cause which could not have been anticipated or avoided by the exercise of due diligence and foresight. *United States v. Delaware, L. & W. R. Co.* (N. D. N. Y. 1913) 206 Fed. 513.

A judgment against an initial carrier for a violation of the statute is not a good defense to an action against the connecting carrier who was also delinquent. *New York Cent. & H. R. R. Co. v. United States*, (C. C. A. 2d Cir. 1913) 203 Fed. 953.

Knowledge of initial carrier imputed to connecting carrier.—In *New York Cent. & H. R. R. Co. v. United States*, (C. C. A. 2d Cir. 1913) 203 Fed. 953, the court said: "Two cars loaded with horses were shipped

from Girard, Kan., consigned to shippers' order at the defendant's stockyard in East Buffalo. The routing was via the St. Louis & San Francisco Railroad Company to Kansas City, thence by the Wabash Railroad Company through Missouri, Indiana, Iowa, Michigan, and Canada, to Black Rock, Buffalo, where the cars were received by the defendant to be transported to destination, a distance of seven miles. The Wabash Company did not unload the horses for food, water, and rest between Peru, Ind., and Black Rock, a period of 38 hours and 55 minutes. The defendant occupied 3 hours and 35 minutes in transporting the cars to destination in East Buffalo.

"The United States instituted these two actions to recover of the defendant a penalty of \$500 for each car for violation of Act June 29, 1906, 34 Stat. 607. . . .

"The complaint alleged that the defendant was not prevented from complying with the act by storm or other accidental and unavoidable causes which could not be anticipated or avoided by the exercise of due diligence and foresight, but knowingly and willfully failed to unload the horses in transit as aforesaid.

"The defendant filed answers, which alleged that it received the cars at Black Rock from its connecting carrier, the Wabash Railroad Company, without knowing the time the horses had been confined, and transported them within the usual and reasonable time to destination in East Buffalo. . . .

"At the trial a jury was duly waived and the cause submitted to the court. The parties stipulated that the facts stated in the complaint were true; also that the time of confinement of the horses had been extended from 28 to 36 hours, the defendant reserving the right to show that when it received the cars it did not know that the horses had been confined longer than the law allowed; also to prove that, if it had refused to transport the cars, they would have had to go back to Michigan, a trip taking from 15 to 20 hours, before the horses could have been unloaded because, being carried in bond, they could not be unloaded in Canada; also to prove that the usual time for transporting live stock from Black Rock to the stockyards

was from 1½ hours to 5 hours, depending upon circumstances.

"The first question is: Did the defendant act knowingly in the transportation of the cars; that is, did it know when the horses had been last unloaded? Relying, no doubt, upon the proposition that the burden of proof lay upon the government, the defendant gave no evidence at all upon the subject. But we think it was bound to make reasonable inquiry as to this fact. The humane purpose of the law would be frequently frustrated if the government were compelled to prove facts directly and often exclusively within the knowledge of the carrier. When the government had proved that the time had long elapsed within which the horses should have been unloaded, knowledge of that fact was properly imputed by Judge Hazel to the defendant, in the absence of any evidence from it that it had made reasonable inquiry and could not ascertain the fact.

"The next question is: Did the defendant act willfully in the premises; that is, unnecessarily disregard the provisions and purpose of the law? Obviously it did the best thing for the horses in taking them to the stockyard in East Buffalo. The time it could properly use in so doing would depend upon whether the period of confinement had or had not expired. Knowledge of the fact that it had expired being imputed to the defendant, it was bound to transport them as quickly as possible. *Prima facie* 3 hours and 35 minutes was an unreasonable time to move the cars seven miles. The only testimony the defendant offered upon the subject was the opinion of two freight conductors that, in view of the condition of the belt line in getting ready for grade crossing improvements, the time actually occupied was reasonable. This was entirely insufficient. The facts should have been stated, so that the court might determine whether the time was reasonable or not."

It is for the jury to say whether a delay in unloading was caused through accident or unavoidable cause, and whether the defendant exercised due diligence and foresight in any endeavor to prevent the delay. *Oregon-Washington R. & Nav. Co. v. United States*, (C. C. A. 9th Cir. 1913) 205 Fed. 337.

## 1909 Supp., p. 44, sec. 2.

**Contracts relieving carrier of statutory duty.**—Under the statute, the carrier cannot, by any contract with the shipper, relieve itself of the prescribed duty of feeding and watering the animals, if their owner or custodian fails to do so. It cannot by contract with the shipper exempt itself from liability for its own negligence; and its failure to perform the duty imposed upon it by the statute is negligence *per se*. *Southern R. Co. v. Proctor*, (1911) 3 Ala. App. 413, 57 So. 513.

**Effect of statute on contracts limiting liability of carrier.**—A special contract of carriage, whereby the shipper is to load, un-

load, reload, feed, water, tend, and care for the stock at his own expense and risk during the entire transportation, does not contravene provisions of this act, since the act in terms provides that the owner of the animals shall primarily be charged with feeding and watering them. *Webster v. Union Pac. R. Co.* (D. C. Colo. 1912) 200 Fed. 597. In this case, which was an action to recover for damage to certain sheep shipped on the defendant's railroad where-in the defendant set up various defenses, the court had this to say of the fourth defense: "The fourth defense sets up a special reduced rate of freight and a special

contract of carriage, whereby the plaintiff shipper was to load, unload, reload, feed, water, tend, and care for the sheep at his own expense and risk during the entire transportation, and further alleges that any injuries suffered by the sheep were due to the carelessness of the plaintiff in and about such matters, and notwithstanding that proper facilities were provided by the defendant. It is not perceived why such agreement would not be valid as between the shipper and the railroad company. Its terms do not contravene the provisions of Act June 29, 1906, c. 3594, 34 Stat. 607, known as the 'Twenty-eight Hour Law,' since that act in

terms provides that the owner of the animals shall primarily be charged with feeding and watering them. While such a provision would not afford any defense to a prosecution by the government for failure of the railroad company, upon the owner's default, it is, as between the owner and the railroad a sufficient defense, since it is tantamount to an allegation that the railroad company was not itself negligent, but that the negligence was that of the owner of the animals in and about a matter as to which such owner had contracted to assume the sole responsibility."

### 1909 Supp., p. 45, sec. 3.

The words "knowingly and willfully," as employed in the act, have been many times construed and their meaning determined. "Knowingly" signifies "with a knowledge of the facts which, taken together, constitute the failure to comply with the statute"; and "willfully" means "purposely or obstinately, and is designed to describe the attitude of a carrier who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements." *Oregon-Washington R. & Nav. Co. v. United States*, (C. C. A. 9th Cir. 1913) 205 Fed. 337. See also a companion case between the same parties in 205 Fed. 341, and *Chicago, B. & Q. R. Co. v. United States*, (C. C. A. 8th Cir. 1912) 194 Fed. 342.

In *United States v. Lehigh Valley R. Co.*, (C. C. A. 3d Cir. 1913) 204 Fed. 706, the court said: "These words mean something more than 'negligent.' A knowing and willful omission to perform a duty is not, as we think, the same as a merely careless omission. For example: Let us suppose that the man whose duty it was to feed these lambs had learned the length of their confinement from the card accompanying the shipment, but that his attention had been diverted, so that he forgot his task until the period limited by the statute had passed. No doubt this would be negligence, but to call it a 'willful' failure of duty seems to contradict one of the essential facts supposed. It is not possible to omit an act knowingly and willfully, unless the act be consciously in the mind; if it be no longer in the mind, it cannot be within the range of either knowledge or intention."

It is not essential to the recovery of a penalty under this section that proof should be made that the defendant knew that the animals did not receive proper food, water, or space to rest in the cars which transported them. It is enough that the railroad company knowingly and willfully confined them more than 28 hours, and the animals did not have proper food, water, space, and opportunity to rest in the cars that carried them during the transportation. *Chicago, B. & Q. R. Co. v. United States*, (C. C. A. 8th Cir. 1912) 195 Fed. 241.

**Penalty.**—There is but one violation of the penalty where cattle cars, though loaded at different points, are consolidated into one train and are subsequently delivered to the connecting carrier at the same time, the consignors and consignees being the same, and the destination of the animals the same. *United States v. New York Cent. & H. R. R. Co.*, (W. D. N. Y. 1911) 191 Fed. 938.

**Effect of proviso.**—The statute provides that cattle shall not be confined continuously for more than 36 hours unless they are carried in cars in which they can and do have proper food and water and opportunity for rest. It will be noticed that it is optional with the carrier either to unload the cattle for rest, food, and water, or to give them proper food, water, and rest or opportunity for rest while in transit without unloading. Congress primarily intended that cattle should be unloaded every 28 or 36 hours; but if the cars are properly equipped and suitable for food and rest, then unloading is not required. When, therefore, the cars are not unloaded, all the animals contained therein must have sufficient space for lying down at the same time. The probabilities are that they will not all lie at the same time, but nevertheless opportunity must be given them to do so. *United States v. New York Cent. & H. R. R. Co.* (W. D. N. Y. 1911) 191 Fed. 938, followed in *United States v. Erie R. Co.*, (W. D. N. Y. 1911) 191 Fed. 941.

In *Erie R. Co. v. United States*, (C. C. A. 2nd Cir. 1912) 200 Fed. 406, the question in issue was whether the circumstance that all the cattle in a car could not obtain rest by lying down at the same time, would prevent the railroad from availing itself of the proviso in this section, when the car was so large that if the movements of the cattle were regulated in some way, all of them might secure proper opportunity to rest at one time or another. The court said: "It seems to us that it is the object of the statute to secure to every animal in the shipment proper space and opportunity to rest. Not only is cruelty to a single one 'cruelty to animals,' but the landing of a single one in a condition bad

for slaughtering exposes the persons who may eat the meat from that one carcass to a risk which might not exist if this statute were strictly conformed to. Every animal in this shipment might have proper opportunity to rest if they all agreed to take turns in occupying space. But such agreement could not be brought about, and, for aught that any one can tell, two or three or four cattle of this shipment may have been deprived of the opportunity to rest, even for the 8 hours out of every 24, which is the lowest period of rest contended for by the defendant."

Burden of bringing case within proviso. — It is not indispensable to a recovery of a penalty under this statute that the government should negative the excuse embodied in the proviso of this section. That excuse is

a separate topic, a defense, and the burden is on the defendant to establish it. It is that the animals can and do have proper food, water, space, and opportunity to rest in the cars which transport them. The facts that their owner or caretaker, who accompanied them, agreed to care for, feed, and water them on their way, and that food and water with which he might have performed his agreement were easily accessible to him, are not sufficient to establish this excuse, where the animals are knowingly and willfully confined more than 28 hours and they do not actually receive proper food, or water, or space and opportunity to rest. *Chicago, B. & Q. R. Co. v. United States*, (C. C. A. 8th Cir. 1912) 195 Fed. 241.

### 1909 Supp., p. 51, sec. 1. [*Exceptions to farmers, retailers, etc.*]

Effect of act on right of state to regulate slaughtering of animals by farmers. — In *Commonwealth v. Moore*, (Mass. 1913) 100 N. E. 1071, it was held that the effect of this section making the provisions of the act inapplicable to animals slaughtered by any farmer was to permit a state under its police powers to regulate the slaughtering of animals by farmers. The court said:

"The pertinent provisions of the federal act are that it confers full authority upon the Secretary of Agriculture to make inspection (inter alia) of all cattle before they are 'allowed to enter any slaughtering, packing, meat canning, rendering or similar establishment' for producing food products to be used in interstate or foreign commerce, and to make a post mortem examination and inspection of carcasses of cattle to be prepared for human consumption, and for an inspection of the establishment where such slaughtering and preparation is carried on. The act exempts from its inspection requirements 'animals slaughtered by any farmer on the farm and sold and transported in interstate or foreign commerce' with certain limitations not here material.

"The transportation of food products in interstate and foreign commerce and the enactment and enforcement of regulations to the end that nothing may become the subject of such commerce which is unwholesome, unhealthy or diseased, is within the power of Congress. *Hipolite Egg Co. v. United States*, 220 U. S. 45, 31 Sup. Ct. 364, 55 L. Ed. 364. When Congress prescribes concerning any branch of commerce within its sphere of control, its regulations are paramount and render nugatory state statutes covering the same ground. The power of the state must yield to the exercise of that delegated to the United States. It is only the silence of Congress which clothes with validity state laws concerning subjects in that jurisdictional zone, within the power reserved to the states, and at the same time within the enumerated powers of the federal government. The federal act governs the inspection of all cattle, both alive and dead,

prepared for interstate transportation in a slaughtering and similar establishment. But it exempts the individual farmer preparing carcasses of cattle for such transportation. Is this exemption to be interpreted as a determination that such product of the farmer shall be absolutely free in interstate commerce, or is it merely a declaration that, until further action is taken, the subject is outside the scope of the act? It seems to us that the act must be interpreted as having the latter effect. We reach this conclusion on authority, and if not controlled by that, on reason. It has been said that 'it should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police power of the states, even when it may do so, unless the purpose to effect that result is clearly manifested.' *Reid v. Colorado*, 187 U. S. 137, 148, 23 Sup. Ct. 92, 96 (47 L. Ed. 108). In *Reid v. Colorado* the alleged conflict was presented between a federal act which covered the driving on foot or transporting between states and territories 'of any live stock known to be affected with any contagious, infectious or communicable disease' and a state statute which prohibited the bringing into Colorado of cattle from designated parts of Texas without such cattle having been held at some place north of the 36th parallel of north latitude for ninety days and without having procured from a state officer a certificate that the cattle were free from all contagious and infectious disease and had not been exposed to any such disease within ninety days prior thereto. It was held that the state statute did not cover the same ground as the act of Congress, and was not inconsistent with it. The ground of the decision was that the prohibition by the federal act from interstate commerce of cattle known to be diseased did not prevent a state from regulating by reasonable inspection laws the introduction within its borders of cattle not known to be diseased. Knowledge by the person transporting the cattle of their diseased condition was the test established by the federal act, while under the state statute knowledge

as to the actual condition of the cattle was of no consequence. This principle is controlling of the case at bar. Congress did not include the farmer within the purview of its inspection in his preparation of food products for interstate commerce, but expressly exempted him. It did not say, however, that he should be immune from valid police regulations by the several states. It went no further than to say that the federal act did not apply to him. That left the farmer just where he would have been if no federal act had been passed. He is on the same footing as the cattle man in *Reid v. Colorado*, *ubi supra*, who had no knowledge as to the freedom from disease of his cattle. But if the case at bar is not within the express authority of *Reid v. Colorado*, we think on reason the same conclusion must be reached. The protection of the public health manifestly is within the police power

of the state. The federal act does not assert expressly nor imply by fair intendment that cattle slaughtered by a farmer are more healthy or less liable to disease than those at a slaughtering establishment. It would be difficult to state any ground on which such a distinction could stand. An inference may be drawn from the federal act that the farmer and retail dealer, so far as concerned their personal preparation of cattle for interstate commerce, were almost negligible. But whatever may have been the motive of Congress, the rational interpretation of the language used is that it omitted from its provisions the farmer, but did not determine that he was to have special protection. The state statute does not conflict in any respect with the federal act, but expressly recognizes whatever may be done under it, and gives it the full effect required by the Federal Constitution."

## ARTICLES FOR THE GOVERNMENT OF THE NAVY.

### Vol. I, p. 463, art. 8, cl. first.

Sufficiency of charge for false swearing.— In *Ex parte Dickey*, (D. C. Me. 1913) 204 Fed. 322, the petitioner sought a writ of habeas corpus to review the validity of his imprisonment under a judgment of a naval court martial on a charge of "scandalous conduct tending to the destruction of good morals." The writ was denied. The court said: "The petition of William W. Dickey shows that on the 2d day of October, 1912, he was an enlisted man in the United States navy, occupying the position of chief commissary steward on board the United States battleship *Kansas*; that he continued to be in such service of the United States up to December 2, 1912, when a court-martial was held on board the United States ship *Louisiana*; that he was tried before such court-martial for scandalous conduct tending to the destruction of good morals; that the specification under this charge set out at length a statement sworn to by the petitioner on the 13th day of November, 1912, before Commander Frederick B. Bassett, Jr., acting as commanding officer of the United States ship *Utah*, in which statement the petitioner swore that he had at several times, detailed therein, practiced frauds on the United States in conjunction with representatives of certain government contractors named therein, from whom supplies for the navy were purchased, and that such frauds had netted him money, amounting to about \$2,000 in certain cases named in said sworn statement; that thereafter, on November 19,

1912, while a witness under oath before a duly constituted court of inquiry, the petitioner gave certain testimony, set out in the specification, in which he denied the truth of his previous statement, and testified that he had never at any time received any money from contractors, and that his former statement was untrue. The specification then concludes: 'And that the said William W. Dickey, chief commissary steward United States navy, did by submitting the said written statement or confession, and by testifying as above shown, make statements inconsistent the one with the other, and one of which must have been, and was, known by him to be false and misleading, and intended to deceive and defeat the ends of justice.'

"Upon this charge and specification the court-martial found the petitioner guilty, and sentenced him to five years at hard labor, deprivation of his pay for that time, and dishonorable discharge at the end of the five years, the same being under the provisions of article 1797 of the Navy Regulations, as changed by order of the Secretary of the Navy November 9, 1911. . . . Upon examination of the charge on which the petitioner was tried, it will be found that it did not attempt to charge the petitioner in the court-martial with 'perjury,' which offense is defined under article 14 of the articles for the government of the navy as a distinct offense, namely, the making of an oath to any fact or writing, knowing such oath to

be false, for the purpose of obtaining, or aiding others to obtain, the approval or allowance of any claim against the United States, or officer thereof. It is clear that the pleadings upon which the accused was tried in the court-martial alleged a lesser offense than 'perjury.' The offense set up was 'scandalous conduct tending to the de-

struction of good morals.' Under this charge the specification made a substantial charge of false swearing, although it did not set forth the charge with the clearness and definiteness required in a civil court. This general charge is well known in courts-martial, and authorized by article 8 of the articles for the government of the navy."

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## ATTACHMENT.

### Vol. I, p. 515, sec. 933.

This section was cited and applied in *M'Dermott v. Hayes*, (C. C. A. 1st Cir. 1912) 197 Fed. 129.

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## BAIL AND RECOGNIZANCES.

### Vol. I, p. 521, sec. 1015.

No provision is made by the statutes of the United States regarding bail during trial, and the defendant may be refused bail in the discretion of the court. *United States v. Rice*, (S. D. N. Y. 1911) 192 Fed. 720, wherein the court said: "The question presented is whether a defendant on trial for a felony (not a capital case) is entitled as matter of right to be enlarged on bail during the progress of such trial. Section 1015, R. S. U. S. provides that 'bail shall be admitted upon all arrests in criminal cases when the offense is not punishable by death.' By section 1016, R. S. U. S. it is also provided that 'bail may be admitted upon all arrests in criminal cases when the punishment may be death.' The statutes of the United States are silent as to bail during the progress of the trial. The Supreme Court of the United States, however, has placed a construction on this statute founded evidently on the rules of the common law. In *Hudson v. Parker*, 156 U. S. 277, 285, 15 Sup. Ct. 450, 453 (39 L. Ed. 424), the court said: 'The statutes of the United States have been framed upon the theory that a person accused of crime shall not, until he has been finally adjudged guilty in the court of last resort, be absolutely compelled to undergo imprisonment or punishment, but may be admitted to bail, not only after arrest and before trial, but after conviction and pending a writ of error. The statutes as to bail upon arrest and before trial provide that bail "may be admitted" upon all arrests in capital cases, and "shall be admitted" upon all

arrests in other criminal cases; and may be taken, . . . ' (citing the statute quoted). The words 'and before trial' and 'before trial' were entirely unnecessary if the court intended to intimate or hold that bail during the progress of the trial is a matter of absolute right. It is in accord with reason that during the progress of a criminal trial for felony the presence of the defendants may be assured by having them in actual custody. At common law in cases of felony at first no bail was permitted. Then bail before trial, but not during the trial, was permitted. This was the law when the Act of September 24, 1789 (1 Stat. 91, c. 20, § 33), was enacted. Section 1018, R. S. U. S. [1 Fed. Stat. Annot. 522] and Act Aug. 8, 1846 (9 Stat. 73, c. 98, § 4), provides that 'any party charged with a criminal offense and admitted to bail may, in vacation, be arrested by his bail, and delivered to the marshal or his deputy before any judge or other officer having power to commit for such offense,' etc.

"This excludes the power of the bail to voluntarily surrender their principal during the progress of the trial and be exonerated, and clearly contemplates that the accused may then be taken into the custody of the court and remain subject to its order and control.

"The rest of the section last quoted reads as follows:

"'And at the request of such bail the judge or other officer shall recommit the party so arrested to the custody of the marshal, and

indorse on the recognizance or certified copy thereof the discharge and exoneration of such bail; and the party so committed shall therefrom be held in custody until discharged by due course of law.'

"As the bail may not surrender the principal during the trial (term) if the court has not power on its own motion to order the defendant into custody of the marshal, the defendant during the trial may openly abscond, and the court and bail are powerless to prevent unless the bail take the defendant into their physical custody and hold him during the trial. I think the decisions of the Supreme Court and statutes quoted clearly contemplate that the defendant admitted to bail 'before trial' may be taken into the custody of the court, and held subject to its order during the trial. The responsibility of the bail may, and I think does, continue during the trial, if defendant is not taken

into actual custody. However, it is within the discretion of the court to take and hold the defendant in actual custody during the trial. As said, the court has the right to be assured of the continued presence of the defendant during the trial. It is an inherent power of the court and one to be exercised in its discretion the same as is the discretionary power to keep the jury together in the custody of the marshal during the criminal trial. It is not in the legal sense an imprisonment or a punishment, but a necessary step in the due administration of justice. The jury is placed in the custody of the sheriff in the state courts or of the marshal in the United States courts to insure them against outside and improper interference and influence, and why may not a defendant be placed in actual custody to render fruitless his attempts, if any, to interfere with or influence jurors?"

## Vol. I, p. 523, sec. 1020.

Prosecution in a territorial court.—The provisions of this statute apply where the recognizance is taken in a territorial court in a prosecution by the United States of an offense against it, as the territorial court is then exercising the jurisdiction of a District Court of the United States. *Lane v. Roth*, (C. C. A. 3d Cir. 1912) 195 Fed. 255, wherein the court said: "While in the trial of cases territorial courts are required to conform to the statutes and practice of the territory, the acts of Congress govern the disposition of moneys and obligations of the United States, and we are clearly of the opinion that the territorial statute was not applicable to the discharge of this forfeiture, that section 1020 of the Revised Statutes of the United States governs, and that under it the court had full power and authority to set aside the forfeiture and exonerate the bond,

even after the term at which the forfeiture was entered. Even though section 1020 of the Revised Statutes governed, that section did not give the parties an absolute right to have the forfeiture vacated. That was a matter left to the discretion of the court upon a proper showing, and it is elementary that a court may vacate, modify, or set aside any order or judgment during the term that such order or judgment is entered, and in this case it appears that the order releasing the defendant and his bondsmen was set aside and vacated by the court during the term. The judgment of the court forfeiting the bond remains, and was the foundation for the present action. So long as the judgment of forfeiture stood, an action upon the bond could be maintained, and the judgment in this case was properly rendered and is therefore affirmed."

## BANKRUPTCY.

### 1912 Supp., p. 465, sec. 1a (9).

Stockholders as such are not "creditors" of a corporation whose stock they own. In *re Eureka Anthracite Coal Co.*, (W. D. Ark. 1912) 197 Fed. 216.

### 1912 Supp., p. 465, sec. 1a (15).

Determination of question as to insolvency.—Where the aggregate of a person's property at a fair valuation is insufficient to pay his debts he is insolvent. *Gill v. Eli-Norris Safe Co.*, (1913) 170 Mo. App. 478, 156 S. W. 811.

In *Underleak v. Scott*, (1912) 117 Minn. 136, 134 N. W. 731, it was held that this

definition of what constituted "insolvency" did not control in determining whether a debtor was insolvent, so as to make a voluntary conveyance fraudulent under the laws of Minnesota.

In *Louisiana Nat. Life Assur. Society v. Segen*, (E. D. La. 1912) 196 Fed. 903, on a petition for the adjudication of the defend-



ant as a bankrupt the court said: "In this matter it is apparent that, unless defendant's open accounts, about \$17,500 called good and \$9,300 called doubtful, and estimated by him as aggregating in value \$16,332.85, are considered as good assets, the defendant is insolvent, and was so at the date the petition was filed against him. If he was insolvent then, he has undoubtedly committed acts of bankruptcy in confessing judgment and in mortgaging his property.

"It appears that the defendant is a peddler of jewelry, and that he sells same on the installment plan, usually to people who have no assets except their salaries. It is a reasonable inference from the testimony taken that a great majority of these parties are execution proof, though they are doubtless honest, and may eventually pay their debts in full. Therefore these open accounts should not be considered in estimating the defendant's resources. In considering assets in relation to liabilities, to determine solvency vel non, the assets ought to be such as a creditor of the alleged bankrupt could realize on if he obtained a judgment against him in the ordinary course of judicial procedure.

"It is urged by the defendant that most small traders sell to people of no financial resources, and, if their open accounts are not to be considered good assets, they would be continually in danger of being proceeded against for involuntary bankruptcy. This, of course, would not be true if they did not commit acts of bankruptcy, and in this case I do not find the argument persuasive. Such being the case, there will be a decree adjudicating the defendant a bankrupt."

On an application for a new trial the court said: "In my former remarks I inadvertently stated too broadly the rule in regard to what assets should be considered in determining solvency vel non, as under it as stated exempt property would be excluded from consideration, which is clearly not the intention of the law. But in determining solvency the property relied upon should undoubtedly be such as would be available to the bankrupt himself with which to meet his liabilities within a reasonable time."

**Fair valuation.**—Insolvency, under the definition contained in this section, turns on what is a fair valuation of the property. In re Gilbert, (D. C. Ore. 1902) 112 Fed. 951. "Fair valuation" has been held to be the present market value, and not the amount which might be realized from a forced sale of the property. Ziegler v. Thayer, (1912) 34 R. I. 288, 83 Atl. 266.

"The valuation for the test of solvency or insolvency under the issue made must relate to the conditions affecting the hotel as a going concern when the mortgage was given, and not at its value as dead property after bankruptcy intervened." In re Klein, (C. C. A. 6th Cir. 1912) 197 Fed. 241.

"It having appeared that at a fair valuation the bankrupt's property at the date of transfer was insufficient in amount to pay its debts, the judge was warranted in finding it to have been insolvent as defined by the act itself." Hewitt v. Boston Straw Board Co., (1913) 214 Mass. 260, 101 N. E. 424.

This clause is cited in In re McCartney, (M. D. Pa. 1911) 188 Fed. 815.

## 1912 Supp., p. 468, sec. 1a (22).

A broad meaning is given to the word "conceal" by this definition. In re Doyle, (W. D. N. Y. 1912) 199 Fed. 247.

## 1912 Supp., p. 468, sec. 1a (23).

The words "secured creditor" are limited to security out of or against the estate. In re Thompson (E. D. N. Y. 1913) 208 Fed. 207.

There is some conflict of opinion as to

whether one who holds security upon the exempt property of the bankrupt is a "secured creditor." In re Cale, (C. C. A. 8th Cir. 1911) 191 Fed. 31.

## 1912 Supp., p. 468, sec. 1a (25).

**Confession of judgment as "transfer."**—A transfer within the meaning of this section occurs when a party transfers his property to another by voluntarily confessing judgment to that other and allowing him to issue execution, having a levy made on such property and a sale made at which the other becomes the purchaser of such property. Grant v. National Bank of Auburn, (N. D. N. Y. 1912) 197 Fed. 581.

**Transfer by way of "security."**—A creditor who obtains a judgment which becomes a lien upon the debtor's property thereby obtains security. And a debtor who aids his creditor to obtain a judgment which has such effect transfers property to him by way of security within the meaning of the act. In re Truitt, (D. C. Md. 1913) 203 Fed. 550.

## 1912 Supp., p. 469, sec. 2.

**Right to exercise original jurisdiction.**—A distinct purpose of the Bankruptcy Act is to subject the administration of the estates of bankrupts to the control of tribunals clothed with authority and charged with the duty of proceeding to final settlement and distribution in a summary way, as are the courts of bankruptcy. Creditors are entitled to have this authority exercised, and justly may complain when an important part of the administration is sought to be effected through the slower and less appropriate processes of a plenary suit in equity in another court, involving collateral and extraneous matters with which they have no concern. *United States Fidelity & Guaranty Co. v. Bray*, (1912) 225 U. S. 205, 32 S. Ct. 620, 56 U. S. (L. ed.) 1055.

**Not courts of limited jurisdiction.**—The jurisdiction of the bankruptcy courts in all "proceedings in bankruptcy" is intended to be exclusive of all other courts, and such proceedings include, among others, all matters of administration, such as the allowance, rejection and reconsideration of claims, the reduction of the estates to money and its distribution, the determination of the preferences and priorities to be accorded to claims

presented for allowance and payment in regular course, and the supervision and control of the trustees and others who are employed to assist them. *United States Fidelity & Guaranty Co. v. Bray*, (1912) 225 U. S. 205, 32 S. Ct. 620, 56 U. S. (L. ed.) 1055.

**Equitable jurisdiction.**—Bankruptcy courts are courts of equity and governed by equity's rules, except so far as otherwise expressly provided by the bankruptcy statute. *In re Gillaspie*, (N. D. W. Va. 1911) 190 Fed. 88.

Although courts of law, in the absence of statutory authority, will not enforce contracts between husband and wife, the instances are many where courts of equity, following the doctrine of the civil rather than the common law, will do so. That courts of equity will aid the wife to recover her separate estate, which has come into the hands of her husband and has been retained by him against her consent, is entirely settled. Courts of bankruptcy are courts of equity, and such recovery will be enforced against the trustee administering the husband's estate in bankruptcy. *In re Hoffman*, (D. C. N. J. 1912) 199 Fed. 448.

## 1912 Supp., p. 470, sec. 2 (1).

**Bankrupt beyond territorial limits of court.**—It was competent for Congress, of course, to determine what should be the locus of the forum in which the adjudication should be had. It might have said that the jurisdiction in which the bankrupt is found at the time of the filing of the petition should determine the forum. What it did say was that the location of the bankrupt's principal place of business or of his residence or of his domicile for the greater portion of the six months preceding the filing of the petition should be the jurisdiction in which proceedings should be begun, and the language of this second section of the act contemplates clearly the possibility of a person being adjudged a bankrupt who was beyond the territorial limits of the court at the time of the filing of the petition; and, in order to preserve the uniformity of the law's operation, it seems clear to us that we must assume that Congress intended the same jurisdiction over, and as complete and full an administration upon the property, of a bankrupt who was without the jurisdiction of the district when the petition was filed, but whose domicile, residence, or place of business otherwise conformed to the provisions of this second section, as in a case where the bankrupt was at the time within the territorial limits of the court. *Hills v. F. D. McKinniss Co.*, (N. D. Ohio 1910) 188 Fed. 1012.

**Jurisdiction as dependent on residence within the district.**—To the same effect as the original note see *In re Wenatchee-Strat-*

*ford Orchard Co.*, (W. D. Wash. 1913) 205 Fed. 964.

**Where a judicial district is divided** and there is a district court in both divisions, the court having jurisdiction of a bankrupt residing in the district is the one within the particular territory where he resides. *In re Lemen*, (N. D. Ohio 1912) 208 Fed. 80.

**Residence distinguished from domicile.**—The presumption must be indulged that every word in a statute was inserted for some purpose, and hence the word "resided" must be regarded as providing for a condition of jurisdiction in the alternative to those meant by the expression "had their domicile within" and "had their principal place of business." Consequently a mere residence, a relationship to the territory which does not rise to the dignity of a domiciliary condition, if it continues for the requisite proportion of the six months immediately preceding the filing of the petition, is sufficient to clothe the court of that district with jurisdiction in bankruptcy. In applying the laws relating to electoral franchise, a distinction is made between residence and domicile, and it is settled that a man may reside in one state and be domiciled in another. The purpose underlying the Bankruptcy Act, that it may operate uniformly, requires that such distinction be employed here, and it is not impossible that the courts of two districts may have jurisdiction to entertain a petition against the same debtor; that one acting which is first invoked. *In re Lemen*, (N. D. Ohio 1912) 208 Fed. 80.

**Residence as dependent on place of business.**—*"Place of business" as used in this section has no application to a clerk who has no "place of business" anywhere.* In re Lipphart, (S. D. N. Y. 1912) 201 Fed. 103, wherein the court said: "It seems to me that it was intended, among other things, by the Bankruptcy Law that these proceedings should, as far as practicable, be carried on in the jurisdiction most convenient to all concerned. The debts of a clerk on a small salary would most likely be owing to the tradesmen doing business in the place where he lived. I think that a clerk, or, for that matter, the general run of employees, cannot be said to be in business or to have a place of business. It seems to me that 'place of business' means a place where a man is conducting a business of his own in which he is a principal. I am inclined to think that the statute contemplated 'place of business' as applying only to those who have a business of their own, but in this case it is only necessary to decide that a clerk, such as this bankrupt, did not have a place of business anywhere, and therefore he should have filed his petition at the place where he resided or had his domicile."

**Corporation's principal place of business**—*Neither charter nor place of incorporation is controlling.*—A corporation's principal place of business is the actual principal place of business, and it is immaterial that a different place is named in the articles of incorporation. In re Beiermeister Bros. Co. (N. D. N. Y. 1913) 208 Fed. 945.

The mere fact that a certificate has been filed in some public office designating a place as the principal place of business of a foreign corporation does not make it a place of business unless business is done there. There must not only be a place where business can be done, but business must be done there, in order that a corporation shall have had a principal place of business within the meaning of section 2 of the Bankrupt Act. In re Thomas McNally Co., (S. D. N. Y. 1913) 208 Fed. 291.

In the case of In re Guanacevi Tunnel Co., (C. C. A. 2d Cir. 1912) 201 Fed. 316, it was held that the principal place of business of the bankrupt corporation was New York city and not Phenix, Arizona, which the charter stated should be its principal place of business. The court said: "The charter of the company provides that its principal place of business shall be at Phenix, Ariz., and that it may have such other offices, principal and branch, as may be established by the board of directors. The statement in the charter is not conclusive, the question being where, in point of fact, was the company's principal place of business during the period fixed by the act. The petition asserts that it was at No. 55 Liberty street, New York city. This formal statement of the board of directors, resulting in an adjudication, at least creates a prima facie case which leaves the burden of evidence to meet it upon the creditor who seeks to vacate the adjudication. The affidavits show that the Tunnel Company

has never done any mining; that its activities have been principally connected with the sale of its stock and the payment of its running expenses; and that the only place in which the business has been conducted has been at 25 Liberty street, in this city. It is true that this had ceased to be the office of the company in the sense that the company paid the rent, and was, in point of fact, the office of Meloy, June 6, 1911, when the board of directors met there and authorized him to file the petition; but, while the company's business was being transacted there, it may well be held to have been established by the board of directors within the meaning of the charter provision. The books were kept there, all meetings of the board were held there, and all moneys of the company were disbursed from there. No meetings were ever held at Phenix except the technical ones required by the law of the state of Arizona. It is not necessary that the company should have actually transacted much, or even any, business at 55 Liberty street during the period fixed by the act. The question is, Where was its principal place of business? Its business was small and irregular, and it may have transacted little or none, but if it had any principal place of business at all, it was there."

In In re Tygarts River Coal Co., (N. D. W. Va. 1913) 203 Fed. 178, the court, construing the words "principal place of business" as applied to a coal mining corporation, said: "I am not ignorant of the fact that some of the federal courts have construed this phrase 'principal place of business' to be the place where its chief officers reside and maintain an office; but in my judgment the determination of the question of where the principal place of business is depends upon where the actual business of the concern is transacted. It is a question of fact to be determined in each particular case largely on the character of the corporation, its purposes, and the kind of business it is engaged in. As regards a coal mining corporation like this, it is very evident that the basic necessity for its doing business at all is to have somewhere a body of coal, owned or leased, from which it may mine and ship coal. It is not sufficient for the officers of such a corporation to gather together in a city office and call it 'the principal place of business' of the concern because it better suits their convenience to live and meet in such city. Unless the coal exists in place somewhere else to be mined and shipped to consumers, such city organization cannot exist. It is purely incident to and dependent upon the practical mining operations, 'the doing of business' elsewhere. The fact that such city organization may control the company's sale of the coal cannot avoid the inevitable conclusion. In such case the city office becomes only the agent of the corporation for a limited purpose, that of selling what cannot be sold until it has first been elsewhere mined, prepared for, and shipped to market for sale."

In Home Powder Co. v. Geis, (C. C. A. 8th

Cir. 1913) 204 Fed. 568, the facts were as follows: The Lincoln Mining & Milling Company was incorporated under the laws of Arizona in October, 1907, and in October, 1908, it was licensed to do business in Missouri. The company acquired a lead and zinc mine by lease and constructed a mill at Duenweg, Jasper county, Mo., and the management of this mine and mill constituted the sole business of the company. The company was engaged in carrying on these lines of business from its organization until about June, 1910, when it closed down. Shortly thereafter its property was attached by certain of its creditors. Later, and on August 16, 1910, a called meeting of its directors, of which meeting all the directors were notified, was held in Chicago, Ill. It was attended by five of the eight directors, and a preamble was adopted stating that the company was unable to pay its debts and had been obliged to shut down its plant at Duenweg, and by a resolution, which was entered at large on the company's records, it admitted its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground. Creditors thereupon petitioned the bankruptcy court in Missouri that the company be adjudged a bankrupt and an order adjudging the company a bankrupt was entered. On appeal the Circuit Court of Appeals said: "It is next contended that the court erred in holding that there was jurisdiction in the United States District Court for the Western District of Missouri, to adjudge the company a bankrupt. It is provided by section 2 of the bankruptcy act that the proper court has jurisdiction to 'adjudge persons bankrupt who have had their principal place of business . . . within their respective territorial jurisdictions for the preceding six months or the greater portion thereof,' and it is provided by the first section that the word 'persons' shall include corporations. It thus becomes a question of fact as to whether the mining company had its principal place of business in the western district of Missouri for the greater portion of the six months next preceding August 27, 1910.

"From a time long prior to the six months next prior to this application up to in June, 1910, all of the tangible property of the corporation was in Jasper county, in the Western district of Missouri. It there had and conducted the mining business for lead and

zinc, and there had its reduction works or mill. It is not even contended its principal place of business, within the meaning of the second section of the bankruptcy law, was in Arizona. There is nothing to indicate it had any authority to do business, except in Arizona and Missouri; but it is claimed that its principal place of business was in Chicago, Ill., and reliance is placed upon *In re Mathews Consolidated Slate Co.*, (D. C.) 144 Fed. 724, and *Burdick v. Dillon*, 144 Fed. 737, 75 C. C. A. 603. On the other hand it cited *Tiffany v. La Plume Condensed Milk Co.*, (D. C.) 141 Fed. 444.

"The managing officers lived in Chicago, and there sold considerable stock in the company; but manifestly this was not the principal business of the mining company in a legal sense. The directors' meetings were held at Chicago, except one, which was held at the mine. The work at the mine and mill was doubtless largely under the direction of the officers, who resided at Chicago, who were the principal owners of the company. The proceeds of sales of stock and of some loans were first deposited in the Commercial National Bank at Chicago, but more than \$42,000 of these funds were transferred to the First National Bank of Carterville, Jasper county, in the Western district of Missouri. The evidence does not clearly show what was done with this money, but it was doubtless expended in connection with the carrying on of the business of the company. Supported as the contention of the petition is by the finding of the master and the court, and conforming as it does to our own opinion from a reading of the evidence, the finding cannot be disturbed on this contention."

*Question of fact.*—The locus of the principal place of business of a corporation is always a question of fact; but the doubt should be resolved in favor of that jurisdiction in which the corporation obtained its corporate existence and where, as is usually the case, the state law requires the maintenance of an office. In *re Tennessee Const. Co.*, (S. D. N. Y. 1913) 207 Fed. 203.

*Objection to jurisdiction by creditor.*—An objection that the principal place of business of an insolvent corporation was not within the jurisdiction of the court is jurisdictional and may be made by a creditor. In *re Guanacevi Tunnel Co.*, (C. C. A. 2d Cir. 1912) 201 Fed. 316.

## 1912 Supp., p. 472, sec. 2 (3).

*Appointment of receivers or marshals for preservation of estate.*—See to the same effect In *re Wentworth Lunch Co.*, (C. C. A. 2d Cir. 1911) 191 Fed. 821; *Le Master v. Spencer*, (C. C. A. 8th Cir. 1913) 203 Fed. 210; In *re White*, (M. D. Pa. 1913) 205 Fed. 393.

The title to the property of the alleged bankrupt remains in him until adjudication, subject to the control of the court, to be exercised either by a receiver or the marshal,

if otherwise the interests of the creditors are not sufficiently protected. *Marcello v. Concordia Fire Ins. Co.*, (1912) 234 Pa. St. 31, 82 Atl. 1090, 39 L.R.A.(N.S.) 366.

*Receiver's powers and duties—Custodian of property.*—The receiver in bankruptcy is but a custodian, without title, for the purpose of preservation, and not for the purpose of distributing the estate. But he is entitled to take custody of whatever is plainly the property of the bankrupt and against

which no third party makes any claim with color of title. In *re Michaelis*, (S. D. N. Y. 1912) 196 Fed. 718.

A receiver has no power to appoint a custodian and if he does so appoint, and the custodian was unnecessary, the custodian's fees are properly chargeable to him. In *re Tisch*, (S. D. N. Y. 1912) 202 Fed. 1018, wherein the court said: "I think, also, that the receiver should be charged with the custodian's fees. There was no need of custodians. The bankrupt's assets consisted of a small lot of jewelry worth about \$1,200, a large safe, and some showcases. The assets might have been put in the safe and the safe locked; or if, for any reason, it was deemed objectionable to leave them in the safe, they could have been stored at slight expense. Apparently the custodian's services consisted in watching the safe and the showcases, but there could not have been much danger of burglars stealing them. If the custodians have rendered the service, they should be paid by the trustee, but the amounts paid should be charged to the receiver. Some receivers seem to suppose that custodians are to be employed in every case. They are not required in most cases. If a receiver takes the same care of the assets that a prudent man takes of his property, that is ordinarily enough."

*Sales by receivers.*—In *re Peerless Furnishing Co.*, (S. D. N. Y. 1912) 199 Fed. 350, the facts were held to warrant the confirmation of a receiver's sale.

In *re Reliable Bottle Box Co.*, (E. D. N. Y. 1912) 199 Fed. 670, a motion was granted for an order compelling a former receiver to pay \$1,583.40, with which his account was surcharged, and also to punish him for contempt for failure to obey a subsequent order to pay at once three items included in the account.

*Attorney for receiver.*—The general rule is that a receiver may not employ the solicitor of either of the parties to the suit in which he is appointed. But it is only when the receiver is acting adversely to one of the parties that there is any impropriety in his employing the counsel of the other. In *re Smith*, (C. C. A. 6th Cir. 1913) 203 Fed. 369, wherein the court said: "In *Keyes v. McKerrow*, 180 Mass. 261, 62 N. E. 259, it was held that, in the absence of a rule of court forbidding such employment, a trustee in bankruptcy might lawfully employ the bankrupt's attorney in the collection of debts, on the ground that there were no conflicting interests between the bankrupt and the trustee in that matter. In the instant case the referee states that it has been the uniform practice in the district, since the present Bankruptcy Act was passed, 'to per-

mit the attorneys for the petitioning creditors or the attorney for other creditors to act as attorney for the receiver or trustee, except in those cases where such attorneys represent creditors whose interests are adverse or contrary to the interest of the general creditors'; and the district judge states that the practice has been to allow attorneys for creditors to advise the trustee." The effect of these statements of the referee and judge as to the practice is not overthrown by the decision of the former district judge in *re Columbia Iron Works* (D. C.) 142 Fed. 234, in which, on review of a selection of counsel previous to the performance of services, a conclusion was reached opposed to the propriety of the appointment here in question. The district judge, in deciding the instant case, said: "In the absence of a rule or decision distinctly forbidding it, it would be unjust to put such rule into force and give it retroactive effect." We cannot disturb this conclusion."

*Duty to turn over assets to trustee.*—It seems to be a common practice for receivers not to turn over assets in their hands to a trustee until their accounts are passed and they are discharged, but there is no reason for such a practice. It is important that dividends be declared to creditors as soon as there are sufficient funds for that purpose. A receiver may properly retain a sufficient sum to cover the probable expenses of the receivership, but any surplus should be immediately turned over to the trustee as soon as he is appointed, in order that an immediate dividend may be declared. In *re College Clothes Shop*, (S. D. N. Y. 1911) 192 Fed. 80.

*Receivers should allow bankrupts only a reasonable time in which to try to effect a settlement or a composition.* Usually a month is enough. In *re Tisch*, (S. D. N. Y. 1912) 202 Fed. 1018.

*Right to maintain suits—Ancillary suit.*—In *re Tygarts River Coal Co.*, (N. D. W. Va. 1913) 203 Fed. 178, the court said: "I do not think the temporary receivers appointed in bankruptcy, pending the election of a trustee, have such interest in the controversy as warrants them to institute in this court of different jurisdiction an ancillary proceeding to secure its aid in confirming their appointment and securing for them the custody of property in this district. Their appointment is merely temporary; they are presumed to be wholly disinterested parties, not creditors, directors, stockholders, officers of, or in any way interested in the affairs of the bankrupt; therefore such ancillary proceeding cannot in my judgment be instituted by them."

## 1912 Supp., p. 475, sec. 2 (6).

A member of a partnership was brought into the case of *re Schwartz*, (E. D. N. Y. 1913) 204 Fed. 326.

## 1912 Supp., p. 476, sec. 2 (7).

Property in the physical possession of the bankrupt is within the jurisdiction of bankruptcy court, to administer it as assets of the estate, and to determine all claims to the property. *Hebert v. Crawford*, (1913) 228 U. S. 204, 33 S. Ct. 484, 57 U. S. (L. ed.) 800.

## 1912 Supp., p. 476, sec. 2 (8).

**Closing of estate.**—As expressly stated in clause (8) an estate is closed when the final account is approved and all the funds are distributed. *Kinder v. Scharff*, (1911) 129 La. 218, 55 So. 769.

**Reopening of estate.**—The power to reopen estates given in this section "when-ever it appears that they were closed before being fully administered" cannot be taken to include the power of the court of bankruptcy to remove the bar of section 11 (1912 Supp. 531) at its own will simply because a trustee may have changed his mind. *Kinder v. Scharff*, (1913) 231 U. S. 517, 34 S. Ct. 164, wherein the court said: "The question is simply whether, when, after an estate is closed, and more than two years lat-

The exception referred to is contained in the provision of section 23, which relates to suits against adverse claimants. In *re Alexander*, (N. D. Ohio 1911) 193 Fed. 749.

er a trustee comes to the conclusion that he undervalued a claim that he knew of and might have sued upon, or finds that the value has risen since, the Bankruptcy Court may reopen the estate for the sole purpose of getting rid of the statute, and allowing the trustee to sue. . . . The judge had no power by an ex parte order reopening the estate to remove the bar that was completed, and that there was no ground for removing. Whether it be put on the construction of the Bankruptcy Act or on the ground that the estate was fully administered quoad hoc, or of laches on the part of the trustee, it comes to the same thing. The claim in controversy cannot be made the ground of a suit."

## 1912 Supp., p. 478, sec. 2 (11).

**Extent of jurisdiction—Generally.**—To the same effect as the original note, see In *re Remmerde*, (N. D. Ia. 1913) 206 Fed. 822.

*Where exempt property is not readily divisible from the mass of the estate* without the necessary inquiry to determine the fact of segregation and the specific property which is really exempt, the court has authority over the property for the time being at least, wheresoever the very title may rest, and it possesses the power to regulate the time and manner in which the exemption shall be claimed and set apart to the ultimate use and benefit of the bankrupt. *Bank of Nez Perce v. Pindel*, (C. C. A. 9th Cir. 1912) 193 Fed. 917, wherein the court said: "It is settled law that exempt property, under the policy and purpose of the bankruptcy act, does not pass to the trustee of the bankrupt, nor does it become, or is it to be considered, a part of the bankrupt's estate for administration or distribution among the creditors thereof. This is said of the title to property generally exempted by state laws, and it must hold true whether the property is in specie—that is, separable and segregated from other property of the estate—or commingled and undivided or indivisible from such other property. There must not be confusion, however, between the title and the present right to possession, and the manner of its treatment while the precise property is being ascer-

tained and determined to which the bankrupt is entitled as exempt. Perhaps in all cases where the exact specie or particular lot or parcel of property legally exempt is segregated and wholly distinct from the general mass of the property the bankrupt not only has the title, but is entitled to maintain the present possession and to enjoy it continuously as his own, 'for it is made the duty of the trustee to set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable.' Clause 11, § 47, Bk. Act. Where, however, the exempt property is not segregated or capable of being readily set apart from other property, and it might be said is indivisible except through some appropriate process of the court, the bankrupt cannot come into his exemption until the essential separation and setting apart for that purpose have taken place. The trustee is vested with the title to the bankrupt's property as of the date he was adjudged a bankrupt, 'except in so far as it is to property which is exempt.' Section 70, Bankruptcy Act. And the bankruptcy courts are invested with jurisdiction—such jurisdiction in law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, and among other things to 'determine all claims of bankrupts to their exemptions.' Clause 11, § 2, Bk. Act."

## 1912 Supp., p. 479, sec. 2 (15).

**A broad grant of power to make orders and issue process is conferred by this section.** In *re Ironclad Mfg. Co.* (C. C. A. 2d Cir. 1912) 201 Fed. 66.

This provision must be given a free interpretation as conveying broad powers upon the bankruptcy court to cause the estate of the bankrupt to be collected, reduced to money and distributed and to determine otherwise in relation thereto, and bring in and substitute additional parties when necessary for the complete determination of a matter in controversy; when the property has become subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held by him or for him, jurisdiction exists to determine controversies in relation to the disposition of the same and the extent and character of liens thereon or rights therein. *Mitchell Storebuilding Co. v. Carroll*, (C. C. A. 6th Cir. 1912) 193 Fed. 616.

**Injunction.**—"It is settled law that the bankruptcy court may restrain the further prosecution of all actions pending against the bankrupt when the bankruptcy proceeding is instituted or commenced thereafter during the pendency of such bankruptcy proceedings, provided the claim or demand sued upon is one from which a discharge in bankruptcy will be a release. Section 11a, Bankruptcy Act, relating particularly to suits begun before bankruptcy proceedings are instituted, and section 2 (15), which specifically authorizes the bankruptcy court to 'make such orders . . . in addition to those specifically provided for as may be necessary for the enforcement of the pro-

visions of this act.' In the latter class of cases it is not essential that the suit be founded on a claim of such a nature that the judgment or debt represented thereby will be released by the discharge. If the prosecution of the suit to judgment and the enforcement of the judgment during the pendency of the bankruptcy proceedings will interfere with the proper and speedy enforcement of the provisions of the act or tend to embarrass the court, its prosecution may be enjoined." In *re Nuttall*, (S. D. N. Y. 1912) 201 Fed. 557.

The institution of a suit in a state court and the appointment of a receiver to wind up the business of a corporation are acts of bankruptcy and a bankruptcy court has authority under this section to enjoin such proceedings pending instituted in the bankruptcy court. *Morehouse v. Giant Powder Co.*, (C. C. A. 9th Cir. 1913) 206 Fed. 24.

This section gives the bankruptcy court power to issue injunctions against persons within the court's jurisdiction, whether parties to the bankruptcy proceedings or not, to prevent the transfer or disposition of any part of the bankrupt's property. *Morehouse v. Giant Powder Co.*, (C. C. A. 9th Cir. 1913) 206 Fed. 24.

The production of books and papers in a proceeding before a special master may be required under this section. In *re Ironclad Mfg. Co.*, (C. C. A. 2d Cir. 1912) 201 Fed. 66.

This section is cited in *In re Donnelly*, (N. D. Ohio 1910) 188 Fed. 1001; *In re James Carothers & Co.*, (W. D. Pa. 1911) 193 Fed. 687.

## 1912 Supp., p. 480, sec. 2 (16).

**Power of commitment.**—To the same effect as the original note see *In re Haring*, (W. D. Mich. 1912) 193 Fed. 168.

## 1912 Supp., p. 480, sec. 2 (18).

**Discretionary power to tax costs.**—By this section the court has a discretionary power to impose the costs "allowed by law" upon one or the other of the parties, or part against each and part against the estate. In *re Ward*, (D. C. N. J. 1913) 203 Fed. 769.

If the unsuccessful party is the bankrupt the costs should ordinarily be visited upon him, but it will not be done if the bankrupt has no property or means whereby the costs could be realized if they were taxed against him. In *re Kyte*, (M. D. Pa. 1911) 189 Fed. 531.

## 1912 Supp., p. 480, sec. 2 (20).

**Ancillary jurisdiction.**—To the same effect as the original note, see *Acme Harvester Co. v. Beekman Lumber Co.*, (1911) 222 U. S. 300, 32 S. Ct. 96, 58 U. S. (L. ed.) 208; *Bear Gulch Placer Mining Co. v. Walsh*, (D. C. Mont. 1912) 198 Fed. 351; *In re Brockton Ideal Shoe Co.*, (C. C. A. 2nd Cir. 1912) 200 Fed. 745; *In re Musica* (E. D. La. 1913) 205 Fed. 413.

"Congress, by express enactment, has vested in the several courts of bankruptcy, 'within their respective territorial limits,' full and complete power and authority to try and determine bankruptcy controversies, and specifically to 'cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto.' The jurisdiction thus de-

financed and conferred is exclusive within the territorial limits of each court and confined to those limits. While a summary proceeding to collect property belonging to the estate of a bankrupt, which is in the possession of a stranger who resides outside of the territorial limits of the court of the original adjudication, is ancillary in character, nevertheless it presents a completely distinct and separable controversy, and therefore one which must be determined by the court within whose jurisdiction the property is located and the respondent resides. Any other rule would result in unnecessary confusion of authority and would do violence to the plain provisions of the Bankruptcy Act." In *re Farrell*, (C. C. A. 6th Cir. 1912) 201 Fed. 338.

*The amendment providing for ancillary proceedings in bankruptcy*, simply recognized by statute a practice which courts of bankruptcy, in pursuance of principles of equity and comity, had theretofore generally exercised. In the nature of things an ancillary receiver must be subject alone to, and obey the orders of, that court of which he is an officer. So obeying, it follows that to it alone must he account. Any other course would breed confusion in administration and go far toward making the exercise of ancillary jurisdiction impracticable; for if a court, in pursuance of comity, undertakes to exercise ancillary jurisdiction by administering local assets, which it alone has power and jurisdiction to administer, it follows that its hand must be free to administer by its own officer and to exact from him the full measure of duty. Such executive work it can only secure from an officer answerable to it alone. *Loeser v. Dallas*, (C. C. A. 3d Cir. 1911) 192 Fed. 909.

**Territorial limits.**—The power of a bankruptcy court to exercise ancillary jurisdiction is restricted to the territorial limits of the district and therefore an order for the delivery of property or money to a trustee may not be made against a non-resident of the district. In *re Boston-Cerrillos Mines Corporation*, (D. C. N. M. 1913) 206 Fed. 794.

**Security for costs** may be required when the trustee intervenes. *The Alert*, (D. C. Mass. 1912) 199 Fed. 542.

**Adverse claims.**—District courts exercising ancillary jurisdiction in bankruptcy are vested with the power and charged with the duty to hear and adjudge the adverse claims of parties who pray their determination of such claims to the title to, or to legal or equitable liens upon, the specific property they seize as the property of the bankrupt, and, according to their adjudications, to send the property, or its proceeds, to the court of primary jurisdiction, or to apply them to the satisfaction of such claims. *Fidelity Trust Co. v. Gaskell*, (C. C. A. 8th Cir. 1912) 195 Fed. 865, wherein the court said:

"A proceeding in bankruptcy is a proceeding in equity, and a district court sitting in bankruptcy, whether it is exercising its primary or its ancillary jurisdiction, is a court

of equity. It is an established principle of equity jurisprudence that whenever a court of chancery takes into its legal custody, and thereby withdraws and withholds property from replevin, attachment, or other legal proceedings, it hears and adjudges the claims to the title and to legal and equitable liens upon that property of all parties who intervene in the suit or proceeding before it in their own behalf and submit their claims to its adjudication. . . . Attention is called to the fact that by the act of June 25, 1910, 'ancillary jurisdiction over persons or property within their respective territorial limits' is granted to the District Courts 'in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy'; and it is contended that the true construction of this grant is that it makes the District Court the agent, the mere hand of the receiver or trustee appointed by the court of primary jurisdiction, bound to seize, convert into money, pay over to him, and send to that court the proceeds of any property in its territorial jurisdiction which he may point out as the property of the bankrupt, without judicial power or duty to inquire, or to decide, whether the property it takes and sends forth beyond its jurisdiction is that of the bankrupt or of a stranger, what legal or equitable liens are held upon it by the citizens of its district, what the expenses of its officers are, or what their compensation shall be and without power to pay them out of the proceeds of the property it seizes and sells. If such had been the purpose of Congress, it would undoubtedly have conferred this power on the receiver or trustee of the court of primary jurisdiction directly. It was probably because the Congress was unwilling to intrust the power to such an officer and desired to invoke the judicial power and discretion of a court of equity to inquire and decide what property ought to be seized and sold and what proceeds ought to be sent to the court of primary jurisdiction as the property of the bankrupt's estate that it conferred this ancillary jurisdiction upon the District Courts within their respective territorial limits. Under it, these courts must appoint their own receivers and guard them against wrongful action and consequent liability, and must direct the course they shall pursue. Conscience, good faith, and reasonable diligence alone move courts of equity to action. They may not be divested of their judicial functions and made mere catspaws to do the will of private parties or public officers, even by legislative action, much less by mere construction. Moreover, it would be unjust, unwise, and detrimental to the administration of justice to establish the rule that courts of ancillary jurisdiction under the bankruptcy law are without judicial power or duty to hear and decide whether the property they take is that of the bankrupt or of strangers, that they must seize and send to the court of original jurisdiction the proceeds of whatever property the receiver or trustee appointed by that court



claims as the property of the bankrupt, and that adverse claimants of title to or liens upon it, and even its own officers, have no remedy for the enforcement of their claims but to follow the proceeds to other jurisdictions or to sue the receiver. Nor is this the natural or rational interpretation of the act of Congress or of the decisions of the Supreme Court. That act and those decisions are that the District Courts sitting in bankruptcy, and consequently in equity, have ancillary jurisdiction in bankruptcy proceedings pending in other districts. Ancillary jurisdiction is a term which has a plain and well-known meaning in the equity jurisprudence of the United States, a meaning fixed by settled practice and adjudged by the uniform current of the decisions of the courts of the United States. As neither the court nor the Congress modified or limited the term, the unavoidable presumption is that they used it, and intended to use it, in its recognized legal significance. In that significance ancillary jurisdiction includes the power to hear and adjudge, at the request of interveners, their claims to title to, or legal or equitable liens upon, the property it takes, or holds in its legal custody, by

virtue of that jurisdiction and to send the proceeds to the court of original jurisdiction, or to apply it to the discharge of the claims of the interveners in accord with its decision. A court exercising ancillary jurisdiction acts independently of the court of primary jurisdiction, or of its officers and for itself. It appoints its own receiver, generally the same person appointed receiver by the court of primary jurisdiction, but in the seizure, management, sale, and distribution of the property seized within the territorial limits of its district, of which it takes the legal custody, this receiver is, and must be, governed by its orders exclusively."

**Sale of property by receiver.**—A receiver appointed to conserve the property of a corporation in a jurisdiction different from that in which bankruptcy proceedings are commenced against the corporation will not be allowed to sell the property in his hands before the appointment of a trustee in bankruptcy, in the absence of instructions from the court in which the bankruptcy petition was filed, unless there is some pressing necessity requiring the sale. In re Brockton Ideal Shoe Co., (S. D. N. Y. 1912) 194 Fed. 233.

## 1912 Supp., p. 481, sec. 3a.

This section and section 60 (see 1912 Supp. 729) are to be construed in harmony. In re Donnelly, (N. D. Ohio 1912) 193 Fed. 755.

"Congress gets its power to legislate on the subject of bankruptcy from section 8 of article 1 of the Constitution, which empowers it to pass 'uniform laws on the subject of bankruptcies throughout the United States.' It has been held, correctly, we think, that the 'subject of bankruptcies' includes the distribution of the property of the fraudulent or insolvent debtor among his creditors, and the discharge of the debtor from his contracts and legal liabilities, as well as all the intermediate and incidental matters tending to the accomplishment or promotion of these two principal ends." *Pope v. Title Guaranty & Surety Co.*, (1913) 162 Wis. 611, 140 N. W. 348.

**Definition of bankrupt.**—Philologically and historically, a bankrupt is but a broken bank or bench. Such bank or bench, or "counter" as we would in this day designate it, was the bench over which the money lender, trader, or merchant transacted his business; and it was broken for or by him as an evidence of the discontinuance of his business. At English law at the time of the adoption of our Constitution, the meaning of the word was usually limited to persons engaged in trade, in one form or another, who did certain acts affording evidence either of an inability to pay their debts, or of an intention to avoid such payment. Other persons not engaged in trade, and who showed a like disposition to avoid, or a like inability to meet, their obligations to their creditors,

were ordinarily called insolvents. By definition in the last federal bankruptcy act, insolvents, as well as bankrupts proper, are included, and the only persons exempt from the operation of the present national law are "wage-earners" and "persons engaged chiefly in farming or tillage of the soil." Whether or not this is an extension of the common-law definition of a bankrupt, and is justifiable, is not a matter of present interest. A bankrupt, then, being as defined a person who by his acts and conduct affords evidence of his inability to pay, or his intention to avoid payment of, his debts, it is quite within the scope of the bankruptcy act to define the acts or omissions of the debtor which shall afford prima facie or conclusive evidence of bankruptcy. This the national bankrupt act has done. *Continental Building & Loan Ass'n v. Superior Court*, (1912) 163 Cal. 579, 126 Pac. 476.

**Authority of state to legislate concerning insolvent debtors.**—A person is a bankrupt, within the meaning of the federal statute, only when he has been guilty of one or another of the forbidden acts whose commission stamp him as a bankrupt. But it does not at all follow that the state, for good reasons of its own, may not prevent a person or corporation from conducting business, and in so preventing it take control of its affairs, terminate its business, and pay its creditors for acts entirely foreign to and absolutely without the contemplation of bankruptcy. And if the state does this thing for acts not within the contemplation of the bankruptcy law, it is immaterial that the proce-

ture which it adopts for the payment of creditors is similar to or identical with the procedure adopted in case of bankruptcy.

Continental Building & Loan Ass'n v. Superior Court, (1913) 163 Cal. 579, 126 Pac. 476.

## 1912 Supp., p. 481, sec. 3a (1).

**Fraudulent transfer, concealment, or removal.**—To the same effect as the original note, see *In re R. L. Radke Co.*, (N. D. Cal. 1911) 193 Fed. 735; *In re Glazier*, (M. D. Pa. 1912) 195 Fed. 1020; *In re Condon* (S. D. N. Y. 1912) 198 Fed. 947.

Where by a state law a chattel mortgage is constructively fraudulent as to creditors where the mortgagor is allowed to remain in possession of the mortgaged property, but the mortgage becomes purged of its fraud by subsequent possession taken by the mortgagee, it is not a transfer in fraud of creditors so as to constitute one act of bankruptcy where, before proceedings in bank-

ruptcy are commenced, the mortgagee has taken possession of the property. *Johansen Bros. Shoe Co. v. Alles*, (C. C. A. 8th Cir. 1912) 197 Fed. 274.

**Necessity of intention to hinder, delay, or defraud.**—To the same effect as the original note, see *In re Kassel*, (C. C. A. 2nd Cir. 1912) 195 Fed. 492.

**Facts held to show no intent to hinder, delay, or defraud creditors.** See *In re Hallin*, (W. D. Mich. 1912) 199 Fed. 806.

**Intent presumed.**—To the same effect as the original note, see *In re Glazier*, (M. D. Pa. 1912) 195 Fed. 1020.

## 1912 Supp., p. 483, sec. 3a (2).

**Preferences.**—To the same effect as the original note, see *In re New Chattanooga Hardware Co.*, (E. D. Tenn. 1911) 190 Fed. 241; *In re Condon*, (S. D. N. Y. 1912) 198 Fed. 947.

**Preference by partnership.**—In *Washington Cotton Co. v. Morgan* (C. C. A. 5th Cir. 1911) 192 Fed. 310, the alleged act of bankruptcy was that the firm, within four months of the filing of the petition, had transferred a portion of its property to named creditors with the intent to prefer said creditors over other creditors. The evidence showed that the firm had, as alleged, paid certain creditors in full, and that the debts of the firm were slightly in excess of the firm's assets; but it was also shown that the individual members of the firm, all residing within the jurisdiction of the court, were amply solvent—that their property was sufficient to pay more than ten times all of their debts, individual and partnership. On these facts the court said: "The property of the individual members of the firm, after the payment of the debts of the individual members, is liable to the satisfaction of the firm's debts. It appears from the evidence, therefore, that all of the creditors of the firm could collect their claims in full. The creditors which the firm had paid as alleged were not enabled to obtain any 'greater percentage' of their claims than any other creditors, for all can be paid in full. This fact alone, without referring to others commented on by the learned district judge, fully sustains the decree dismissing the petition."

**Bankruptcy Act of 1867 contrasted.**—The thirty-ninth section of the Bankruptcy Act of 1867 specified some nine acts of bankruptcy. The eighth of these declared that an act of bankruptcy is committed when one, 'who, being bankrupt, or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, gift, grant, sale, convey-

ance or transfer of money or other property, estate, rights or credits, or give any warrant to confess judgment or procure or suffer his property to be taken on legal process with intent to give a preference to one or more of his creditors.' A debtor did not, within the meaning of the words quoted, procure or suffer a judgment unless he in some way actively aided in obtaining it. The word 'transfer' is given by the present law a much broader meaning than it had under its predecessor. It follows that the second act of bankruptcy under the act of 1898 is substantially the same as was the eighth under that of 1867. There may be some cases which will fall under the former and not under the latter, or vice versa. Speaking generally, however, under the law of 1867 the eighth act of bankruptcy was committed whenever an insolvent debtor with intent to prefer one of his creditors did anything which gave that creditor a preference or which aided such creditor in obtaining a preference. Under the law of 1898, under like circumstances, the second act of bankruptcy is committed. In so holding, the second act is not confused with the third. The words 'procure or suffer his property to be taken on legal process,' used by the act of 1867 in defining the eighth act of bankruptcy, have a suggestive resemblance to 'suffered or permitted while insolvent any creditor to obtain a preference through legal proceedings,' which in the act of 1898 formed part of the description of the third act. Nevertheless, the acts themselves are radically different. Under the law of 1867 the act of bankruptcy was not committed unless the debtor actively and knowingly had a part in it. Under the act of 1898 it is not essential that he shall do anything at all." *In re Truitt*, (D. C. Md. 1913) 203 Fed. 550.

**Necessity of intent to prefer.**—To the same effect as the original note see *In re*

Columbia Real Estate Co., (D. C. N. J. 1913) 205 Fed. 980.

"A creditor who relies on the commission of the second act must show affirmative action on the debtor's part and must prove that it was taken with intent to prefer the creditor. If such showing is made and the effect of what the debtor did was to give a preference, the commission of the second act of bankruptcy has been established. It may be that what is proved constituted a part of a chain of events which culminated in the commission of the third act also. They have features in common. Neither of them can be committed unless the debtor is insolvent nor unless the preference has actually resulted from it. In other respects they are radically different. In determining whether the second act has been committed, it is not important to inquire what the creditor did or intended.

It is the debtor's act and purpose which is material. On the other hand, the third act may be proved without showing that the debtor ever did or tried to do anything, or even that he had ever given the matter a thought." In re Truitt, (D. C. Md. 1913) 203 Fed. 550.

**Insolvency.**—To the same effect as the original note, see In re Kassel, (C. C. A. 2d Cir. 1912) 195 Fed. 492; Johansen Bros. Shoe Co. v. Alles, (C. C. A. 8th Cir. 1912) 197 Fed. 274; In re Berkeley, (C. C. A. 2d Cir. 1913) 203 Fed. 7.

**The burden of proving insolvency** is upon the creditors if the alleged bankrupt appears and produces his books as required by section 3d (1912 Supp. 493). In re Electron Chemical Co., (E. D. N. Y. 1913) 208 Fed. 954.

## 1912 Supp., p. 486, sec. 3a (3).

**Preference obtained through legal proceedings.**—To the same effect as the original note see In re McCartney, (M. D. Pa. 1911) 188 Fed. 815; Johansen Bros. Shoe Co. v. Alles, (C. C. A. 8th Cir. 1912) 197 Fed. 274; Citizens' Banking Co. v. Ravenna Nat. Bank, (C. C. A. 6th Cir. 1912) 202 Fed. 892.

**Legal proceedings** within the meaning of the statute clearly include attachment proceedings. In re Putman, (N. D. Cal. 1911) 193 Fed. 464.

**Insufficient petition.**—In In re Pressed Steel Wagon Goods Co., (W. D. Mich. 1911) 193 Fed. 811, a petition was held insufficient where it alleged generally that a specified corporation while insolvent committed an act of bankruptcy, in that it suffered and permitted while insolvent a certain named creditor to obtain a preference through legal proceedings, and alleged specifically only the rendition of a judgment against the alleged bankrupt and in favor of one of the creditors for a certain amount and upon a date named. The court said: "There is no averment of the issuance of an execution upon such judgment, or of the levying thereof upon any property of the judgment debtor. The petition is silent upon the subject of the sale of any property or a notice of such sale. No property affected by such judgment, or any preference thereby created, is described. No date of sale, or proposed sale, is specified. In short, except as to the judgment itself, the allegations of the petition with respect to any act of bankruptcy are mere conclusions, rather than averments of particular facts from which such conclusions could be inferred, or upon which they could be based. Upon both reason and authority the petition must state the particular facts which, under the statute, constitute the claimed act of bankruptcy. The respondent in these proceedings has the right to be informed of the exact charge made against him which he is to be called upon to meet, and, if he so demands, is entitled to a trial of the issue thus presented by the court or a jury. An aver-

ment couched in the very general language of the statute conveys no such information and presents no triable issue, and therefore is insufficient."

**Sufferance of enforcement of execution.**—Merely suffering an execution to be levied is not an act of bankruptcy; failure to discharge the lien of the execution before it ripens into an indissoluble preference, and an imminent probability that the lien will ripen into such a preference, are absolutely essential to constitute an act of bankruptcy under the terms of the section. In re R. L. Radke Co., (N. D. Cal. 1911) 193 Fed. 735.

**Sufferance of the enforcement by execution of a lien antedating four months the filing of the petition** does not constitute or amount to the preference by legal proceedings contemplated by this section. In re Deer Creek Water & Water Power Co., (M. D. Pa. 1913) 205 Fed. 205.

In In re Truitt, (D. C. Md. 1913), 203 Fed. 550, certain creditors of one Truitt sought to have him adjudicated a bankrupt, one of the grounds being that he had committed an act of bankruptcy under the third act. They charged in certain paragraphs that the debtor owned real estate in Wicomico county, Md., and that while insolvent and on a date particularly specified, which was two or three days less than four months before the filing of the petition in bankruptcy, he permitted named creditors to obtain judgments against him in the circuit court for that county; that he had done nothing to satisfy or discharge such judgments or the liens created by them; and that within less than five days after the filing of the petition the lien created by them would become absolute and unavoidable by the trustee in bankruptcy and the property would thereby become finally disposed of and sequestered by such judgment creditors. On demurrer to these paragraphs, the court said: "Stated briefly, the contention of the petitioning creditors is that whenever a creditor of an insolvent debtor secures a preference by obtaining a lien through legal pro-

ceedings upon the property of his debtor, and the latter does not within five days before the expiration of four months thereafter pay, discharge, satisfy, or vacate such lien, an act of bankruptcy has been committed. This contention has been made before. It was held unsound in *Seaboard Steel Casting Co. v. Trigg* (D. C.) 124 Fed. 75; *In re Vastbinder*, (D. C.) 126 Fed. 417; *In re Vetterman*, (D. C.) 135 Fed. 443. It has been upheld in *Re Tupper*, (D. C.) 163 Fed. 766, and in *Folger v. Putnam*, 194 Fed. 793, 144 C. C. A. 513. The last is a decision of the United States Circuit Court of Appeals for the Ninth Circuit. I understand that on March 1, 1913, the Supreme Court of the United States granted a writ of certiorari to bring up the record in it. The question at bar has thus been put in the way of final and authoritative decision. In regular course eighteen months or two years will doubtless elapse before the answer can be given. A decision in the case at bar cannot be so long postponed.

"In *Folger v. Putnam*, the United States Circuit Court of Appeals analyzes the law and reviews the decided cases fully and ably. It is unnecessary here to go over any of the ground there traversed. If the law is not as it is there held to be a creditor will often have the power to obtain preferential security upon the property of a passively friendly debtor and to hold such security no matter what the other creditors may do or try to do. All that will be necessary will be for the favored creditor to obtain a lien through legal proceedings and then so to arrange matters that such lien shall not be enforced by actual sale or other final disposition of the property until the expiration of four months and five days after it has been acquired. Where the debtor happens to have property upon which a judgment so soon as entered becomes a lien, all that the creditor will have to do in the first instance is to obtain a judgment. If, in order to secure a lien, an attachment or execution is necessary, that may issue. Even in that event a creditor will be able to hold his preferential rights if it is possible under the state law or practice to delay a sale for the period mentioned.

"An act of bankruptcy has certainly been committed whenever a creditor causes his debtor's property, upon which he has secured a lien by judgment, execution, or attachment, to be sold within four months and four days after the date of such lien. In the nature of things it does not seem that he should be any better off if he postpones the sale two days longer. Such considerations argue strongly in favor of the conclusion reached by the United States Circuit Court of Appeals for the Ninth Circuit and by Judge Ray in *Re Tupper*, *supra*.

"The question has another side. Congress defines the third act of bankruptcy as consisting in the bankrupt having 'suffered or permitted while insolvent any creditor to obtain a preference through legal proceedings and not having at least five days before

a sale or final disposition of any property affected by such preference vacated or discharged such preference.'

"If the petitioning creditors are right, this language means the same thing as if Congress had used the words 'suffered or permitted while insolvent any creditor to obtain a preference through legal proceedings and not having at least five days before (a) the expiration of four months after the obtaining of such preference, or (b) a sale or final disposition of any property affected by such preference vacated or discharged such preference.'

"Should such construction be put upon the language actually employed? The words 'final disposition,' it is true, may have the import which the petitioning creditors would give to them. The connection in which those words are used does not naturally suggest that they should receive such an interpretation. It is highly desirable that the creditors generally should be able to prevent one of their number from securing a preference by a lien obtained through legal proceedings of a character which would be vacated if bankruptcy ensued within four months after the lien was first fastened upon the debtor's property. Such would be the result of upholding the petitioner's contention. The courts might well give such construction to the language used if there was no reason to suppose that Congress had deliberately refrained from saying what they contend it in effect did say. But is there not such reason? The language used by Congress in defining the third act of bankruptcy is very different from that employed to describe the others.

"By the general scheme of the law, creditors have four months after the commission of the act of bankruptcy within which to file a petition for an involuntary adjudication. Such act must therefore consist in some definite and precise thing which happens at a particular time. The fraudulent conveyance under the first act, the preferential transfer under the second act, the general assignment under the fourth, and so on, are definite acts. They are committed on a particular day. From that day the four months' period begins to run. There are difficulties in applying any such rule to the securing by the creditor of a preference through judgment. It was unnecessary, as has already been held, to deal specially with those instances in which the debtor, with intent to prefer a creditor, actively participated in securing him by confessing the judgment to him. When that took place the second act was committed.

"Some provision, however, had to be made for those cases in which the creditor, without the assistance of the debtor and against his passive or active resistance, obtained a preference through legal proceedings. Congress would doubtless have been unwilling to declare that an insolvent debtor had committed an act of bankruptcy whenever such a lien was obtained against him. That he was insolvent might be due entirely to the judgment which constituted a lien. If he

was liable on it, his debts exceeded his assets. If he was not, he might be able to pay all that he owed and have a surplus besides. He might be entitled to take the case to an appellate court. Until the judgment or decree below had been affirmed it might be unjust to hold him bankrupt. Sound policy requires that something more than the mere rendition of a judgment or the levy of any attachment must take place before it can be said than an act of bankruptcy has been committed. There are difficulties in the way of drawing a definition both just and workable of an act of bankruptcy which will prevent a creditor from obtaining a lien upon the debtor's property, through legal proceedings. A creditor should not be able to get a preference out of an insolvent debtor's estate. A debtor should not be adjudicated a bankrupt because he does not pay what he says he does not owe and which he may still be in a position to show that he does not owe."

*Compare Folger v. Putnam*, (C. C. A. 9th Cir. 1912) 194 Fed. 793, wherein it was held that it is incumbent upon an insolvent person to discharge or vacate a lien secured by an attachment upon his property at least five days before a period of four months expires following the date of the levy of such

attachment, and if he fails therein he commits the act of bankruptcy described in this section. The court said: "It may be and has been suggested that this will sometimes force a person into bankruptcy, when the attachment is acquired upon an invalid or spurious claim, or one not provable against the bankrupt's estate; but it seems to us better that this contingency should obtain than that the very statute itself should be defeated in its fundamental purpose. Of course, unless the person against whom the attachment is secured is insolvent, the conclusion reached cannot apply."

**Lien obtained beyond four months period.**—See *Colston v. Austin Run Mining Co.*, (C. C. A. 3d Cir. 1912) 194 Fed. 929, wherein the court said: "An attempted enforcement while insolvent within the space of four months next before the filing of a petition in involuntary bankruptcy, of a lien on the property of the alleged bankrupt validly created and subsisting for more than that period, coupled with an omission by him to secure, at least five days before a sale or final disposition of such property, the vacation or discharge of such lien, [does not] constitute an act of bankruptcy under [this] section."

## 1912 Supp., p. 488, sec. 3a (4).

### I. ASSIGNMENT FOR BENEFIT OF CREDITORS.

**The making of a general assignment for the benefit of creditors**—The "general assignment" contemplated.—To the same effect as the original note and quoting the case there cited, see *Courtenay Mercantile Co. v. Finch*, (C. C. A. 8th Cir. 1912) 194 Fed. 368.

**A valid assignment for all purposes is not necessary.**—To the same effect as the original note, and affirming *In re Courtenay Mercantile Co.*, (D. C. N. D. 1911) 186 Fed. 352 cited therein. *Courtenay Mercantile Co. v. Finch*, (C. C. A. 8th Cir. 1912) 194 Fed. 368.

**Insolvency unnecessary.**—To the same effect as the original note, see *In re Farthing*, (E. D. N. C. 1913) 202 Fed. 557; *In re Columbia Real Estate Co.*, (D. C. N. J. 1913) 205 Fed. 980.

### II. APPOINTMENT OF RECEIVER OR TRUSTEE.

**Appointment of receiver or trustee.**—To the same effect as the original note, see *Schumert v. Security Brewing Co.*, (E. D. La. 1912) 199 Fed. 358; *In re Wenatchee Heights Orchard Co.*, (W. D. Wash. 1913) 204 Fed. 674; *Doyle-Kidd Dry Goods Co. v. Sadler-Lusk Trading Co.*, (W. D. Ark. 1913) 206 Fed. 813.

**Appointment of temporary receiver.**—To the same effect as the original note, see *In re Columbia Real Estate Co.*, (D. C. N. J. 1913) 205 Fed. 980.

**Merely consent to the appointment of a re-**

ceiver does not constitute an act of bankruptcy. *In re Gold Run Mining & Tunnel Co.*, (D. C. Colo. 1912) 200 Fed. 162.

**Receiver asked for by stockholders.**—A petition for the appointment of a receiver of a corporation constitutes an act of bankruptcy although the petition is not filed in the name of the corporation but in the name of a majority of the stockholders in number and in amount of stock without opposition by the other stockholders. *Doyle-Kidd Dry Goods Co. v. Sadler-Lusk Trading Co.*, (W. D. Ark. 1913) 206 Fed. 813.

**Allegation of appointment of receiver.**—The allegation in a petition that a corporation had made an assignment, by filing a petition admitting its insolvency and inability to pay its debts, and asking for the appointment of a receiver, is in effect an allegation that the corporation, being insolvent, applied for a receiver for its property. *Doyle-Kidd Dry Goods Co. v. Sadler-Lusk Trading Co.*, (W. D. Ark. 1913) 206 Fed. 813.

**Insolvency essential.**—To the same effect as the original note, see *In re Gold Run Mining & Tunnel Co.*, (D. C. Colo. 1912) 200 Fed. 162; *In re Wm. S. Butler & Co.*, (C. C. A. 1st Cir. 1913) 207 Fed. 705.

**Insolvency in the sense employed by the amendment has been held to mean only that condition of financial affairs of the alleged bankrupt "whenever the aggregate of his property . . . shall not at a fair valuation be sufficient in amount to pay his debts."** *Karst v. Black Diamond Range Co.*, (N. J. 1913) 88 Atl. 692.

**1912 Supp., p. 491, sec. 3a (5).**

**Authority to make admission — Admission by corporation.**— An unqualified admission made by resolution adopted by the board of directors of a corporation and by the stockholders is sufficient to constitute an act of bankruptcy. In re American Guarantee & Security Co., (D. C. Cal. 1911) 192 Fed. 405.

But an admission by the directors of a corporation personally and not as a corporate act is not sufficient under this section to constitute an act of bankruptcy. In re Gold Run Mining & Tunnel Co., (D. C. Colo. 1912) 200 Fed. 162.

"It was originally contended that there was no power in the board of directors, as distinguished from the stockholders, to com-

mit the act of bankruptcy by admitting the inability of the corporation to pay its debts and its willingness to be adjudged a bankrupt. The law requires that the corporation admit in writing its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground, and in every case the question is one of authority of the agent, which must be determined by an examination of the special charter or the general laws of the state of the residence of the corporation and the articles of incorporation and the by-laws lawfully adopted." Home Powder Co. v. Geis, (C. C. A. 8th Cir. 1913) 204 Fed. 568.

**1912 Supp., p. 492, sec. 3b (1).**

**The notorious, exclusive, or continuous possession contemplated by the Bankruptcy Act in question is only that kind of notoriousness, exclusiveness, and continuousness**

which the nature of the property will permit or of which it is susceptible. Jones v. Coates, (C. C. A. 8th Cir. 1912) 196 Fed. 860.

**1912 Supp., p. 494, sec. 3e. [*Petitioner to give bond.*]**

**Scope of section.**— This section created a new right in the debtor. He is to be reimbursed in case such seizure and detention occasioned him pecuniary loss. It has no application where the seizure and detention occasions no loss; and such section cannot be invoked to recover costs and expenses occasioned in making a successful defense to the charge of bankruptcy. In re Ward, (D. C. N. J. 1913) 203 Fed. 769.

Section 3e creates a cause of action where-

by damages and costs may be recovered under the bond required, if the petition is dismissed without malice and probable cause being shown. T. E. Hill Co. v. United States Fidelity & Guaranty Co., (1911) 250 Ill. 242, 95 N. E. 150.

Section 3e and section 69 are cognate.— To the same effect as the original note, see T. E. Hill Co. v. United States Fidelity & Guaranty Co., (1911) 250 Ill. 242, 95 N. E. 150.

**1912 Supp., p. 494, sec. 3e. [*Allowance of costs, damages, etc.*]**

**The remedy given here is cumulative.**— T. E. Hill Co. v. United States Fidelity & Guaranty Co., (1911) 250 Ill. 242, 95 N. E. 150.

**Amount of recovery.**— Only in cases where the proceedings resulting in a receivership have been instituted improvidently or

without reasonable cause, or without good faith, or the like, can the moving party be held liable for the payment of the excess of the costs of the receivership over and above the assets of the same. In re Metals Extraction & Refining Co., (C. C. A. 7th Cir. 1911) 195 Fed. 226.

**1912 Supp., p. 495, sec. 4a.**

**The purpose of a voluntary proceeding in bankruptcy is in consideration that the bankrupt promptly surrender all of his nonexempt property to the bankrupt court, to the end that all of his creditors, without preference or priority, may take share and share alike in percentage of the property thus surrendered; then the bankrupt is given an acquittance of such percentages of his debts not thus paid, and may commence his business life anew.** Baylor v. Rawlings, (C. C. A. 8th Cir. 1912) 200 Fed. 131.

**Corporations.**— To the same effect as the original note, see In re Weedman Stave Co., (E. D. Ark. 1912) 199 Fed. 948.

**Directors of a corporation have the power to put the corporation into bankruptcy.** In re Kenwood Ice Co., (D. C. Minn. 1911) 189 Fed. 525, wherein the court said: "A board of directors ought to have the power to put the company into bankruptcy. They have care of the general business of the corporation. They are the persons who know whether the corporation is able to go on or not. It might very well happen that under the articles and by-laws of the corporation it would be impossible to hold a meeting of the stockholders for months. Under these circumstances the bankruptcy of the corporation might be delayed so long that in many

cases the purposes of the bankrupt law would be defeated and preferences given. I am satisfied that the board of directors at a duly called meeting has the power to put the corporation into bankruptcy."

An insufficient petition may be amended at any time before adjudication. *Dodge v. Kenwood Ice Co.*, (C. C. A. 8th Cir. 1913) 204 Fed. 577.

## 1912 Supp., p. 495, sec. 4b.

### II. STATUTORY EXCEPTIONS.

**Wage earners.**—A traveling salesman receiving a salary of one hundred dollars a month and his traveling expenses which amount to forty dollars a month is not a "wage earner" as his salary amounts to more than fifteen hundred dollars a year. *In re Hurley*, (D. C. Minn. 1913) 204 Fed. 126.

**Persons engaged chiefly in farming or in tillage of the soil.**—In *American Agriculture Chemical Co. v. Brinkley*, (C. C. A. 4th Cir. 1912) 194 Fed. 411, the following facts appeared: The debtor was carrying on three country stores. By himself, or in partnership with others, he tilled five farms. He was a member of four distinct partnerships. Each of these cultivated a separate farm. In the conduct of one farm he had no associate. The Circuit Court of Appeals affirmed a decree denying an injunction, saying: "There is no question that this mercantile business far exceeded in importance the agricultural operations conducted by him individually. This proceeding is against him as an individual. No one of the firms of which he was a member is a party to it. The creditors say that the so-called entity theory requires that, in determining whether the debtor was engaged chiefly in farming, we must exclude from consideration anything he did in connection with any of the partnerships. We cannot assent to this contention. Whether a debtor is or is not chiefly engaged in farming or tilling the soil is a question of fact, to be determined in each case in which it is sought to have him individually adjudicated. In passing upon that question, all the debtor's activities and pursuits must be considered as a whole. No part of them may be ignored merely because they concern themselves with the affairs of copartnerships of which he was a member. Doubtless a firm may be adjudicated an involuntary bankrupt when it is engaged in a nonexempt business, in spite of the fact that the principal occupation of some of its partners protects them from individual adjudication. Such is not the case before us. The creditors, however, insist that the evidence shows that the mercantile business of the debtor exceeded in importance all the agricultural operations in which he was engaged, whether severally or in copartnership with others. The case in this aspect is undoubtedly close. The learned judge below had the witnesses before him. He saw and heard them testify. He was of opinion that the debtor was chiefly engaged in farming. We do not see any sufficient reason for coming to a different conclusion."

Because a man who produces food prod-

ucts by cultivating the soil markets these products by carting the same from door to door, or by selling to merchants at wholesale, or at retail upon his own premises, he cannot be said to be a huckster and not a tiller of the soil. Neither will the fact that a tiller of the soil engages so extensively in cultivating plants for "setting" as to require the aid of a greenhouse for said purpose change the nature of his vocation, for it is then a necessary part of the business. *In re Terry*, (M. D. Pa. 1913) 208 Fed. 162.

A state law under which persons engaged chiefly in the tillage of the soil may be proceeded against by their creditors was not superseded by the bankrupt act of 1898. *Lace v. Smith*, (1912) 34 R. I. 1, 82 Atl. 268.

**Determination of status of statutory exceptions.**—One who incurs debts in a non-exempt occupation, changes to an exempt occupation, and thereafter commits an act that in a nonexempt occupation would be an "act of bankruptcy," is not subject to adjudication of involuntary bankruptcy because thereof, and of such debts still existing, or at all. *In re Folkstad*, (D. C. Mont. 1912) 199 Fed. 363, wherein the court said: "Petitioners contend that, since it appears the debts involved were incurred while respondent was engaged in the mercantile business, his subsequent change of occupation and his occupation when the alleged act of bankruptcy was committed are immaterial, and he is still subject to be adjudicated a bankrupt—citing *In re Burgin* (D. C.) 173 Fed. 726; *In re Crenshaw* (D. C.) 156 Fed. 638. *In re Burgin* clearly so holds, but it would seem that therein it is not justified by the cases on which it relies. *In re Crenshaw* merely determines that one who incurs debts in an occupation subject to adjudication of bankruptcy cannot escape by changing to an exempt occupation. It does not hold, however, that, if the alleged act of bankruptcy is committed only after such change, involuntary proceedings will lie; and the cases therein relied on merely decide that a change to an exempt occupation after an act of bankruptcy is committed affords no defense to involuntary proceedings. The law of bankruptcy is what Congress has made it, and not what expediency and convenience might desire it. The statute is clear and unambiguous. It declares that certain persons, having committed an "act of bankruptcy," may on petition filed within four months thereafter be adjudged involuntary bankrupts. It expressly excepts persons engaged chiefly in farming or tillage. The effect is that these excepted persons cannot commit an 'act of bankruptcy.' An act is

an 'act of bankruptcy' for the reason that he who commits it can because thereof be adjudicated an involuntary bankrupt. It is an 'act of bankruptcy' when the act is committed, or not at all. If the act is committed by one who then is not of the class that the law says may be adjudicated an involuntary bankrupt, it is not an 'act of bankruptcy,' and furnishes no foundation for involuntary proceedings.

"No former occupation can make the act of an exempt person an 'act of bankruptcy.' No subsequent change of occupation can deprive the act of a nonexempt person of its quality as an 'act of bankruptcy.' The act takes color only from the bona fide occupation of the actor at the time it is committed, and not from his occupation prior or subsequent thereto. Otherwise, a farmer of ten years' standing might be adjudicated an involuntary bankrupt because of debts incurred prior thereto in the vocation of merchant."

### 1912 Supp., p. 501, sec. 4b. [*Liability of officers and stockholders of corporations.*]

**Liability of officers, directors, and stockholders.**—The discharge of a corporation under the federal bankruptcy act does not discharge or extinguish the constitutional

liability of its stockholders for the payment of its debts. *Way v. Barney*, (1911) 116 Minn. 285, 133 N. W. 801, Ann. Cas. 1913A 719, 38 L.R.A.(N.S.) 648.

### 1912 Supp., p. 501, sec. 5a.

**Adjudication of partnerships as bankrupts.**—Under the Bankruptcy Act a partnership is a distinct entity, a person, separate from the partners who compose it and from all other partnerships. It owns its property apart from the individual property of its members and apart from the property of every other partnership of which any of its members happen to be members, and it owes its debts apart from the individual debts of its members and from the debts of other partnerships of which any of its members are members. It may be adjudged a bankrupt, although the partners who compose it are not so adjudicated. Its members may be adjudged bankrupts, but where one or more, but not all, of them are not so adjudged, the partnership property may not be administered in bankruptcy without the consent of the partner or partners not adjudged bankrupt. A receiver or trustee of a partnership adjudged a bankrupt is not the receiver or trustee of the property of another unadjudicated partnership in which the members of the bankrupt partnership were also members, and he has no more right to seize or to administer such property than

he has to take and distribute the property of any other stranger. *Fidelity Trust Co. v. Gaskell*, (C. C. A. 8th Cir. 1912) 195 Fed. 865.

A firm may be adjudicated a bankrupt although one of the firm was principally engaged in farming and could not therefore be adjudicated a bankrupt in his individual capacity. *In re R. F. Duke & Son*, (N. D. Ga. 1912) 199 Fed. 199.

That a partnership may commit an act of bankruptcy and upon the petition of its creditors, or upon its own petition, be adjudged bankrupt, without proceeding against or joining the partners individually, is made clear enough by section 5 of the act, and numerous decisions of the courts. It is, however, equally clear that, in either involuntary or voluntary proceedings, both the partnership and the individual members thereof may, in the same proceeding, be adjudged bankrupts, and that, upon conformity to the law, the partners may apply for and receive their discharge, both as partners and as individuals. *In re Springer*, (E. D. N. C. 1912) 199 Fed. 294.

### 1912 Supp., p. 504, sec. 5b.

**Trustee of partnership estate.**—Where a firm is adjudicated a bankrupt the trustee is entitled to an order that the separate estate of the partners be turned over to him for administration. *Francis v. McNeal*,

(1913) 228 U. S. 695, 33 S. Ct. 701, 57 U. S. (L. ed.) 1029, wherein the court said: "We should infer from § 5, clauses c through g, that the assumption of the Bankruptcy Act was that the partnership and individual



estates both were to be administered, and that the only exception was that in h, 'in the event of one or more, but not all of the members of a partnership being adjudged bankrupt.' In that case naturally the partnership property may be administered by the partners not adjudged bankrupt and does not come into bankruptcy at all except by con-

sent. But we do not perceive that the clause imports that the partnership could be in bankruptcy, and the partners not. The hypothesis is that some of the partners are in, but that the firm has remained out, and provision is made for its continuing out. The necessary and natural meaning goes no further than that."

## 1912 Supp., p. 504, sec. 5c.

Entity doctrine.—To the same effect as the original note, see *In re Schwartz*, (E. D. N. Y. 1913) 204 Fed. 326.

## 1912 Supp., p. 506, sec. 5f.

Distribution.—To the same effect as the original note, see *In re Knowlton & Co.*, (C. A. 3d Cir. 1913) 202 Fed. 480.

*Partnership creditors have a lien, in equity*, upon partnership property for the payment of the partnership debts. This right is expressly provided for in the bankrupt law. Partners in an insolvent partnership have no interests of their own in the partnership property, but the whole is subject to the lien of the partnership creditors. There is nothing in the partnership property of such a partnership out of which the surviving partner is entitled to any exemptions. *In re Abrams*, (D. C. S. D. 1912) 193 Fed. 271.

Firm creditors are entitled to be first paid out of firm assets.—To the same effect as the original note, see *Mayes v. Palmer*, (C. A. 8th Cir. 1913) 208 Fed. 97.

Creditors of individual partners.—In the case of *In re Knowlton & Co.*, (E. D. Pa. 1912) 196 Fed. 837 it was held that where one of the partners of a bankrupt partnership was itself a partnership its assets should first be applied to liquidating the claims of its own creditors.

Pro rata distribution between firm and individual creditors—*Where there are no partnership assets and no solvent partner.*—Where a partnership and the individual partners are all insolvent and all in bankruptcy, and where no partnership assets are available for distribution among partnership creditors, the creditors have the right to share *pari passu* with the separate creditors of one partner in the net proceeds of his separate property. *In re Gray*, (E. D. Pa. 1913) 208 Fed. 959.

## 1912 Supp., p. 507, sec. 5g.

Administration of estate of partner.—A court of bankruptcy may draw to itself for administration the estate of a partner, not adjudicated, as part of the administration of the firm bankruptcy. *In re Samuels*, (S. D. N. Y. 1913) 207 Fed. 195, wherein the court said: "This motion presents a question which has been much contested in the books; i. e., may a court of bankruptcy draw to itself for administration the estate of a partner, not adjudicated, as part of the administration of the firm bankruptcy? In this case two partners and the bankrupt firm have been adjudicated, but Valentine never has. The greater number of authorities appear to be in favor of the motion, but there is a strong decision to the contrary in the eighth circuit, by a divided vote. *In re Bertenshaw*, 157 Fed. 363, 85 C. C. A. 61, 17 L.R.A. (N.S.) 886, 13 Ann. Cas. 986.

"The law has taken its rise from what was certainly an obiter remark of Judge Wallace in *Re Meyer*, 98 Fed. 976, 979, 39 C. C. A. 368, which affirmed Judge Thomas in the same case (D. C.) 92 Fed. 896. That remark was the basis of a decision of Judge McPherson, in *Re Stokes* (D. C.) 106 Fed. 312, and it was followed by Judge Severens, for the sixth circuit, in *Dickas v. Barnes*, 140 Fed. 849, 72 C. C. A. 261, 5 L.R.A. (N.S.)

654, although the actual decision went off on a question of appeal. It was likewise a basis of the decision of Judge Holland in *Re Lattimer* (D. C.) 174 Fed. 825, which was affirmed in an elaborate opinion by Judge Lanning, for the third circuit, in *Francis v. McNeal*, 186 Fed. 481, 108 C. C. A. 459. The doctrine in that case was limited to a case where the firm adjudication involved the insolvency of the partnership; the theory being that the firm could not be insolvent unless the partners were also insolvent, under the rule in *Re Blair* (D. C.) 99 Fed. 76; *Vaccaro v. Security Bank*, 103 Fed. 436, 43 C. C. A. 279, and other cases. It was the basis also, of Judge Hook's dissent in *Re Bertenshaw*, supra. Judge Quarles, in *Re Junck & Balthazard* (D. C.) 169 Fed. 481, ruled in the same way, as did Judge Lanning in *Re Ceballos & Co.*, (D. C.) 161 Fed. 445. *In Re Kaufman*, 176 Fed. 96, 99 C. C. A. 107, in our own Circuit Court of Appeals, expressly reserved this question from the decision, and, so far as it bears upon the question at all, favors the rule in *Re Meyer*, supra. I have found nothing to the contrary, unless it be *In Re Solomon*, (D. C.) 163 Fed. 140, where Judge Chatfield ruled that the partner should administer the estate, yet file schedules in this court. I do not under-

stand that he did not think *In re Meyer* controlling.

"On principle, the entity theory forbids considering the solvency of the partners, in determining the firm adjudication. They are guarantors of the firm's solvency, and though they may have to pay the whole deficiency of the firm debts, they still have a right against the firm. While from the point of view of the creditors the partner's liability is an asset, the firm books would show it as a liability of the firm to the contributing partners. It is only when the firm entity is forgotten that the partner's liability may be regarded as a firm asset. If the firm be regarded as an individual for a moment the thing is plain. Suppose that A. guarantees all of B's debts and B. then becomes bankrupt. From the point of view of the creditors the claim against A. is an asset, and it might be thought that A.'s insolvency was a necessary condition of B.'s bankruptcy. However, this is not true, because, though A. could not prove in competition with any of the creditors against B.'s estate, having guaranteed all equally, still he would have a claim in case he took up all the debts, or in case he paid the deficiency after the assets were exhausted. Precisely the same relations exist between the firm and the partners. If this be so, then it follows that the separate estates should not be drawn into bankruptcy administration without separate adjudication. The firm as an entity may be solvent or insolvent, as its assets are sufficient, and the deficiency which the partners will have to pay will be great or small according to this insufficiency. That deficiency is an individual liability of the partners, and under any adequate grasp of the entity theory ought to be a provable claim against the separate estate, though, of course, the law has been settled to the contrary for 100 years, unless section 5g may some day be

held to effect the more consistent rule. In determining the partner's solvency, that liability would, of course, be reckoned, even though under the law the individual debts are preferred claims, and his solvency would depend upon whether his estate can answer all these debts. It seems to me obvious justice that this whole separate estate ought not to be drawn into the bankruptcy court for administration unless that be true; and so far, indeed, Judge Lanning felt bound to go in *Francis v. McNeal*, supra, to avoid unjust results. The whole subject of partnership has undoubtedly always been exceedingly confused, simply because our law has failed to recognize that partners are not merely joint debtors. It could be straightened out into great simplicity, and in accordance with business usages and business understanding, if the entity of the firm, though a fiction, were consistently recognized and enforced. Like the concept of a corporation, it is for many purposes a device of the utmost value in clarifying ideas and in making easy the solution of legal relations. It would, moreover, avoid what must appear to every unsophisticated person the very grave injustice of seizing the separate estate of a man who has committed no act of bankruptcy, or who may even be solvent, and administering it in this court. Nevertheless, the law was too well fixed until 1898 to allow a change, at which time the present act gave an opportunity to construe the law in accordance with principle. Yet I cannot disregard the language of *In re Meyer*, supra, even though it was obiter in the case there at bar. It was probably intended as a direction for the future conduct of that very case, and as such it was perhaps followed. Nor do I think that Judge Lanning's distinction ought to be followed, though it would somewhat mend the hardship of the rule."

## 1912 Supp., p. 508, sec. 5h.

When section 5h applies.—To the same effect as the original note, see *Fidelity Trust Co. v. Gaskell*, (C. C. A. 8th Cir. 1912) 195 Fed. 865; *In re Schwartz*, (E. D. N. Y. 1913) 204 Fed. 326.

## 1912 Supp., p. 508, sec. 6a.

### I. CLAIMING EXEMPTION.

**Necessity of claiming.**—*The failure to claim the exemption is, in the absence of a good reason therefor, considered to be a waiver of the right to make such claim.* *In re Strach*, (N. D. Ohio 1913) 208 Fed. 842.

To the same effect as the original note, see *In re Harrington*, (N. D. N. Y. 1912) 200 Fed. 1010.

**Time and manner of claiming.**—The bankrupt's right to such exemptions as are permitted by state laws is referable to the condition of things as they existed "at the time of the filing of the petition." *Mullinix v. Simon*, (C. C. A. 8th Cir. 1912) 196 Fed. 775.

**Amendment of schedules.**—The courts in

bankruptcy as a rule exercise great liberality in permitting amendments. But it is clear that bankruptcy courts do not favor the extension of exemptions by amendment, when such extension works solely for the benefit of a creditor, and not for the benefit of the bankrupt and his family. *In re Merry*, (D. C. Me. 1913) 201 Fed. 369.

Under authority given in the Bankruptcy Act to amend the schedules, in which under the bankruptcy rules adopted the claim to exemptions should be made, the courts have been liberal in the matter of allowing amendments, where the original schedules had not made exemption claims; but they have uniformly required, before doing so,

that the omission to make the claim to exemption had occurred through inadvertence, and that there had been diligence in seeking to cure the defect. *In re Burnham*, (W. D. Wash. 1913) 202 Fed. 762.

**Sale of exempt property with other goods by agreement.**—In the case of *In re Hutchinson*, (W. D. Mich. 1912) 197 Fed. 1021, it appeared that the property of the bankrupt consisted of a small stock of groceries, tools and store fixtures, some accounts receivable, less than \$20 in cash, and exempt household goods. In his schedules the bankrupt claimed an exemption of \$250 in the stock of goods. The trustee attempted to set off that amount of the goods in bulk, and not in specific articles. The bankrupt assigned his exemption to a grocery company and the assignee refused to permit the trustee to sell the stock of goods as an entirety and to accept a pro rata share of the proceeds. Thereupon the trustee, believing that more could be secured for the creditors by selling the entire stock and paying the assignee the sum of \$250 than could be obtained by selling the remnant of the stock after setting apart the exemption, entered into a written contract with the assignee, by which the assignee agreed to allow the trustee to sell the entire stock and the trustee agreed to pay over to the assignee the sum of \$250, the value of the exemption. The stock of goods, including the exemption, was appraised at \$600, and was sold by the trustee for \$427.55. The sale was confirmed. Thereupon the trustee paid to the assignee of the bankrupt the sum of \$250, and asked the referee to allow such amount as a disbursement. The referee refused so to do, but did allow the sum of \$177.50, upon the theory that, the entire stock of goods having brought but 71 per cent. of the appraised value, the bankrupt or his assignee was not entitled to more than 71 per cent. of the amount of his exemption. The court said: "The precise question here presented does not appear to have been decided in any reported case. While the action of the trustee was somewhat irregular, yet the course pursued by him was undoubtedly for the best interests of the estate. The bankrupt claimed and insisted upon the full amount of his exemption, and consented to the sale of his property solely upon the condition and agreement that he would receive the full amount in cash. No creditor has objected. The trustee having paid out the money pursuant to his contract, made in good faith, and the estate and its creditors having profited by his action, he ought in justice and equity to be reimbursed."

This section is cited in the cases of *In re Orear*, (C. C. A. 8th Cir. 1911) 189 Fed. 888; *In re T. C. Burnett & Co.*, (E. D. Tenn. 1912) 201 Fed. 162.

## II. MATTERS AFFECTING RIGHT TO EXEMPTION.

**Residence.**—The burden of proving a change of residence is upon those asserting  
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the change. *In re Bassett*, (E. D. Wash. 1911) 189 Fed. 410.

**Sale of property**—*Where the trustee erroneously sells exempt property.*—To the same effect as the original note, see *In re Zack*, (E. D. Pa. 1912) 196 Fed. 909.

**Fraud.**—To the same effect as the original note, see *In re Peacock*, (S. D. Ga. 1913) 203 Fed. 191.

In the case of *In re Hammonds*, (E. D. Ky. 1912) 198 Fed. 574, there arose a question whether provisions bought by a bankrupt with no intention to pay for them were exempt, in view of the manner in which they were obtained. The court said: "The ground upon which the creditors claim that the provisions allowed should not have been set apart as exempt is that they had been purchased with no intention to pay for them. The referee found against this claim in matter of fact—i. e., he held that they had not been so purchased—and on this ground denied the claim. If the necessities of this case required that I should pass on this question of fact, of course, I would have to have before me the evidence heard by the referee, but the necessities of the case do not so require. Even if it be a fact that the provisions set apart to the bankrupt had been purchased by him with the intention of not paying for them, the creditors, as such, have no right to complain of the action of the referee in setting them apart. Notwithstanding such intention, the title thereto passed from the sellers to the bankrupt. Because thereof the sellers were entitled to reclaim their property. But this right did not prevent the passage of the title. The effect thereof was to make the title which the bankrupt acquired what is termed in *Donaldson v. Farwell*, 93 U. S. 631, 23 L. Ed. 993, a 'defeasible title.' In order to reinvest the sellers with title, a rescission of the contract of sale was essential. The fact that immediately upon the sale the sellers had the right to recover their goods in replevin is not against this. The bringing of such a suit is a 'judicial rescission,' which is a substitute for 'a rescission in pais' effected by a mere demand. 1 *Bigelow on Fraud*, p. 77. This right of rescission and recovery of the goods were personal to the sellers. It could not have been asserted as against the trustee had not the provisions been set apart as exempt, and can be asserted as against the bankrupt, notwithstanding they have been set apart as exempt. It follows from this that the petitioning creditors, as such, are not interested in the question as to whether the provisions were purchased with an intention not to pay for them."

## III. RECOGNITION OF STATE AND FEDERAL EXEMPTION LAWS.

**Construction.**—As a rule, the federal courts are governed by state construction of local exemption statutes; but, in the absence of such construction, they will adopt their own interpretation. *Jennings v. Stannus*, (C. C. A. 9th Cir. 1911) 191 Fed. 347.

**Federal exemption laws recognized.**—To the same effect as the original note see *In re Pears*, (C. C. A. 3d Cir. 1913) 205 Fed. 255.

**State law adopted.**—To the same effect as the original note, see *In re Carlon*, (S. D. S. D. 1911) 189 Fed. 815; *In re Loveland*, (D. C. Mass. 1912) 192 Fed. 1005; *In re Kolber*, (E. D. Pa. 1912) 193 Fed. 281; *In re Denson*, (N. D. Ala. 1912) 195 Fed. 857; *In re Zimmerman*, (E. D. Wis. 1913) 202 Fed. 812; *In re Strauch*, (N. D. Ohio 1913) 208 Fed. 842.

*In re Hammonds*, (E. D. Ky. 1912) 198 Fed. 574, the court, construing the section, said: "The meaning of this provision cannot be other than that, if under the state law the bankrupt would be entitled to certain exemptions as against his creditors, he is entitled to the same exemptions notwithstanding the bankrupt law and the institution of bankruptcy proceedings thereunder. The question then comes to this: What is the law of Kentucky on this subject? Does it affect the debtor's right to hold a certain article of the kind prescribed as exempt that he purchased it with nonexempt property, and in order that he might have this property to that extent in an exempt condition? The statute is absolute. It provides that a debtor of the kind covered by it shall be entitled as against his creditors to the exemptions prescribed in it without any qualification whatever. Under it therefore, one who has purchased property of the kind that is nonexempt, and not paid for it, may convert it into property of the kind that is exempt with the deliberate purpose of having his property in an exempt condition, and hold the property so purchased exempt as against the creditor whose crediting has enabled him to acquire it. This looks hard on the creditor. But it is presumed that one so giving credit will have it in view when he gives it. What is here said has reference only to exemptions of personal property. It is not true of the homestead exemption. In the case of *Northington v. Boyd*, 12 Ky. Law Rep. 227, Judge Bowden of the superior court said arguendo:

"If a prior debtor, anticipating a levy and having three work beasts, but only one cow, sells one of the work beasts and buys another cow, we do not suppose the latter could be taken, though it were admitted that he did so in order to hold in this way the value of the work beast."

"It is clear, therefore, that the bankrupt was entitled to hold the two mules and the cow, notwithstanding the circumstances under which they were acquired, as exempt

from administration herein. The referee thought that the matter was controlled by section 67, subsec. 'e,' of the Bankrupt Act, providing that conveyances and transfers of property made by a debtor with intent to hinder, delay, or defraud his creditor shall be void as to them. But that section has no application. It has in view dispositions of property made by the debtor to others with such intent, and provides that such property may be followed up and subjected to his debts. A transaction which the law permits could not have been intended to be covered by the section."

**A valid lien upon property of a bankrupt which is exempt** under the state law is not affected by bankruptcy proceedings, and will not be set aside as an illegal preference under the federal bankruptcy law. *Morris v. Covey*, (1912) 104 Ark. 226, 148 S. W. 257.

**Homestead exemptions.**—To the same effect as the original note, see *In re O'Brien*, (N. D. Tex. 1913) 203 Fed. 1012.

Property exempt as a homestead under the laws of the state in which the bankrupt has his domicile is expressly recognized as exempt in bankruptcy proceedings, and the acquisition of a homestead by an insolvent debtor is not a fraud upon his creditors. *Lacy v. Chandler*, (Tex. 1913) 163 S. W. 328.

**Proceeds derived from the sale of the crops raised upon the homestead** are not exempt. *In re Friedrich*, (D. C. Minn. 1912) 199 Fed. 193.

**An assignment of shares of stock to lift a lien from the assignor's homestead**, although made while he was insolvent, and was contemplating an application in bankruptcy, is valid and binding. *Southern Irr. Co. v. Wharton Nat. Bank*, (Tex. 1912) 144 S. W. 701.

**Partnership exemptions—Individual partners.**—Where a member of a partnership against which bankruptcy proceedings are pending is on his petition discharged from liability or participation in the proceedings on the ground of infancy he cannot thereafter obtain exemptions because he no longer has any status as a debtor. *In re Ellenbecker*, (E. D. Wis. 1913) 205 Fed. 396.

Under the statutes of South Dakota in case of the bankruptcy of a partnership, neither member of the firm can claim any portion of the firm property to be set apart to him as his individual exemptions. *In re I. S. Vickerman & Co.*, (D. C. S. D. 1912) 199 Fed. 599.

**Tools, implements of trade, etc.**—To the same effect as the original note, see *In re Robinson*, (N. D. Idaho 1913) 206 Fed. 176.

## 1912 Supp., p. 520, sec. 7a (8).

### I. SCHEDULE OF ASSETS.

**Duty to schedule assets.**—In the case of *In re Podolin*, (E. D. Pa. 1913) 202 Fed. 1014, bankrupts refused to file their schedules in bankruptcy on the ground that their schedules might tend to incriminate them,

and the referee thereupon ordered the filing of schedules, omitting therein matter which might incriminate them. On a certificate to review this order the District Court said: "As a general proposition, the referee's ruling that the bankrupts must file schedules, so far as they can do so without incriminating

themselves, is obviously correct. But, until an effort is made to comply with his order, it is practically impossible for the court to decide whether a particular fact is to be included or omitted. To decide that a bankrupt is not bound to put his hand to a declaration of fact that may incriminate him, does not advance a particular dispute very much. What is required is an effort in good faith by the bankrupt to file a schedule that obeys the act up to the point where the court can see that further obedience would violate the constitutional protection. When the bankrupts present such schedules as they can conscientiously declare to be a compliance with the order (saving their constitutional rights), the referee will then be able either to order them to do specific acts or to approve the refusal to do them; and in either event the District Court will then have something definite to rule upon. Until such a situation is presented, the discussion is almost wholly academic." This case was affirmed in *In re Podolin*, (E. D. Pa. 1913) 205 Fed. 563.

**Schedule of outlawed debts as waiver of statute of limitations.**—A person, in fact solvent, but ignorant of the fact, may not file a voluntary petition in bankruptcy, schedule outlawed debts, thereby acknowledging their existence as present, valid and existing

claims, and then, on discovering his solvency, himself plead the statute of limitations to such claims on the theory that he could not as against creditors and therefore as against himself in effect waive the statute of limitations at the time of and on filing his voluntary petition in bankruptcy. In *re Currier*, (N. D. N. Y. 1912) 192 Fed. 695, wherein the court said: "I think the person alleging himself a bankrupt may, so far as he is concerned and his interests are involved, waive the statute of limitations and acknowledge the debt, otherwise barred, by inserting it as a valid, existing claim in his schedules. Should a creditor be interested and raise the question of the right of a bankrupt actually insolvent on filing his petition to then renew his outlawed debts, I should be inclined to hold that such acknowledgment made at that time would not preclude creditors from showing the debt was barred."

**Who may compel filing of schedules.**—Ordinarily the trustee is the proper person to set the machinery in motion to obtain the schedules, but in the absence of such action there is no reason why a creditor should not proceed. In *re Brockton Ideal Shoe Co.*, (C. C. A. 2d Cir. 1912) 200 Fed. 745.

**Insufficient schedule.**—See *Guasti v. Miller*, (1911) 203 N. Y. 259, 96 N. E. 416.

## 1912 Supp., p. 524, sec. 7a (9).

**Construction.**—In *Cameron v. United States*, (1914) 231 U. S. 710, 34 S. Ct. 244, the court construing this clause said: "This section was before this court, so far as the immunity provided is concerned, in *Glickstein v. United States*, (1911) 222 U. S. 139, where it was held not to prevent a prosecution for perjury in giving of testimony by a bankrupt, and the immunity was held to apply to past transactions concerning which the bankrupt might be examined. In the opinion in that case *Edelstein v. United States*, Circuit Court of Appeals for the Eighth Circuit, (1906) 149 Fed. 636, which had held that the words 'any criminal proceeding' in which immunity is provided are limited to such criminal proceedings as arise out of the conduct of the bankrupt's business or the disposition of his property, etc., concerning which he may be examined, was cited with approval. In *Ensign v. Commonwealth of Pennsylvania*, (1913) 227 U. S. 592, 600, it was held that full effect could be given to the immunity provision by confining it to the testimony given under subdivision 9, to which it was immediately subjoined. As the present prosecution was based upon alleged false swearing in the course of the bankruptcy proceedings, section 7 of the Bankruptcy Act can have no application."

**"Testimony" defined.**—Bankruptcy schedules are not within the description of "testimony" as the word is used in the clause. It refers to oral evidence. *Ensign v. Commonwealth of Pennsylvania*, (1913) 227 U.

S. 592, 33 S. Ct. 321, 57 U. S. (L. ed.) 658, wherein the court said: "And for like reasons, the evidence showing the results of an expert examination of the books of the bankers was also admissible.

"This conclusion renders it unnecessary for us to consider whether the prohibition with which we have dealt, that 'no testimony given by him shall be offered in evidence against him in any criminal proceeding' is not limited to criminal proceedings in the federal courts; and upon this question we express no opinion."

**Production of books and papers.**—A bankrupt is entitled to a hearing on a petition by a trustee to compel the production of books and papers. In *re Soloway*, (D. C. Conn. 1912) 195 Fed. 100.

**Subsequent use of evidence.**—"While such testimony is primarily for the information of the trustee in aid of his administration of the estate, it is also available to parties in interest. Such testimony is not to be classed with declarations made out of court. It is judicial in its nature and with reference to it the trustee may properly be said to be in privy with the bankrupt, and, while not concluded by the bankrupt's admissions made therein, they are admissible against him in controversies arising in such bankruptcy proceedings." In *re Thompson*, (D. C. N. J. 1912) 197 Fed. 681.

The words "*in any criminal proceeding*."—The guarantee of immunity does not bar a prosecution for perjury for false swearing in giving testimony under the section. *Glick-*

stein v. United States, (1911) 222 U. S. 139, 32 S. Ct. 71, 56 U. S. (L. ed.) 128. See to the same effect Daniels v. United States, (C. C. A. 6th Cir. 1912) 196 Fed. 459.

This subdivision was cited in Glickstein v. United States, (C. C. A. 5th Cir. 1911) 193 Fed. 51.

## 1912 Supp., p. 528, sec. 8a. [*Dower and allowances for widow and children.*]

Allowance for support of widow and family of deceased bankrupt.—The year's support of the family immediately succeeding the death of its head is an "allowance." In re Dicks, (N. E. D. Ga. 1912) 198 Fed. 293.

## 1912 Supp., p. 529, sec. 9a.

Arrest prior to institution of bankruptcy proceedings.—In Turgeon v. Bean, (1912) 109 Me. 189, 83 Atl. 557, the court, construing this provision, said: "The Bankruptcy Act of 1867, (Act March 2, 1867, c. 176, 14 Stat. 5) provided that 'no bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him.' Section 26. The federal courts in a long line of decisions have held in the most emphatic language that this section did not relieve from arrest one who was legally in custody upon civil process at the time the petition in bankruptcy was filed. The Bankruptcy Act of July 1, 1898, c. 541, § 9, 30 Stat. 549, provides that 'a bankrupt shall be exempt from arrest upon civil process, except,' etc. We are unable to discover any essential difference between this section and section 26 of the act of 1867, before referred to. Both are designed to cover the same situation; that is, immunity from arrest made after petition filed. In one case the prohibition is expressed affirmatively, in the other negatively; but the meaning of both is the same. So, too, general order No. 27, established

by the United States Supreme Court in connection with the act of 1867, covers the same ground as No. 30 (89 Fed. xii, 32 C. C. A. xxx), in connection with the act of 1898. Both provide for the production of the bankrupt, upon habeas corpus, before the court to facilitate the bankruptcy proceedings, and his restoration to custody, if arrested before proceedings begun, and his release, if arrested after, upon a provable and dischargeable debt.

"Moreover, in construing the act of 1898, no little weight should be given to the fact that the exemption from arrest clause in the act of 1867 was frequently and clearly interpreted by the courts to be confined to subsequent arrests; and when this clause was placed in the act of 1898 in substantially the same language Congress must be presumed to have intended to adopt the former language as interpreted by the court. Had it wished to extend it beyond the limit already placed upon that section, and to release the bankrupt from detention as well as arrest, it should have expressed itself in clear and unmistakable terms, leaving nothing to inference. In other words, the act of 1898 is to be construed in the light of the act of 1867, plus the decisions thereunder."

## 1912 Supp., p. 531, sec. 11a.

### I. IN GENERAL.

Power given for benefit of bankrupt estate.—"The bankruptcy act authorizes the District Court as a court of bankruptcy to stay suits against the bankrupt founded upon provable claims pending in state courts at the time of the bankruptcy. It also authorizes such stays in attachment actions instituted within four months of the bankruptcy, the lien of the attachment being invalidated thereby. But the power is given in both cases only for the benefit of the bankrupt estate. If the estate have no interest in the suit or action it cannot properly be stayed. As this court said in In re Mercedes Import Co., (C. C. A. 2d Cir. 1908) 166 Fed. 427:

"As the trustee in bankruptcy has no interest whatever in the claim against the surety, we think the creditor's rights and

equities are questions to be disposed of by the state court."

"In the Mercedes case the facts were somewhat similar to those appearing here. An attachment suit had been brought in a state court against a corporation which subsequently became bankrupt. A bond was substituted for the attachment. The District Court stayed the action, but this court reversed the order upon the ground indicated in the extract quoted, viz: that the bankrupt estate had no interest in preventing proceedings in the state court which looked only to enforcing the obligation of the surety company upon the attachment bond. But in the Mercedes case the attachment was made more than four months before the bankruptcy and, what is particularly important, no property of the bankrupt estate was held directly or indirectly to indemnify the surety. In the present case, on the other hand, the attachment was made within four months of

bankruptcy and if Anger has a right to the property transferred for his benefit the trustee has a substantial interest in the attachment action. If the surety company is held it can look to Anger for indemnity and he may avail himself of the property of the estate. Thus if a stay be not granted a suit against a bankrupt on a provable claim brought within four months of bankruptcy may result in a depletion of the assets of the estate—a result clearly in contravention of the purpose of the bankruptcy act." In *re Federal Biscuit Co.*, (C. C. A. 2d Cir. 1913) 203 Fed. 37.

## II. DISCRETION AS TO GRANTING STAYS.

**Stay discretionary.**—To the same effect as the original note, see *In re United Wireless Telegraph Co.*, (S. D. N. Y. 1912) 196 Fed. 153.

## III. STAY AS DEPENDENT ON DISCHARGEABILITY OF DEBT.

**Stay of actions on dischargeable debts.**—To the same effect as the original note, see *In re Nuttall*, (S. D. N. Y. 1912) 201 Fed. 557.

The provision for a stay of proceedings has no application where the claim is not provable in bankruptcy. *Imbriani v. Anderson*, (1912) 76 N. H. 491, 84 Atl. 974.

In *re Dowie*, (S. D. N. Y. 1912) 202 Fed. 816, a stay enjoining the enforcement of judgment for costs recovered against the

bankrupt by a defendant whom the bankrupt sued for slander was vacated, the court saying: "A judgment on a debt which is not dischargeable should not be stayed pending bankruptcy proceedings. It has been held that a judgment to recover damages for slander is not dischargeable, and, in my opinion, a judgment for costs in such an action, recovered by a defendant against the plaintiff, partakes of the same character. A judgment in such an action, or in any action for a pure tort, either in favor of the plaintiff or the defendant, can be enforced by an execution against the person."

## IV. STAY OF PROCEEDINGS ON VALID LIENS.

**Stay denied.**—A suit to enforce a specific lien on property cannot be determined in a summary way such as is usual in the administration of a bankrupt estate. Such a suit is plenary in its character, and possessory in its nature, even though it may eventuate in a money decree, and is not one contemplated by section 11 of the bankruptcy act, which deals with suits in personam and not in rem. In *re United Wireless Tel. Co.*, (D. C. N. J. 1911) 192 Fed. 238.

Where a mortgagee has obtained a judgment for foreclosure and sale in a state court before the institution of proceedings in bankruptcy against the mortgagor the foreclosure in the state court will not be stayed. In *re Wagner's Estate*, (E. D. Pa. 1913) 206 Fed. 304.

## 1912 Supp., p. 539, sec. 11c.

The court whose approval this section requires is the court who appointed the trustee. —The Alert, (D. C. Mass. 1912) 199 Fed. 542.

**Prosecution of suit by bankrupt.**—In *Johnson v. Collier*, (1912) 222 U. S. 538, 32 S. Ct. 104, 56 U. S. (L. ed.) 306, the question arose whether prior to the election of a trustee the bankrupt might prosecute. The answer was in the affirmative, the court saying: "The trustee, with the approval of the court, may prosecute any suit commenced by the bankrupt prior to the adjudication. But the statute is otherwise silent as to the right of the bankrupt himself to begin a suit in the time which intervenes between the filing of the petition and the election of the trustee. There is a conflict in the conclusions reached in the few cases dealing with this question. *Rand v. Sage*, (1905) 94 Minn. 344; *Rand v. Iowa Cent. R. Co.*, (1906) 186 N. Y. 58; *Gordon v. Mechanics' & Traders' Ins. Co.*, (1907) 120 La. 441.

"While for many purposes the filing of the petition operates in the nature of an attachment upon choses in action and other property of the bankrupt, yet his title is not thereby divested. He is still the owner, though holding in trust until the appointment and qualification of the trustee, who thereupon becomes 'vested by operation of law with the title of the bankrupt' as of the date of adjudication. (§ 70.)

"Until such election the bankrupt has title—defeasible, but sufficient to authorize the institution and maintenance of a suit on any cause of action otherwise possessed by him. It is to the interest of all concerned that this should be so. There must always some time elapse between the filing of the petition and the meeting of the creditors. During that period it may frequently be important that action should be commenced, attachments and garnishments issued, and proceedings taken to recover what would be lost if it were necessary to wait until the trustee was elected. The institution of such suit will result in no harm to the estate. For if the trustee prefers to begin a new action in the same or another court in his own name, the one previously brought can be abated. If, however, he is of opinion that it would be to the benefit of the creditors, he may intervene in the suit commenced by the bankrupt, and avail himself of rights and priorities thereby acquired. *Thatcher v. Rockwell*, (1881) 105 U. S. 467.

"If, because of the disproportionate expense, or uncertainty as to the result, the trustee neither sues nor intervenes, there is no reason why the bankrupt himself should not continue the litigation. He has an interest in making the dividend for creditors as large as possible, and in some states the more direct interest of creating a fund which

may be set apart to him as an exemption. If the trustee will not sue and the bankrupt cannot sue, it might result in the bankrupt's debtor being discharged of an actual liability. The statute indicates no such purpose, and if money or property is finally recovered, it will be for the benefit of the

estate. Nor is there any merit in the suggestion that this might involve a liability to pay both the bankrupt and the trustee. The defendant in any such suit can, by order of the bankrupt court, be amply protected against any danger of being made to pay twice."

## 1912 Supp., p. 540, sec. 12a.

This section is cited in *In re New Chattanooga Hardware Co.*, (E. D. Tenn. 1911) 190 Fed. 241.

## 1912 Supp., p. 541, sec. 12b.

Composition in money by use of credit.—Section 12, in prescribing the time and mode of offering terms of composition, plainly contemplates that a composition in money may be offered, and expressly prescribes that an application for the confirmation of a composition may be made after, but not before, "the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated

by and subject to the order of the judge." And he same section provides that "upon the confirmation of a composition the consideration shall be distributed as the judge shall direct, and the case dismissed." The act, of course, contemplates that the bankrupt may acquire the money required for the purposes of the composition by the use of his credit. *Zavelo v. Reeves*, (1913) 227 U. S. 625, 33 S. Ct. 365, 57 U. S. (L. ed.) 676.

## 1912 Supp., p. 543, sec. 12d (1).

Creditors' interests prevail.—To the same effect as the original note, see *In re New Chattanooga Hardware Co.*, (E. D. Tenn. 1911) 190 Fed. 241; *In re McLellan*, (N. D. N. Y. 1913) 204 Fed. 482; *In re B. Jacobson & Son Co.*, (C. C. A. 3d Cir. 1912) 196 Fed. 949.

The confirmation affects a general discharge by virtue of section 14c (see 1912 Supp. 568). *Friend v. Talcott*, (1913) 228 U. S. 27, 33 S. Ct. 505, 57 U. S. (L. ed.) 718.

## 1912 Supp., p. 544, sec. 12d (2).

Where discharge is barred.—"The Bankrupt Act requires, among other things, that the composition shall be confirmed if the judge is satisfied that the bankrupt has not been guilty of any acts or failed to perform any of the duties which would bar his discharge. By the manner in which the proposition is stated, the act would seem to require the bankrupt to establish the fact that he is not amenable to it in this respect; but the burden of proof is cast upon the objecting creditor, and he must establish the fact by a clear preponderance of the evidence. The bankrupt is entitled to a discharge unless he has, among other things, 'with fraudulent intent to conceal his true financial condition, . . . destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained.' Section 14b, subd. 2 [1912 Supp. 558.]

"Reading the two clauses together, this latter is available as an inhibition to a composition with creditors." *In re Barde*, (D. C. Ore. 1913) 207 Fed. 654.

Elements to bar discharge must be present.—In the case of *In re B. Jacobson & Son*

*Co.*, (C. C. A. 3d Cir. 1912) 196 Fed. 949, it appeared that in the bankruptcy proceeding of the B. Jacobson & Son Company in the court below a composition was offered after deposit of the requisite funds. To such composition the Georgia Pine Company, a creditor, objected on three grounds: First, that the composition was not for the best interest of creditors; second, that the bankrupt had committed acts which barred a discharge; and, third, that the offer and acceptance were not in good faith and had been procured improperly. On reference thereof to the referee as special master, he heard proofs and reported against the objections. Thereafter the court on hearing sustained his action, and entered a decree overruling the exceptions to his report and confirming the composition. It was held on an appeal from such decision that there was an error in confirming the composition. The court said: "The second objection concerned the omission to include certain real estate in the bankrupt's schedules, for which omission, it is alleged, there could have been a conviction for the statutory offense of having concealed, while a bankrupt, from its trustee, property



belonging to its estate. The findings of fact by the referee, which we approve, leave no ground on which this objection can be sustained. Clearly there was neither dishonest concealment nor a willful intent to exclude from the schedule assets belonging to the bankrupt estate. The company itself was engaged in selling building material to contractors, and was desirous of carrying on building operations itself. It was thought, however, that if contractors knew the company was engaged in building operations in competition with them they would cease dealing with it. Certain real estate was therefore purchased by the company in the names of different officers, and as buildings were erected the materials, etc., furnished by the company were charged against such properties. Over and above the liens against them there was little, if any, equity in the company in such properties. The situation was such that, even when called to testify,

the officers of the company were uncertain whether the company was the holder of claims against the properties or owners of the properties themselves. Nor was there evidence of concealment or fraudulent intent. At a meeting of creditors held before the bankruptcy proceeding was begun, the fact that the company had had such dealings, and that some real estate was thus held, was disclosed by its officers. When the bankruptcy schedules were prepared, counsel were informed of the situation, and by their advice these properties were not scheduled. In view of the above facts, and in the absence of any fraudulent or criminal intent in that regard, and in the alleged omission of other assets which the referee fully and satisfactorily discussed in his report, we are not justified in holding that the bankrupt, or its officers, had committed an offense punishable by imprisonment as provided by the bankrupt law."

### 1912 Supp., p. 546, sec. 13a.

Composition set aside for fraud.—To the same effect as the original note, see *In re Ballance*, (E. D. N. Y. 1913) 206 Fed. 505.

The general equitable principle is that a composition agreement is invalid if based upon or procured by a secret arrangement with one or more favored creditors, in violation of the equality and reciprocity upon which such an agreement is avowedly based. *Zavello v. Reeves*, (1913) 227 U. S. 625, 33 S. Ct. 365, 57 U. S. (L. ed.) 676.

Where it appears that at the time of a composition with creditors the true state of

the affairs of the bankrupt must have been known not only to the counsel for the creditors but also to many people having an interest in the matter, and notwithstanding all this, every creditor either expressly accepted the composition, or failed to make any objection to the same although having notice of the offering and of the hearing, the composition will not be set aside for fraud. *Union Furniture Co. v. Walker-Coolley Furniture Co.*, (N. D. Ga. 1913) 206 Fed. 217.

This section is cited in *In re Wilkens*, (E. D. N. Y. 1911) 191 Fed. 94.

### 1912 Supp., p. 547, sec. 14a.

When application must be made.—Congress has made it a condition precedent to favorable action by the court that the bankrupt shall apply for his discharge within the time limited by the statute. To avail himself of the benefit, he *must* take positive action within the time, and is not entitled to make excuses of any kind. *In re Richter*, (D. C. Conn. 1911) 190 Fed. 905.

*In Lindeke v. Converse*, (C. C. A. 8th Cir. 1912) 198 Fed. 618, the court said: "The provisions of section 14 of the Bankruptcy Law that the application for a discharge shall be filed within one year after the adjudication, that if the bankrupt is unavoidably prevented from doing so it may be filed within the next six months, and that the judge shall hear the petition and the proofs in opposition to it at such time and place as will give parties in interest a reasonable opportunity to be heard, plainly indicate the purpose of Congress to secure an early hearing and disposition of the issues springing from such petitions. It is obvious that a wise and just administration of this law requires that such issues shall be framed and tried before the memory of the witnesses familiar with the transactions of the bank-

rupt at and shortly before the time of his adjudication has been dimmed by long delay and before they and the documentary evidence surrounding these transactions have been scattered or lost. The record in this case is so clear and compelling that the court is unable to resist the conclusion that the bankrupt failed to exercise that reasonable diligence in the prosecution of her claim for a discharge which is requisite to call a court of equity into action in her behalf."

Effect of failure to apply for discharge on subsequent bankruptcy proceedings.—The failure of a bankrupt to apply for a discharge within the time required by law under an earlier petition is a good ground for denying his discharge when applied for by the bankrupt under a later petition, in which no new assets are scheduled, as to creditors who held provable claims under the first petition. *In re Bacon*, (C. C. A. 5th Cir. 1912) 193 Fed. 34.

Extension allowed because of unavoidable delay.—To the same effect as the original note, see *Lindeke v. Converse*, (C. C. A. 8th Cir. 1912) 198 Fed. 618.

*In In re Daly*, (W. D. Wash. 1913) 205 Fed. 1002, an extension of time for filing an

application for discharge was refused on the ground that ordinary diligence or attention on part of applicant would have enabled him to prevent application within twelve months.

*Mistake.*—In the case of *In re Churchill*, (E. D. Wis. 1912) 197 Fed. 111, the reason given for failure to apply for a discharge within a year was that the bankrupt "understood and believed that his . . . attorneys had filed his petition for discharge within the statutory period of 12 months and in compliance with the law relating thereto; that his said attorneys understood and honestly believed that they were not to file said petition until further specific instructions from the bankrupt; that, owing to such misunderstanding, and with no intention to mislead or delay, and without bad faith on the part of any one connected with the case, failure to file said petition occurred." In holding that an unavoidable delay was shown the court said: "It will be conceded that there is no fixed rule or standard whereby it can readily be determined whether a person was 'unavoidably prevented' from doing a certain act. If a narrow view respecting the meaning of these words be entertained, then nothing short of physical obstacles, or other facts or circumstances which literally deprived the bankrupt of his will or power to exercise his right, must be shown to have existed before the demands of the statute are satisfied. However, I think that the terms should be given a broader construction. The fact that the bankrupt is given nearly a year within which to file his application, and that such time can be enlarged six months, indicates that Congress was disposed to be rather liberal. If the terms are narrowly construed as above suggested, a situation would rarely arise in which the bankrupt could satisfy that construction. In other words, it would not happen very frequently, if ever, that a bankrupt would be 'unavoidably prevented' for a period of a full year from preparing and filing the petition for discharge. It seems to me that the act was intended to provide a remedy for situations which were likely to occur—and which would occur, not through the intervention of overruling obstacles as above indicated, but rather through excusable neglect, reasonable grounds for delay, mistake, possibly inadvertence, and the like. That is, it was contemplated that a bankrupt might default, as parties to litigation frequently default, in the performance of an act within a limited time, and that a further time in the discretion of the court be allowed to relieve from the consequences of such default. This seems a more reasonable construction to be given the words in question. While it may be claimed that a delay occasioned through a misunderstanding as is alleged fails not only to show that the bankrupt was 'unavoidably prevented,' but also fails to show a reasonable excuse, it is equally true that a different view is possible; that if a bankrupt in good faith represents to the court his reliance upon counsel, and counsel appear to have misunderstood their client's

instructions, the default is explained in an entirely reasonable manner, and if, upon such explanation, the judge is satisfied, it seems to me he has exercised a discretion which ought not to be disturbed."

*Sickness and poverty.*—In the case of *In re Casey*, (N. D. N. Y. 1912) 195 Fed. 322, the reason given why the application for a discharge had not been made within the twelvemonth period was that the petitioner was "a common laborer, and had no other means of support except that derived from his daily toil, and through sickness and the necessity of providing for the support of his family did not have sufficient means to pay for the expense of said proceeding, and, further, your petitioner was not informed of the necessity of filing said petition within said 12 months by his said attorney, and that he failed and neglected to notify him of said fact."

In holding that the showing was sufficient, Ray, District Judge, said: "It is true that this petition does not set forth with particularity the sickness of the bankrupt and the amount of his earnings and the amount required for the support of his family. It may be said that the allegations of the petition are a conclusion, and that the judge might have required the bankrupt to show that he was constantly sick during the 12 months' period, and that all his money was required to support his wife and children, and that he was unable to see his attorney, or that his attorney refused to act without pay, and did not inform him of the necessity of filing the petition within 12 months. If the bankrupt was sick or if his family was sick, and he was under the necessity of providing for their support, and did not have means to pay an attorney for making the papers on his application for a discharge, I think it may fairly be said that he was inevitably prevented from filing his application within the 12 months. Poverty is no excuse for the commission of a crime, but poverty and sickness may be an absolute bar to the institution of a legal proceeding."

*Notice of application for extension.*—"The contentions that the order is erroneous because made without notice, and because the petition or statement filed was not verified, are without merit. The Bankruptcy Act, § 14a, authorizes an application for a discharge within the first 12 months. Such application may be filed as a matter of course. It may also be filed within the next six months 'if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it' within the first 12 months. The act being silent upon the procedure to be followed, it is fair to presume that the judge has a right to entertain the application of the bankrupt for leave to file, not only ex parte, but in such summary or informal manner as may be proper or convenient at the time. The proceeding to permit filing within the enlarged time would seem to be one addressed to the discretion of the judge, and its purpose, after all, is simply to reinstate the bankrupt for a limited

period to an absolute right which he possessed during the 12 months succeeding the adjudication. The further fact that parties in interest, who may desire to oppose a discharge, are protected in their rights whether the petition be filed within the original or enlarged time, and are therefore not prejudiced by the enlargement of the time, tends to negative the requirement of notice, verification, formalities of practice, or procedure, except such as the judge may, at the time

of the application, direct." In re Churchill, (E. D. Wis. 1912) 197 Fed. 111.

**Waiver of objection to extension.**—A creditor, with knowledge that an application for an order extending the time to file an application for a discharge has been made, waives such objection by appearing and obtaining time to file specifications of objection to the discharge, and then filing objections. In re Casey, (N. D. N. Y. 1912) 195 Fed. 323.

## 1912 Supp., p. 549, sec. 14b.

### I. GENERALLY.

**Construction—Sections 14 and 17 should be construed together.**—The only obstacles to a discharge are described in this section, and they do not include the creation of a debt by the bankrupt's fraud or other misconduct while acting in a fiduciary capacity. Section 17, however, protects such a debt from discharge. In re Gara, (E. D. Pa. 1911) 190 Fed. 112, wherein the court said: "It may be that the debt due to the objecting creditor was created by the misconduct of the bankrupt while acting in a fiduciary capacity. Assuming this to be true, section 17 protects the debt from discharge, but the mere existence of such a debt does not prevent the bankrupt from receiving a discharge from his other provable obligations. The only obstacles to a discharge are described in section 14, and I do not find among them the creation of a debt by the bankrupt's fraud or other misconduct while acting in a fiduciary capacity. At the best, the pending specification charges such creation and nothing more, and this is plainly insufficient. The motion to dismiss is granted."

**No discharge from disputed claims.**—The discharge authorized by the bankrupt act is a discharge from debts, not from disputed claims. A bankruptcy court has no jurisdiction to grant a discharge unless there are dischargeable debts to discharge. In re Gulick, (S. D. N. Y. 1911) 190 Fed. 52, wherein the court said: "This is a motion to confirm a referee's report recommending a discharge. The bankruptcy is voluntary. Three claims only are listed in the schedules, each of which is stated in the schedules to be disputed. In fact, three actions were pending on them when the bankruptcy petition was filed, in which the bankrupt had interposed answers denying liability. These answers have not been withdrawn. The referee has reported in favor of a discharge, to which the creditors object on the ground that, as the bankrupt denies that any debts exist, the court has no jurisdiction."

"The point is novel; but, in my opinion, the objection is valid. The discharge authorized by the bankrupt act is a discharge from debts, not from disputed claims. I think that a bankruptcy court has no jurisdiction to grant a discharge, unless there are dischargeable debts to discharge. Thus it has been held that the court has no jurisdiction to grant a discharge when the only claim listed is

not provable (In re Yates [D. C.] 114 Fed. 365; In re Schwaninger [D. C.] 144 Fed. 555), or, though provable, is not dischargeable (In re Maples [D. C.] 105 Fed. 919; In re Yates [D. C.] 114 Fed. 365). Two of the claims filed in this case appear to be dischargeable; but the point is that the bankrupt does not admit that they are debts. He may prefer to get a discharge, instead of litigating the claims on the merits; but, until he admits that they are debts, I do not see what power a bankruptcy court has to discharge such contested claims because they may be established as debts."

"The referee's report is not confirmed, and the discharge is denied."

### II. OBJECTIONS TO BANKRUPT'S DISCHARGE.

**Who may object to granting of discharge—"Party in interest."**—The assignee of a judgment which was listed by the debtor in his schedules of liabilities is a "party in interest" within the meaning of this section. Haley v. Pope, (C. C. A. 9th Cir. 1913) 206 Fed. 266.

**Specification of objections—General requisites.**—It is uniformly held by the courts under this section that the specification of objection to the discharge must clearly and unequivocally allege the requisite facts, as distinguished from legal conclusions, which it is claimed will prevent a discharge, and that the burden is upon the objector to prove such facts; and that averments in the language of the statute are not sufficient.

The specification must also allege, and the proofs must show, that the objector is a party in interest, and, if a creditor, has a debt provable in bankruptcy which will be affected by the discharge. In re Main, (N. D. Ia. 1913) 205 Fed. 421.

The application of the bankrupt for his discharge and the specifications in opposition thereto partake of the nature of a suit or proceeding. When, therefore, the petition is filed and the creditors and parties in interest are given notice to appear, they should not be permitted to attempt to oust the court of its power to entertain the proceeding and to answer the petition upon its merits at one and the same time. The proceeding to vacate the order permitting the filing of the petition is of a special character, analogous perhaps to a proceeding to vacate service of process, and, if there is coupled therewith an answer to the merits of the petition, any

error or irregularity in permitting the filing of the petition within the enlarged time should be deemed waived. In re Churchill, (E. D. Wis. 1912) 197 Fed. 111.

### III. HEARING AND PROOF.

Hearing must be had before judge.—As the act has excluded from the referee the power to hear applications for discharge, the notice to creditors of the hearing and the fixing of the date should be upon the order of the judge, in accordance with Supreme Court form 57. In re Hockman, (E. D. Pa. 1912) 205 Fed. 330.

Specifications of objection must be proved.—To the same effect as the original note, see In re Miller, (E. D. N. Y. 1913) 203 Fed. 170.

### IV. DETERMINATION.

Withholding decision—*Stay to determine rights.*—To the same effect as the original note, see Meinhard v. Pincus, (C. C. A. 5th Cir. 1912) 200 Fed. 736, wherein the court said: "In Roden Grocery Company v. Bacon, reported in 133 Fed. 515, 66 C. C. A. 497, this court held:

"While the creditor holding a waiver note given by a bankrupt has no lien on specified property—in fact, no lien at all—and the debt represented by such note is one within the purview of the bankruptcy law, to be discharged by proper proceedings thereunder, yet the rights of said creditor are to be so far recognized as to require the withholding of the bankrupt's discharge a reasonable time to permit the creditor to assert in the proper state tribunal his alleged right to subject the exempt property to the satisfaction of his claim. Lockwood v. Exchange Bank, 191 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061. This being the case, it would seem that it is to the interest of the general creditors that such right should be prosecuted and enforced pending the bankruptcy, and prior to proof of debt, to prevent the creditor holding the waiver from taking a dividend on his whole claim from the general assets and thereafter availing himself of the right resulting from the waiver to proceed against the exempt property. As the creditor holding a waiver may proceed to assert his right in a state tribunal pending the proceedings in bankruptcy, it follows that the form his action may take in the state tribunal is of no concern in the bankruptcy court, unless such writs are issued and proceedings had as directly interfere with property passing to the trustee in bankruptcy, or with exempt property not claimed by the bankrupt and in actual custody of the bankruptcy court. The ruling of the referee and the order of the district judge complained of in the petition for revision are largely based on the finding that under the evidence in the case the petitioner here, although asserting in the state tribunal that he holds a waiver contract, in fact had no waiver. The undisputed evidence shows that the petitioner held prima facie waiver contracts as claimed.

Whether the bankrupt could avoid or defeat such contracts was for the state courts to decide, and the issue seems to us to be wholly immaterial in the bankruptcy court. If an application should be made to withhold a bankrupt's discharge, to which he would otherwise be entitled, to give time to a creditor claiming to hold a waiver note to assert his rights to proceed against exempt property in the state courts, then it would be proper for the bankruptcy court to inquire whether or not the creditor really held such waiver note; but even then it is doubtful whether the court would go beyond a prima facie case and undertake to settle the rights between the parties."

"The foregoing seems to be very pertinent in the instant case, where a creditor of the bankrupt, holding a written waiver of homestead exemption, has instituted a suit in the state court, which is now pending, to have his rights enforced against the exempt property of the bankrupt; and the only question is whether the court will order the bankrupt's discharge withheld for a reasonable time to enable the creditor to prosecute his rights in the state court, and as preliminary thereto will undertake to decide on the merits of the creditor's claimed waiver. As indicated in the case of Roden Grocery Co. v. Bacon, supra, we were then of opinion that the court's inquiry should go no further than to ascertain whether or not a prima facie waiver existed in the case, and the fact that the bankruptcy court is without jurisdiction to pass upon and adjudicate the question of waiver vel non seems to be good reason for such opinion; and, as the applying creditor has actually commenced a suit in the state court which has jurisdiction in the premises, greater force is given to the proposition that the bankruptcy court should not attempt to prejudge the matter."

Res judicata.—It is uniformly held that a denial of the petition for a discharge in a former proceeding in bankruptcy is, when properly pleaded, a bar to granting a discharge in a second proceeding. This conclusion is based upon the familiar principle, applied to proceedings in bankruptcy, that the right to a discharge, as between the parties to the former proceeding, is res judicata. The same principle has been applied to cases in which the bankrupt fails to apply for a discharge within the time prescribed by the act—twelve months after adjudication, or by the permission of the court, upon good cause shown, "within, but not after, the expiration of the next six months." In re Springer, (E. D. N. C. 1912) 199 Fed. 294.

Costs.—Costs will not be awarded against an objecting creditor who fails to substantiate his specifications of objection in opposition to a bankrupt's discharge where the opposition to the discharge was not frivolous or vexatious but was made in good faith. In re Miers, (D. C. S. D. 1912) 193 Fed. 288, wherein the court said: "The further question arises here, Should the costs and disbursements above set forth be awarded the

bankrupt here? So far as I am able to ascertain from this record, there is no pretense that this creditor who objected to this bankrupt's discharge was not acting in good faith at the time his specifications of objection were filed, nor does it appear that said objections were either frivolous or vexatious. There is no finding in the record that the creditor's objections were intended merely to vex or delay the bankrupt. It is true he failed to prove the truth of his objections, but, in so far as I can see, there are none of the elements which go to make up a frivolous or vexatious attack upon this bankrupt by this creditor. I agree with the referee in *Re Wolpert*, supra, wherein he states that 'It would be unfair to hold that costs should be awarded against the creditor from whom they can be collected, when, had the decision been the other way, the creditor would have been unable to collect costs from the bankrupt.'

"The bankrupt in this case received his discharge. The creditor had a perfect right to in good faith oppose such discharge so long as his opposition was not frivolous or vexatious, and this court will not impose upon the creditor the taxation of these costs so long as he acts in good faith. I hold that the discretion is always in the court, and that it should be exercised under the rules above stated. The foregoing is, I think, in

conformity with the practice that has heretofore obtained in this district."

**Laches.**—Delay in bringing on the hearing is not a ground for refusing a discharge. Thus, where a bankrupt had filed his petition for discharge within the time limited by the Bankruptcy Act and thereafter was in contempt it was held that his failure to bring on his petition for hearing within eight days after the contempt was discharged was not ground for refusing a discharge in bankruptcy. In *re Glasberg*, (C. C. A. 2d Cir. 1912) 197 Fed. 896. "Delay in bringing on the hearing is not a ground for refusing a discharge found in the act. It specifically enumerates what the grounds are and this is not one of them. Assuming that the District Court may make rules requiring a speedy hearing, we are unable to find that it has done so. At least, there is no rule which applies to the present case. Rule 20 (Bankruptcy Forms, Hagar & Alexander, 612) relates to the first meeting of creditors, the examination of the bankrupt, and the completion thereof before the application for discharge is filed. There is no pretense that this rule was not fully complied with. Rule 21 provides for the hearing of specifications filed in opposition to the discharge. As no specifications were filed, this rule is inapplicable."

## 1912 Supp., p. 557, sec. 14b (1).

**Making false oath.**—To the same effect as the original note, see *In re Hennebray*, (N. D. Ia. 1913) 207 Fed. 882.

The intention must be to make a false oath, otherwise no offense is committed. In *re Doyle*, (W. D. N. Y. 1912) 199 Fed. 247, wherein the court said: "The special master found as established specification 2 which relates to a false oath made by the bankrupt, in that he testified that he did not in the year 1908 transfer any property to his wife. I think, however, that in view of the bankrupt's explanation before the completion of his examination that he had testified inadvertently and mistakenly regarding such transfers of securities, and that it was not his intention to falsely testify, negatives any intention on his part to make a false oath in this proceeding."

An objection to the discharge of a bankrupt on the ground that he made a false oath must show wherein the bankrupt made a false oath, and that crucial fact cannot be disposed of speculatively by the assertion that he swore falsely on one occasion or another, and therefore is not sustained by a

finding of a special master that it was clear, in his opinion, that in (1) verifying the answer and in (2) giving his testimony the bankrupt made a false oath "either in one or the other." In *re Mayer*, (S. D. N. Y. 1912) 195 Fed. 571.

A prior adjudication that the bankrupt had made a false oath, on the certificate of the referee, and his summary punishment for contempt, are to be considered as showing *prima facie* that this specification was established. In *re Shear*, (W. D. N. Y. 1913) 201 Fed. 460.

**Offense must be knowingly and fraudulently committed.**—To the same effect as the original note, see *In re Mayer*, (S. D. N. Y. 1912) 195 Fed. 571.

**Conviction of offense.**—To deprive a bankrupt of a discharge, it is not necessary that he shall have been convicted of one of the offenses enumerated. It is enough if it be shown by clear and convincing evidence that he has been guilty of such an offense. In *re Shear*, (W. D. N. Y. 1913) 201 Fed. 460.

## 1912 Supp., p. 558, sec. 14b (2).

**Concealment of financial condition.**—To the same effect as the original note, see *Baylor v. Rawlings*, (C. C. A. 8th Cir. 1912) 200 Fed. 131; In *re A. O. Brown & Co.*, (C. C. A. 2d Cir. 1913) 204 Fed. 63; In *re*

*Weston*, (C. C. A. 2d Cir. 1913) 206 Fed. 281.

**Where books are unnecessary.**—A mere failure to keep books or records or the mere destruction of those kept is not sufficient

to justify the court in refusing a discharge. There must be circumstances and conditions from which the inference ought to be drawn and necessarily should be drawn that such failure or destruction was "with intent to conceal his financial condition." *In re Hodge*, (N. D. N. Y. 1913) 205 Fed. 824.

In *In re Brown*, (N. D. N. Y. 1912) 199 Fed. 356, the court said: "A mere failure to keep books is not enough to justify the refusal of a discharge. A person is presumed to intend the natural and known consequences of his voluntary acts, but it cannot be said that the natural and known consequences of a failure to keep books of account are to conceal the financial condition of the one omitting to keep books. The Bankruptcy Act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517), as does the English law, made the mere failure to keep books a ground for refusing a discharge, but the Bankruptcy Act of 1895 explicitly states that the omission must have been accompanied by the specific intent to conceal the true financial condition, and hence the burden of proving this intent is on the objecting creditors. So, when from certain acts or omissions two inferences may be drawn, the one pointing to a guilty or bad intent and the other perfectly consistent with honesty and absence of a bad purpose, it is the duty of the court to find in favor of honesty of purpose and intent."

*Compare McKibben v. Haskell*, (C. C. A. 8th Cir. 1912) 198 Fed. 639, wherein it was held that every one is presumed, in the absence of countervailing proof, to intend the natural and inevitable consequences of his acts, and that where a merchant, who had conducted his business in a small town for many years, and had kept books of account of some kind, moved with a stock of merchandise, worth about \$2,000, and a debt of about the same amount, to a city, kept no books of account after his removal, but within four months bought more than \$8,000 worth of new merchandise, sold more than \$1,300 worth thereof in bulk at 25 per cent. less than cost, and more than \$462 worth thereof in bulk at 10 per cent. less than cost, and paid with the proceeds thereof relatives and friends, from whom he had borrowed more than \$1,700, and went into bankruptcy with a stock scheduled at \$2,415.13 and debts to the amount of more than \$8,000, the legal presumption that the bankrupt intended, by failing to keep books, the natural effect thereof, the concealment of his financial condition, was so strongly supported by these facts as to overcome the persuasive presumption of the contrary finding of the chancellor below, and his discharge must be denied.

*Failure to make inventory.*—In the case of *In re Marcus*, (C. C. A. 2d Cir. 1913) 203 Fed. 29, it appeared that when the bankrupt firm was organized one of the partners contributed a stock of goods which he brought over from his former business. The items of this stock, valued at cost, were all set down

in the books, but these entries were made in pencil, because there was some dispute between the partners as to what discount there should be made from the cost price. From the beginning a merchandise account was kept, and the evidence indicated that from the original pencil entries and the merchandise account it was possible at any time to prepare an inventory which would show with substantial accuracy what goods the firm had on hand. The court said: "We do not understand that the bankrupt act requires a new inventory to be taken every time there is some fluctuation in the actual selling value of the stock on hand, so that the revised estimates of value may be from time to time recorded on the face of the books. It seems to us that the books of this firm were so kept as to show what goods they had on hand, stated at their cost value, and that a person familiar with the particular trade could estimate with reasonable accuracy what discount there should be made from cost, in order to ascertain the financial condition."

The word "records" may include canceled and paid checks and the stubs thereof. In *re Hodge*, (N. D. N. Y. 1913) 205 Fed. 824, wherein the court said: "If a 'stub book' is not a book of account in the strict sense, it is at least a 'record' which shows checks drawn, their date, amount, and to whom payable. It is a record from which the financial condition of one who keeps the bank account may, to some extent at least, be ascertained. Their intentional destruction, in the absence of regular books showing details, is the destruction of books and records from which the financial condition of the bankrupt might be ascertained. When no other books of account or records of financial transactions are kept, such a stub book with the paid checks become 'a record' and, so far as they go, the equivalent of a book of account. The checks show to whom the money was paid, when drawn, etc., and with proper indorsements become vouchers for the payment of money. Their destruction with intent to conceal financial condition will defeat discharge."

*Intention to conceal.*—To the same effect as the original note see *In re Tanner*, (E. D. Wash. 1911) 192 Fed. 572; *In re Marcus*, (S. D. N. Y. 1911) 192 Fed. 743; *In re Sabsevitiz*, (S. D. N. Y. 1912) 197 Fed. 109.

*Inaccurate books.*—The act does not refuse discharge because the books have been so kept as to make it difficult, if not impossible, to get an exact financial condition without further examination. The failure to keep sufficient books of account must have been with intent on the part of the bankrupt to conceal his financial condition. Such books may be inaccurate on account of misunderstanding, inadvertence, mistakes, and other reasons consistent with a desire that they should truthfully show the real conditions. *In re Marcus*, (C. C. A. 2d Cir. 1913) 203 Fed. 29.

*Intent must be shown.*—To the same effect as the original note, see *In re Sabsevit*, (S. D. N. Y. 1912) 197 Fed. 109.

In the case of *In re Weston*, (C. C. A. 2d Cir. 1913) 206 Fed. 281, it appeared that the bankrupt was a commission broker and had been in business since 1899. He had the usual blackboard telegraph operator and marker, but no other clerks. His customers gave verbal orders, which he transmitted by telegraph to a firm in Cincinnati to be executed, making a memorandum on a piece of paper which he put on a spindle, and afterwards made up from the memorandums a list of the day's transactions on a sheet of paper. These sheets he kept "until all trades were closed out," and they were thrown into the waste paper basket about once a month. He had a bank account and bank book, but kept most of his money in his safe, disbursing it as cash. His customers deposited a small margin on their orders, and actual deliveries were not contemplated. His profits were in the shape of a commission of one-fourth of 1 per cent., paid him by the firm to which he transmitted his customers' orders. Transactions with this firm were settled every day; the daily sheet showing whether he owed it or it owed him, and how much. It was held that the special master was justified in finding that the facts showed an intent to conceal the bankrupt's financial condition.

In the case of *In re Hirshowitz*, (M. D. Pa. 1912) 194 Fed. 562, it appeared that the bankrupt within a month or two prior to the adjudication, established at least two branch stores or stations in neighboring towns, where he moved large quantities of goods and merchandise, and instructed his agents to sell the same at any price, even below cost, if necessary. He never kept any account of this merchandise or the proceeds thereof. That he might be able to check the sales, his agents were required to return to him slips indicating the amount of the sales and the goods sold. These slips, although they practically contained a correct record of the goods and the amount of sales, were destroyed by the bankrupt before his adjudication, so that the only available account of these transactions was thus wholly extirpated, and the bankrupt was unable to account for the proceeds received from these sales as well as for the proceeds of the store. The court said: "Even if these slips were destroyed with an honesty of purpose, the bankrupt could not have selected a more opportune moment for self-preservation, nor a more unfortunate moment for the interest of his creditors, because they were deprived of the last vestige of written evidence that might lead to the recovery of assets that rightfully belonged to them. It even precluded a proper examination of the bankrupt. It is conceded that the bankrupt is a good business man, and to within a short period prior to the filing of the petition was successful, yet he kept no books that would tend to explain the disposition of merchandise aggregating many thousands of dollars,

which he disposed of in some manner, within the last two or three months prior to his adjudication. The greater portion of this merchandise was purchased on credit within four or five months immediately preceding his adjudication and not paid for, and the bankrupt could not have been ignorant of the fact that he was hopelessly insolvent at the time he made these purchases. I cannot determine that the slips were destroyed without any ulterior or improper motive."

*The specification of objections.*—The purpose of a specification is to fairly apprise the bankrupt of such matters in bar of his discharge as will be insisted upon, in order that he may be able to meet them. Such matters are not to be specified with the exactness and formality required in indictments, but only in such substantial form as will fairly inform one of the charges made against him. But where, as in the case of books of account, the bankrupt in the very nature of things, and he alone, already knows what books he did or did not keep, and the creditor does not know, except as he infers their nonexistence, concealment, or destruction from the fact of their nondelivery to the trustee, it would seem that a specification following the language of the statute and covering nonkeeping, concealment, or destruction sufficiently and fairly apprises the bankrupt of the matter insisted upon in that respect. *In re Magen Bros. Co.*, (C. C. A. 3d Cir. 1912) 192 Fed. 883.

In *In re Mintzer*, (E. D. N. Y. 1912) 197 Fed. 647, where objections to a discharge on the ground of failure to keep books was alleged in the language of the statute the court said: "The trustee would have been compelled to amend them or make them more specific if an objection had been taken before the case was called for trial. But after the witnesses had been called, and when it was apparent that the bankrupt would not be affected by surprise or prejudice by proceeding upon the specifications as they stood, the commissioner was correct in his ruling that he would deny the motion until he heard the testimony, and then see if the testimony supplied the deficiency. But, on the other hand, the commissioner was wrong in ultimately refusing to let the specifications be made to conform to the proof, if he intended to rely upon the proofs as supplying the deficiencies of the specifications. This error, however, makes no difference, for no one was affected thereby. The complete record comes up to the court, and an error of law, having no influence upon the proceeding, makes no action necessary, except that this court should correct the ruling, as a basis for its own action."

A specification of objection, which charged that the bankrupt, while conducting a brokerage business in the city of Buffalo in the years 1908, 1907 and 1908, "failed and neglected to keep any books, with full and complete knowledge of the importance and necessity of books and records in the brokerage business, and with intent to defraud and deceive the undersigned and others," was held,

although very inapt, to fairly indicate the statutory ground upon which it rested, so that the special master had power to allow

an amendment making it conform to the words of the statute. In re Weston, (C. C. A. 2d Cir. 1913) 206 Fed. 281.

## 1912 Supp., p. 560, sec. 14b (3).

**False statement in writing.**—To the same effect as the original note, see In re Ellerbe, (N. D. Ga. 1912) 198 Fed. 952; In re Braverman, (S. D. N. Y. 1912) 199 Fed. 863; In re McLellan, (N. D. N. Y. 1913) 204 Fed. 482.

**Credit must have been extended on faith of false statement.**—To the same effect as the original note, see In re Mintzer, (E. D. N. Y. 1912) 197 Fed. 647.

A discharge will not be refused under this section where it is apparent that the objecting creditor did not rely on the statement complained of. In re Sabsevitz, (S. D. N. Y. 1912) 197 Fed. 109.

In the case of In re Arenson, (D. C. N. J. 1912) 195 Fed. 609, the facts were as follows: The bankrupt had been in the retail shoe business for about 11 years, and had been a customer of the objecting creditor for about two years. On Sept. 30, 1910, the bankrupt was at the creditor's place of business soliciting more goods, and was told by Mr. Harting, the credit man of such creditor, that his account was large enough, and that a statement of his financial condition was desired. Thereupon the bankrupt was turned over to the company's collector and assistant credit man, who, after talking with the bankrupt, filled in the blanks of a printed form used by such creditor in obtaining financial statements. This blank, after being filled in, was handed to the bankrupt, who thereupon signed it. He was then taken back to Mr. Harting, who looked the statement over, and, after some talk with the bankrupt, approved the order for the goods, given that day. Further credit was given the bankrupt on divers other days subsequent thereto. In this financial statement, in the blank opposite the phrase "loans from friends or relatives," was written the word "none." The bankrupt could read and write the English language, and he knew at that time that he owed to relatives and friends, for loans, sums of money aggregating above \$3,500. On behalf of the bankrupt it was contended that no new credit was obtained by him after making such statement; that is, that though subsequent purchases were made, yet, by reason of payments made by him on earlier purchases, the amount owed by him to such creditor at the time he went into bankruptcy was less than that owing at the time the statement was requested. The court said: "The practice of bankrupt had been to make payments due on an old account when additional purchases were made. This course was pursued both before and after making such statement. Under section 14b (3) of the Bankruptcy Act, it is immaterial whether the credit obtained is large or small, or whether it is given to a new customer or one

who had already dealt with the creditor. It includes further credit as well as new or larger credit. It is further contended that such credit was not due to the making of such statement. But the evidence does not warrant any such conclusion. It is further contended that this statement was obtained from the bankrupt on representation that it was a mere matter of form; that upon being asked by O'Connor what properties he had, bankrupt replied that he had not any idea and could not give any figures. He said he was told that they did not amount to anything, that it was only a matter of form, and that he was told to make a guess and give any figures at all; that when he gave the statement he did not know exactly how much he had; that it was only guesswork; that he had not taken account of stock for some years previous. This, however, if true, cannot absolve the bankrupt from making a statement which he knew was absolutely untrue. If the alleged falsity related to the amount of merchandise or cash on hand, or the amount due for merchandise, and in the answer the amounts given were not accurate, such a course of obtaining a financial statement might be effectively pleaded against such an accusation. But here we have not an approximation of the amount due by him to his relatives or friends on loans, but a positive assertion that no such indebtedness existed. Furthermore, this transaction of obtaining and giving a financial statement did not end with this more or less loose talk that passed between the bankrupt and O'Connor. The bankrupt was taken to the credit man, Mr. Harting, who had declined to give him further credit without a financial statement, and who says that, after looking it over, he talked with him about its contents. The bankrupt does not contend that he told Mr. Harting he had not any idea of the value of his assets or the extent of his liabilities. He admits that Harting told him that his account was large enough; that he would have to give a statement; that he saw Harting immediately after he had signed the statement; but denies that there was any talk between them about it. He knew of the practice of exacting financial statements from merchants, for he admits having given one to a shoe mercantile agency about 16 months previous, in which he also omitted any mention of such loans. In the present instance he had been turned over to O'Connor by Mr. Harting for the very purpose of securing a statement. He knew that it was being asked for because of an unwillingness to give further credit. He was able to read and write. He signed it after he had seen O'Connor filling in the blanks while he was answering his questions. In such circum-



stances it does not lie in the mouth of bankrupt to say that the whole thing was looked upon as a mere matter of form, and that he should not be held accountable for his statement that he owed nothing to friends and relatives for loans, when he knew the fact to be otherwise."

*A false statement made by the bankrupt's agent* has the same effect as if made by the bankrupt himself, provided it was made while the agent was acting within the scope of his employment. In re Reed, (W. D. Okla. 1911) 191 Fed. 920.

An indemnity bond is not "property" within the meaning of the section. In re Tanner, (E. D. Wash. 1911) 192 Fed. 572, wherein the court said: "The term 'property' in its most comprehensive sense includes everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal, choses in action as well as in possession; in fact, everything which has an exchangeable value, or which goes to make up one's wealth or estate. The term, however, is not always used in this comprehensive sense in constitutional and statutory provisions, and it is manifest that it was not so used here. By the insertion of the words 'money or' before the word 'property' in the amendment of 1910, Congress manifestly doubted whether the term 'property' as used in the amendment of 1903 was comprehensive enough to include money; and, if it did not include money, most assuredly it did not include a contract or obligation such as this.

"In *Firestone v. Harvey*, (C. C. A. 6th Cir. 1909) 174 Fed. 574, Mr. Justice Lurton said: 'This ground for denying a discharge was evidently leveled particularly at the practice of making false statements of one's financial condition by a buyer or borrower for the purpose of obtaining from the person to whom such false statement is made, in writing, the articles or money desired on credit.'

"There must, therefore, be the obtaining of property by purchase or otherwise by means of the false statement, and the relation of debtor and creditor must exist between the parties obtaining the property and the person from whom it is obtained, after the property is so obtained. In my opinion, therefore, the indemnity bond in question is not property within the meaning of the statute, and, if it is, it was not obtained 'on credit' because the relation of debtor and creditor did not exist after the bond was obtained any more than before."

*Time of obtaining property on false statements.*—In the case of *In re Simon*, (W. D. N. Y. 1913) 201 Fed. 1004, the court said: "The contention by the bankrupt that to bar his discharge the merchandise obtained by means of the false statements must have been delivered within four months of bankruptcy is untenable. The Bankruptcy Act, as amended in 1910, does not prescribe any limitation of time within which the credit must have been given or the merchandise delivered, and the authorities cited by counsel

for the bankrupt do not uphold him in his contention."

*Written financial statement made by business firm to commercial agency.*—To the same effect as the original note, see *In re Schwartz & Co.*, (S. D. N. Y. 1912) 201 Fed. 186; *In re Simon*, (W. D. N. Y. 1913) 201 Fed. 1004.

In *Novick v. E. P. Reed & Co.*, (C. C. A. 3d Cir. 1911) 192 Fed. 20, which was an appeal from the District Court to the Circuit Court of Appeals, it appeared that the District Court refused to discharge the bankrupt on the ground that he had, in May, 1908, violated clause 3, subd. "b," of section 14 of the bankruptcy act. At that time the clause provided that the district judge should hear the bankrupt's application for a discharge and discharge him, unless he had "obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit." It appeared that, on or about May 21, 1908, the Shoe & Leather Mercantile Agency applied to the bankrupt for a written statement of his financial condition, saying: "This information is asked for and received in strict confidence for commercial use only." The statement was made out, was dated May 28, 1908, was received by the Mercantile Agency on June 1, 1908, and purported to show the bankrupt's condition on May 1, 1908. The appellees, creditors of the bankrupt, contended in the District Court that it was materially false, and that it was made to the Mercantile Agency, as the agent of the appellees, for the purpose of obtaining on credit the property which the appellees sold to the bankrupt. The master, to whom the cause was referred in the District Court, so found, and the District Court affirmed the finding. The court said: "There is proof that some, but not all, of the objecting creditors were subscribers of the Shoe & Leather Mercantile Agency, and that some, but not all, of those subscribers received from the Mercantile Agency copies of the bankrupt's statement. Which of the objecting creditors were such subscribers, and which of them received copies of the statement, we do not know, except that E. P. Reed & Co. was one of them. Nor do the proofs show that any of the creditors, except possibly E. P. Reed & Co., relied upon the statement when the bankrupt's present debts to them were contracted. The question, therefore, is, assuming the statement to have been materially false, whether E. P. Reed & Co. have any standing to object to the bankrupt's discharge.

"The section of the law under consideration was materially modified by an amendment in 1910 (Act June 25, 1910, c. 412, 36 Stat. 839). It now provides that a bankrupt shall not be discharged if he has 'obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person.' Collier, in commenting on the section as it

stood before 1910, says that the crucial words were 'such property.' No such provision is to be found in any other bankruptcy law. The history of the section shows that it is not to be too liberally construed, for the clause 'or of being communicated to the trade' was stricken from it in Congress. 'It would seem from this,' said the Circuit Court of Appeals of the Second Circuit in the Russell case, 176 Fed. 253, 258, 100 C. C. A. 77, 82, 'that the ordinary statement of financial condition made to a mercantile agency for general circulation among its inquiring subscribers would not be within the statute.' In that case it appears that Russell, in May, 1905, had made a statement of his financial condition to a reporter of Bradstreet's Commercial Agency; that on January 12, 1907, the Commercial Trust Company, to whom Russell had applied for a loan, sought information from the Bradstreet Company as to Russell's financial condition; that the Bradstreet Company delivered to the Trust Company a copy of Russell's statement of May, 1905; and that on January 26, 1907, the Trust Company made to Russell the loan which he desired. Concerning this transaction the Circuit Court of Appeals said:

"If the statement of January 26th, which Russell gave to the reporter sent to him by the Bradstreet Company, is to be considered as merely the usual commercial agency report filed with such agency to secure a rating, then, not having been made to the Trust Company for the purpose of obtaining the property or [on] credit, it is not within the language of the act."

"We agree with this construction of the law as it stood before 1910. In the case now in hand the bankrupt's statement to the Shoe & Leather Agency was made in May, 1908. The indebtedness to E. P. Reed & Co. is for merchandise sold to the bankrupt on July 6, 1909, and September 24, 1909. There is nothing to indicate that the statement of May, 1908, was made to the Mercantile Agency as the agent either of the bankrupt or of E. P. Reed & Co. The time intervening between the date of the bankrupt's statement and the dates of sales by E. P. Reed & Co. to the bankrupt forbids such inference. Its purpose seems rather to have been the general one of obtaining a rating by the Mercantile Agency to which it was sent. It was communicated to the Agency 'in strict confidence for commercial use only.' If the 'commercial use' was intended to be more than the use of the statement by the Agency in fixing a rating for the bankrupt, it is difficult to understand how it could have been regarded as a statement sent 'in strict

confidence.' On the proofs before us it is impossible to find that the case comes within the language of section 14b (3) as it stood in 1908."

**Statement as continuing representation.**—Where a false statement as to assets and liabilities is made in writing, and it is stated that the statement is binding for "each purchase now or hereafter made, unless charged by written authority from the undersigned," and it appears that the transactions between the parties are in the nature of a running account, the false statement will bar a discharge of the bankrupt although the particular property obtained at the time the statement was made was paid for before the adjudication in bankruptcy. *Ragan, Malone & Co. v. Cotton*, (C. C. A. 5th Cir. 1912) 200 Fed. 546.

But in *In re O'Callaghan*, (D. C. Mass. 1912) 199 Fed. 662, the court said: "I must hesitate to hold that section 14b (3) applies, without limit of time, to any obtaining of credit, however long before the bankruptcy, and irrespective of intervening transactions with the creditor."

**False statement made by partners.**—To the same effect as the original note, see *Ragan, Malone & Co. v. Cotton*, (C. C. A. 5th Cir. 1912) 200 Fed. 546.

**False statement to surety.**—The applicability of this section to money obtained from a third party through false statements made to a surety was considered but not decided in *In re Dunfee*, (N. D. N. Y. 1913) 206 Fed. 745.

**Intent—Guilty knowledge essential.**—To the same effect as the original note, see *In re Mintzer*, (E. D. N. Y. 1912) 197 Fed. 647.

**The word "false."**—To the same effect as the original note, see *In re Arenson*, (D. C. N. J. 1912) 195 Fed. 609.

**Who may object.**—The making by a bankrupt of a materially false statement in writing to any person for the purpose of obtaining property on credit, and upon which statement property is so obtained, prevents the granting of a discharge; and the objections may be interposed by any party in interest. *In re Miller*, (N. D. Ia. 1912) 192 Fed. 730.

**Evidence—Burden of proof.**—While the burden of proof is upon the objecting creditor to establish the cause which he claims bars a discharge, yet, when such creditor shows that a material statement was known to be untrue when it was made, the burden of proof shifts to the bankrupt to show that it was not made with intent to deceive. *In re Arenson*, (D. C. N. J. 1912) 195 Fed. 609.

## 1912 Supp., p. 562, sec. 14b (4).

**Concealment, etc., of assets.**—To the same effect as the original note, see *Pirvitz v. Pithan*, (C. C. A. 8th Cir. 1912) 194 Fed. 403; *In re Hirshowitz*, (M. D. Pa. 1912) 194 Fed. 502; *In re Bouck*, (S. D. N. Y. 1912) 199 Fed. 453; *In re Diamond*, (E. D. Wis.

1913) 204 Fed. 137; *In re Schickerling*, (C. C. A. 2d Cir. 1913) 204 Fed. 592; *In re Felts*, (N. D. Ia. 1909) 205 Fed. 983; *In re Cohen*, (C. C. A. 2d Cir. 1913) 206 Fed. 457; *In re Silverman*, (N. D. N. Y. 1913) 206 Fed. 960.

**Necessity of transfer being within four months' period.**—To the same effect as the original note, see *In re Wakefield*, (N. D. N. Y. 1913) 207 Fed. 180; *In re Hennebry*, (N. D. Ia. 1913) 207 Fed. 882.

**What constitutes concealment, removal, or destruction of property—Transfer to bankrupt's wife.**—To the same effect as the original note, see *In re Graves*, (M. D. Pa. 1911) 189 Fed. 847; *In re Hirshowitz*, (M. D. Pa. 1912) 194 Fed. 562.

Where it appeared that within four months prior to bankruptcy the bankrupt paid \$4,500 to his wife who thereafter gave \$1,250 of the sum to the bankrupt to go to Europe and see friends there, with a view to obtaining further capital to put into his business, and the special master found that the payment to the wife was borrowed money due him, it was held that although the payment might have been preferential, it did not constitute a transfer or concealment with intent to hinder, delay, or defraud creditors so as to prevent the bankrupt's discharge. *In re Marcus*, (C. C. A. 2d Cir. 1913) 203 Fed. 29, wherein the court said: "What she might do with the money after she received it in payment of the debt to her was of course her own affair."

Where it appeared that the bankrupt, shortly before bankruptcy, and in anticipation of the levy of a execution on a judgment, obtained from his brokers \$2,000 in the form of cash which was kept in the brokers' strong box for a few days, later deposited in the name of the brokers' cashier, and still later returned into an account in the name of the bankrupt's wife and was not scheduled as part of the bankrupt's assets, it was held that there was such concealment of assets as would warrant refusing a discharge. *In re De Mauriac*, (E. D. N. Y. 1913) 206 Fed. 358.

**A payment of lawful debts is not a concealment of assets.** *In re Mintzer*, (E. D. N. Y. 1912) 197 Fed. 647, wherein the facts showed that after the bankrupt's credit was stopped by the association controlling those dealers from whom he was purchasing goods, and apparently after he must have known that without credit he could do nothing except wind up his business or proceed on a cash basis, he continued to pay debts. The court said: "Many of these payments may have been preferential, but the creation of a preference without intent to defraud other creditors is not a ground for denying dis-

charge, and a payment of lawful debts is not a concealment of assets."

**Transfer to corporation owned by bankrupt.**—*In re Perger*, (E. D. N. Y. 1912) 200 Fed. 325, a bankrupt was refused a discharge because he concealed property by transferring it to a corporation which did not exist except as merely a form of business activity by the bankrupt himself.

**Intent.**—To the same effect as the original note, see *In re McLellan*, (N. D. N. Y. 1913) 204 Fed. 482.

A preference alone, even if it be a voidable one, is not a bar to a discharge. It does not constitute a conveyance of property with intent to delay or defraud creditors. *In re Friedrich*, (D. C. Minn. 1912) 199 Fed. 193.

The right to a discharge is forfeited, if the bankrupt knowingly conceals his property, and the wrongful act, when once committed during the proceedings, may not be avoided, so as to restore the dishonest bankrupt to his former status, and enable him to reap the benefits, notwithstanding the attempt. *In re Sussman*, (M. D. Pa. 1911) 190 Fed. 111.

**Specification of objections.**—To the same effect as the original note, see *In re Mintzer*, (E. D. N. Y. 1912) 197 Fed. 647.

**Evidence—Burden of proof on opposing creditors.**—To the same effect as the original note, see *In re Cohen*, (C. C. A. 2d Cir. 1913) 206 Fed. 457.

An established discrepancy of large amount, together with proven concealment of some of his assets by the bankrupt from his trustee, are sufficient to make a prima facie case for the trustee, calling for the bankrupt's explanation of what became of the property which he is shown to have had, prior to bankruptcy, and which he failed to surrender to the trustee. *In re Denson*, (N. D. Ala. 1912) 195 Fed. 857.

**Preponderance of evidence sufficient.**—To bar a bankrupt's discharge, it is enough, that the evidence by a fair preponderance establishes a fraudulent concealment, and proof thereof beyond a reasonable doubt is unnecessary. *In re Doyle*, (W. D. N. Y. 1912) 199 Fed. 247.

**Evidence—res judicata.**—In the case of *In re Krall*, (D. C. Conn. 1912) 196 Fed. 402, the court said: "The question at issue as to concealment of assets was res adjudicata, and the record evidence made out a prima facie case."

## 1912 Supp., p. 567, sec. 14b (5).

**Discharge within six years.**—To the same effect as the original note, see *In re Lachenmaier*, (C. C. A. 7th Cir. 1913) 203 Fed. 32.

The six years is measured backward from the time the application for the discharge is filed and not from the time the court acts on the application. *In re Dunphy*, (D. C. Me. 1913) 206 Fed. 680, wherein the court said: "Does section 14b have reference to the judge at the moment when he enters a

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decree granting or refusing a discharge? And does it direct him to grant the discharge unless within six years before that time the bankrupt has been discharged in former voluntary proceedings? In the *Little Case*, 137 Fed. 521, 70 C. C. A. 105, the Court of Appeals for the Seventh Circuit held that the limitation of six years referred to the time between the first and second discharge, and not between the first discharge

and the filing of the second petition in bankruptcy. In the *Jordan Case*, (D. C.) 142 Fed. 292, the District Court for the Eastern District of Pennsylvania granted a discharge where the bankrupt had been discharged in voluntary proceedings on June 20, 1899, and where he applied for another discharge on September 21, 1905, namely, more than six years after his former discharge. The court overruled the objections to the discharge, and thus decided that in order that the former discharge in voluntary proceedings should be 'within six years,' so as to defeat the right of a second discharge in subsequent proceedings under the statute, it must have been granted within six years prior to the application for a second discharge. The court, however, clearly expressed its opinion as follows:

"The section evidently has reference to the judge at the moment when he is about to enter a decree granting or refusing a discharge, and directs him to grant it, unless within six years the bankrupt has been discharged in voluntary proceedings."

"In the *Haase Case*, (D. C.) 155 Fed. 553, in the Southern District of New York, the bankrupt was granted a discharge within six years before the filing of the petition in bankruptcy in the case. Judge Hough quoted the provision of the statute, and said: 'I cannot perceive how this language bears any construction other than that the six years is measured backward from the time of hearing.'"

"Judge Hough cited the *Little Case* and the *Jordan Case*. His decision was affirmed by the Court of Appeals. 164 Fed. 1022. This section was considered in this circuit by Judge Lowell, in the *Carleton Case* (D. C.) 131 Fed. 146, and by the Court of Appeals in the *Seaholm Case*, 136 Fed. 144, 69 C. C. A. 142; but this question did not arise in either of those cases. Loveland, in his fourth edition, section 732, says:

"The six years limit runs from the date of the discharge in voluntary proceedings to the date of judicial action upon the application for the next discharge, either in voluntary or involuntary proceedings."

"Most of the other text-writers upon bankruptcy who have considered the subject take the same view. Remington, however (volume 3, p. 757), in speaking of the six years provision, says:

"Yet it would seem, on principle, that the rule should be that it measures the time between the granting of the first discharge and the filing of the application for the second discharge; otherwise a bankrupt, by

merely delaying the final hearing upon his second application, might overcome that which was a valid bar at the time creditors were required to file specifications of their grounds for barring the discharge. Moreover, the finding of courts ordinarily should revert to the conditions as existing at the time of the instituting of the particular application in controversy.' I think the language of Remington presents a sound view of the subject, although it is not based upon any judicial decision; nor can I find that any court has distinctly held to this view. It must be said, however, that the cases which I have cited which seem to take the opposite view present merely dicta. They contain merely cogent and forcible language of the court, and not direct judicial decision. The statute (section 14b) provides: 'The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto . . . and discharge the applicant unless he has (5) in voluntary proceedings been granted a discharge in bankruptcy within six years.' The statute thus points vividly to the hearing as the vital time to be considered. It seems to me, however, that this reference to the time of hearing must be held to mean the time when the petition for discharge is filed; otherwise the bankrupt might file his application for his second discharge long before the expiration of the six years, and by procuring delays upon the final hearing of his second application he might then render the six years rule invalid. I think Remington is right in saying that the findings of courts should revert to the conditions as existing at the time of the instituting of the particular application. The day when the court happens to take up the case for decision ought not to be conclusive on the bankrupt's rights. A bankrupt ought not to be able to apply for his discharge within the six years, and then by delay avoid a law intended for the protection of creditors. The pleadings fix the status of a controversy. The bankrupt states his case in his petition for discharge. He ought not to be allowed to state a groundless case, and then wait for time to give him a good case. I cannot hold that the moment of the finding of the court is conclusive, and that all a judge has to do, when he hears the petition for discharge, is to see if a discharge has not been rendered within six years before that moment. I think the application for discharge must be held to be the conclusive time as affecting the vital question."

## 1912 Supp., p. 568, sec. 14b (6). [*When trustee may interpose objections.*]

The object of the amendment is to confer upon those most vitally interested—that is, the creditors—power to authorize the trustee to interpose objections. Unless the trustee is so authorized, he is not permitted to intervene by objection. His authority to

interpose objections is derived, not from the judge or from the referee, but from the creditors. In re *Hockman*, (E. D. Pa. 1912) 205 Fed. 330.

**Meeting by whom called.**—The section is satisfied if the authority be given at a meet-

ing called by the referee, and the district judge is not required himself to issue the call and hold the meeting, or specially to authorize such call and meeting. In *re Reiff*, (E. D. Pa. 1913) 205 Fed. 399, *following* In *re Hockman*, (E. D. Pa. 1912) 205 Fed. 330.

**Scope of trustee's authority.**—"The effect of the act is to grant to the trustee the right to oppose a discharge, provided only the creditors, at a meeting called for that purpose, shall first authorize him to do so. The act gives to creditors the privilege of determining whether such right be granted to the trustee; but, having determined to authorize him, his right to exercise, and the extent of, such authority is based upon the statute. The action of the creditors is merely a prerequisite. In other words the action of the creditors, when taken, serves to put him in the same position and to exercise the rights which 'parties in interest' may exercise as a matter of course and without precedent authorization from any one. From this it must follow that when the creditors take such step, the trustee can exercise his authority by presenting 'proofs and pleas,' and that he must under the statute be given 'a reasonable opportunity to be fully heard.' Whether a trustee, being authorized as contemplated by the statute, is in duty bound to exercise such authority, may be open to question, and is not necessary to be decided at this time. But the right to exercise the authority, having been granted or perfected as contemplated by the statute, is no more subject to denial by the court than is the same right residing in 'parties in interest.' By committing to the creditors' meeting the privilege of determining whether the trustee shall have and exercise such right, the law, it seems to me, denies to the referee, or to the court, any discretion to withhold such right and the power of its exercise from the trustee. It must also follow from this that neither the court nor the referee can, in advance, annex to the trustee's right conditions which are repugnant to its free, or at least its reasonable, exercise. Therefore the condi-

tions denying to the trustee reimbursement for his costs and reasonable expenses in exercising his authority should not have been imposed.

"What is above stated is true of the condition that the order granting to the trustee authority to oppose the discharge shall not delay the final settlement of the estate more than 60 days. The trustee, if he participate in the proceedings to oppose the discharge, must do so according to the usual course and subject to any reasonable delays that may occur. The expedition of the proceedings is not within his sole control or discretion. All he can do is to proceed with reasonable diligence, and, if he be limited in advance as to time, compliance with such conditions might frustrate the object sought to be accomplished by the authority granted him. Under the terms of sec. 14, the right of the trustee would seem to depend solely upon the action of the creditors' meeting, and no further order of the court or of the referee is contemplated. It may be, as suggested by the referee, that the statute opens the way for expensive and burdensome litigation, authorized perhaps by a majority against the objections of a minority of creditors. These considerations, however, bear upon the wisdom of the act, and are not sufficient to give it a construction through which the action of the creditors in meeting is to be deemed merely advisory upon the court. If a majority of the creditors, as parties in interest, desire to oppose a discharge, they may, as the law now stands, in a meeting called for that purpose, and in order to avoid a multiplicity of proceedings by individuals, delegate to the trustee the exercise of their right. They must necessarily contemplate, no doubt desire, that the burdens of the contest, when made by him, fall upon the bankrupt estate. A sufficient safeguard against useless litigation by the trustee will, of course, be found upon his application for allowance of the costs and charges claimed to have been incurred in opposing the discharge." In *re Churchill*, (E. D. Wis. 1912) 197 Fed. 114.

## 1912 Supp., p. 568, sec. 15a.

**Revocation of discharge.**—Under this section, the power of the judge to revoke a discharge is confined and limited. It must be exercised: (a) upon application of parties in interest; (b) within one year after it has been granted; (c) upon a trial in which it must be shown by petitioners that they have (d) not been guilty of undue laches; (e) that the discharge was obtained through the fraud of the bankrupt; (f) that the knowledge of said fraud has come to the petitioners since the granting of the discharge; and (g) that the actual facts did not warrant the discharge. In each and every one of these particulars the burden of proof is upon the petitioners, and each requirement of the statute is absolutely essential to be proven. In *re Howard*, (N. D.

W. Va. 1913) 201 Fed. 577, wherein the court said: "It will be perceived that to revoke a discharge in bankruptcy involves an exercise of judicial discretion and power far more reaching in effect than the suspension for fraud of a statute of limitation barring the recovery of a debt or single demand of a single creditor; further, that it is in direct opposition to the whole spirit and intent of the bankruptcy act. That purpose and intent clearly is to give the bankrupt's creditors his property and to him complete relief from further claims upon him so that he may start over again. His failure may have been solely because of collateral obligations; he may still have the confidence of those who, after his discharge, are willing to sell him property, extend to him credit,

help to start him up again in business. To revoke his discharge not alone affects his interest but also all these new obligations that he has incurred to others upon the security and strength of such discharge. Under these conditions, I am inclined to think that this provision was incorporated in the bankruptcy act more as a check upon what might be the assumption of the courts under equity powers to revoke these discharges and the enforcement of equity's old rule that no limitation runs against fraud. The limitation here is directly upon the court's power, not upon 'the cause of action' as most limitations are. It provides that the judge 'may' act, not that he shall; that he may act only within the year, after the lapse of which his power to act at all ceases; that his action within this year must depend not alone upon the fraud of the discharged bankrupt, but also upon the conduct of the petitioning 'party in interest'—that is to say, upon the latter's good faith and diligence in bringing the matter to the judge's attention. In other words, it becomes absolutely necessary for such petitioner, before he can be heard at all, to show that he has not been guilty of laches in bringing forward his complaint."

In the case of *In re Cuthbertson*, (D. C. S. D. 1912) 202 Fed. 266, the court said: "A mere casual analysis of this section discloses the following elements, all of which must, in my judgment, appear in the petition to give the court jurisdiction to act: (1) The application must be made by a party or parties in interest. (2) The petition must allege that the petitioner has not been guilty of undue laches. (3) The petition must be filed within one year after the discharge shall have been granted. (4) There must be allegations in effect, if true, that the discharge of the bankrupt was obtained through the fraud of the bankrupt. (5) That the knowledge of the fraud has come to the petitioner since the granting of the discharge. (6) That the actual facts did not warrant the discharge.

"There is no allegation in the petition filed herein with reference to the lack of laches of the petitioner.

"There is no statement of facts in this petition that in any manner refers to the

knowledge of the said fraud by the petitioners, or when such knowledge came to the petitioners.

"It is questionable whether there is an allegation in this petition that the bankrupt has any interest in the property referred to in the petition.

"I am of the opinion that this section of the law requires that the 'knowledge of the fraud has come to the petitioner since the granting of the discharge,' and that it is essential, and is jurisdictional. Note in *Re Marionneaux's Case*, 16 Fed. Cas. No. 9,088.

"In each and every one of the foregoing particulars the burden of proof is upon the petitioner, and every requirement of this statute is absolutely essential to be proven."

The creditor should show that he has not only reason for opposing the discharge, but legal reason and grounds which, if sustained, would result in the refusal of a discharge. In *re Downing*, (N. D. N. Y. 1912) 199 Fed. 329.

**Undue laches.**—To the same effect as the original note, see *In re Downing*, (N. D. N. Y. 1912) 199 Fed. 329.

**Collateral attack.**—A discharge in bankruptcy is not open to collateral attack in a district other than that in which the discharge was granted. *Atlantic Dynamite Co. v. Reger*, (N. D. W. Va. 1912) 200 Fed. 1002.

**Amendment of petition.**—In the case of *In re Howard*, (N. D. W. Va. 1913) 201 Fed. 577, the court refused to permit the amendment of a petition for the revocation of a discharge because it was not made in season. The court said: "Finally, petitioners' attorneys suggest that they should be permitted to amend their petitions. I do not think so. If such application to amend had been made before the expiration of the year, I think I could have allowed such amendment; but it was not. At the end of the year fixed by the statute, there was no sufficient petition filed upon which I could grant hearing to revoke this discharge. To allow these petitioners under guise of amendment to file new and possibly sufficient, possibly insufficient, petitions would be exercising judicial power on my part after, by express enactment, my right to exercise such power had ceased."

## 1912 Supp., p. 569, sec. 16a.

The manifest purpose of this provision is to preserve the creditor's original remedy, notwithstanding the discharge of the bankrupt, for the collection of the balance of his debt in all cases where some one else, besides the bankrupt, is also liable in any capacity therefor with the bankrupt. The discharge of a debtor in bankruptcy does not extinguish the debt, but relieves him from all legal obligation to pay it, leaving unimpaired all remedies for securing payment thereof out of property upon which it is a lien. *Way v. Barney*, (1911) 116 Minn. 285,

133 N. W. 801, Ann. Cas. 1913A 719, 38 L.R.A.(N.S.) 648.

**Surety on appeal bond.**—Where a judgment is rendered against a principal and his surety on an appeal bond the surety becomes liable as a "creditor" with the principal, and if the principal later is adjudicated a bankrupt, his liability is not altered by the bankrupt's discharge. *Bailey v. Reeves*, (1912) 102 Miss. 438, 59 So. 802.

**Surety on bond to dissolve attachment.**—The defendant's discharge in bankruptcy, duly pleaded by him, does not bar a plaintiff

from prosecuting his claim to judgment, when the plaintiff's suit was commenced more than four months prior to the commencement of proceedings in bankruptcy by the attachment of personal property of the defendant, which attachment was discharged upon the giving of a bond with sureties, with a condition therein that the same should be null and void if the final judgment or decree in the action in which the writ was served should be forthwith paid and satisfied after the rendition thereof. *Butterick Pub. Co. v. E. F. Bowen Co.*, (1911) 33 R. I. 40, 80 Atl. 277, wherein the court said: "The argument of the defendant is that the provision of this section applies only to those secondarily liable on the debt itself, and not to those who became surety for the bankrupt in court proceedings instituted against the bankrupt, and that the discharge prevents the happening of the contingency upon which alone the liability of the surety would arise. It relies in support of this contention largely upon the authorities and the reasoning of *Carpenter v. Turrell*, 100 Mass. 450, which holds that a discharge in bankruptcy is a bar to the further prosecution of a suit against the bankrupt commenced by attachment more than four months before the commencement of the bankruptcy proceedings, if the attachment was dissolved by giving bond under the statutes of Massachusetts, notwithstanding the provisions of the United States bankrupt act which preserved the lien of an attachment made four months or more before the commencement of bankruptcy proceedings, and continued the liability of sureties after the discharge in bankruptcy of their principal. Since the decision in *Carpenter v. Turrell*, supra, the Massachusetts legislature has enacted a statute permitting the entry of a special judgment against the bankrupt. The enactment of this statute, however, does not affect the weight that should be given to *Carpenter v. Turrell* as an authority in this state, as we have no statute similar to that of Massachusetts. We are of the opinion, however, that the better position is one which preserves to the bankrupt the full benefit of his discharge, and at the same time does not deprive the creditor of the advantage which the bankruptcy law permits him to have by reason of his attachment made more than four months before the commencement of bankruptcy proceedings. This position, more in accord with reason and justice, as it seems to us, is supported by the weight of authority."

**Surety on release bond.**—While there is some conflict the weight of authority supports the conclusion that a surety on a release bond given in an attachment suit is relieved by the

bankruptcy of the defendant. *Windisch-Muhlhauser Brewing Co. v. Simms*, (1911) 129 La. 134, 55 So. 739, wherein the court said: "In *Keyes v. Shannon*, (1844) 8 Rob. 172, 41 Am. Dec. 299, our predecessors decided that where property attached was released on the execution of bond with surety, and the debtor, before judgment, made a surrender of his property under the state insolvent laws, the surety will be discharged. The court held that the bond represented the property so far as the attaching creditors were concerned, that the cession of property dissolved the attachment, and that plaintiff, having no privilege on the property, could have no right of action on the bond."

"The court said, *inter alia*, that the surety bound himself to satisfy such judgment as the plaintiffs might obtain against the defendants in the suit between them, and that the event on which the surety undertook and bound himself to pay never happened."

"The doctrine of this case has never been overruled or modified. In *Serra é Hijo v. Hoffman*, (1878) 30 La. Ann. 67, it was held that the defendant's discharge in bankruptcy *pendente lite* did not release the surety on their appeal bond. In that case a money judgment had been rendered against the defendants, who thereupon appealed to the Supreme Court, which affirmed the judgment. That case was decided on the well-recognized rule that the liability of a surety is not affected by the discharge in bankruptcy of the principal debtor. Section 16 of the bankrupt act of 1898 merely recognizes this general rule of law. Section 67f of the same statute, however, strikes with nullity all levies, attachments, or liens obtained through legal proceedings against an insolvent at any time within four months prior to the filing of a petition in bankruptcy in case he is adjudged a bankrupt. It is difficult to conceive how attachment proceedings thus pronounced null and void can produce any legal effect. The attachment being dissolved by operation of the statute, nothing is left but a suit in personam which is stayed by the pendency of the bankruptcy proceedings. In such a case the subsequent discharge of the debtor extinguishes the obligation on which the suit was based, and renders it legally impossible for the creditor to recover judgment against his former debtor."

**Lease with surety.**—Notwithstanding this section a referee in bankruptcy has no right to cancel a lease containing a clause requiring the tenant to execute a bond with surety for the payment of at least a substantial portion of the rent for the entire term. In *re Sapinsky*, (W. D. Ky. 1913) 206 Fed. 523.

## 1912 Supp., p. 570, sec. 17a.

This section enumerates the debts provable under section 63a (see 1912 Supp. 753) which are not discharged. *Clarke v. Rogers*, (1913)

228 U. S. 534, 33 S. Ct. 587, 57 U. S. (L. ed.) 953.

All provable debts released.—Section 17,

broadly distinguishes between debts which have and those which have not been reduced to judgment before discharge. *American Surety Co. of New York v. Spice*, (1912) 119 Md. 1, 85 Atl. 1031.

An action in attachment was based upon indebtedness due on promissory notes. It appeared by agreement on the trial, while plaintiffs were submitting evidence, that the defendants, after the filing of the declaration, had been duly adjudicated bankrupts, that in the bankruptcy proceedings the schedules of assets and liabilities were filed as required by law, that the notes held and sued on by the plaintiffs were properly scheduled among the unsecured liabilities of the defendant bankrupts, and that a discharge in bankruptcy had been duly and regularly granted to each of the defendants. It was held that, as it appeared that the indebtedness claimed by the plaintiffs was provable in bankruptcy, the defendants were relieved from liability therefor by the discharge in bankruptcy and a nonsuit was properly granted. *Fort-Mims & Haynes Co. v. Branan-Akers Co.*, (1913) 140 Ga. 131, 78 S. E. 721.

Where a creditor who holds a promissory note for the purchase price of goods reduces it to judgment, after a subsequent discharge of the debtor in bankruptcy the creditor cannot enforce an execution based on such judgment against property of the debtor acquired after such discharge. *Ford v. Blackshear Mfg. Co.*, (1913) 140 Ga. 670, 79 S. E. 576.

**Nonprovable debts.**—The exemptions do not rest upon any theory of the exclusion of the creditor from the Bankruptcy Act or of deprivation of right to participate in the distribution, but solely on the ground that although such rights are enjoyed, an exemption from the effect of the discharge is superadded. *Friend v. Talcott*, (1913) 228 U. S. 27, 33 S. Ct. 505, 57 U. S. (L. ed.) 718.

**History.**—In *Friend v. Talcott*, (1913) 228 U. S. 27, 33 S. Ct. 505, 57 U. S. (L. ed.) 718, Chief Justice White said: "The Bankruptcy Act of August 19, 1841, c. 9, § 5 Stat. 440, in the first section comprehensively stated the classes of claims which were embraced within its scope and expressly excluded certain enumerated classes. No exemption from the operation of a discharge when granted was conferred, and therefore all who were within the scope of the act, while enjoying its benefits, were bound by its burdens. Under this act, in *Chapman v. Forsyth*, (1844) 2 How. 202, it was held that although a claim was excluded from the law if brought in by the voluntary act of the creditor and he thereby participated in the distribution, the creditor by such election waived his right to be treated as not bound by the statute, and consequently the debt or claim was discharged. The Bankruptcy Act of March 2, 1867, c. 176, § 14 Stat. 517, presumably to correct the injustice which arose from excluding from all participation in the distribution of assets those creditors whom it was thought because of the meritorious nature of their debt should not be bound by the discharge, departed from the system of ex-

cluding such creditors from the act and on the contrary adopted the principle of including them in the benefits of the act and yet at the same time exempting them from the operation of the discharge. To accomplish this result, § 19 of the act (14 Stat. 525) made a most comprehensive enumeration of provable debts, including as well unliquidated damages for torts as for breaches of contracts. Those things which in the act of 1841 were stated to be excluded from the operation of the act were embodied in a particular section (§ 33, 14 Stat. 333) dealing with exemptions from discharge, and to avoid all possible misconception the section provided ' . . . but the debt may be proved, and the dividend thereon shall be a payment on account of said debt.' It is obvious that the present act embodies the same policy, since the exemptions from discharge which are given by the statute are found in a section devoted to that subject and are stated in words, as we have said, to be exemptions from discharge allowed in favor of provable debts, that is, debts entitled to participate which are given the benefit of an exemption from the operation of the discharge."

**Revival of discharged debt.**—"It is settled that a discharge, while releasing the bankrupt from legal liability to pay a debt that was provable in the bankruptcy, leaves him under a moral obligation that is sufficient to support a new promise to pay the debt. And in reason, as well as by greater weight of authority, the date of the new promise is immaterial. The theory is that the discharge destroys the remedy but not the indebtedness; that, generally speaking, it relates to the inception of the proceedings, and the transfer of the bankrupt's estate for the benefit of creditors takes effect as of the same time to which the discharge relates, and is as competent to bind himself by a promise to pay an antecedent obligation, which otherwise would not be actionable because of the discharge, as he is to enter into any new engagement. And so, under other bankrupt acts, it has been commonly held a promise to pay a provable debt, notwithstanding the discharge, is as effectual when made after the filing of the petition and before the discharge as if made after the discharge. Our attention is not called to any decision in point arising under the present Bankruptcy Act; but we deem it clear that the same rules should be applied." *Zavelo v. Reeves*, (1913) 227 U. S. 625, 33 S. Ct. 365, 57 U. S. (L. ed.) 676.

"At common law a verbal promise to pay by a bankrupt after his adjudication, whether made before or after his discharge, was effectual and revived the debt. And this continued to be so until the enactment of the Bankruptcy Act, 6 Geo. IV, c. 16. *Evan's Stats.* vol. 4 p. 454. The 131st section of this act provides: 'That no bankrupt after his certificate shall have been allowed under any present or future commission shall be liable to pay or satisfy any debt, claim or demand, upon any contract, promise or agreement made or to be made after the *swearing out of*



the commission unless such promise, contract or agreement be made in writing, signed by the bankrupt, or by some person thereto lawfully authorized.' It is obvious that this statute expressly sanctions the making of such promise, contract, or agreement, before the granting of the certificate. Its effect was to require a more solemn act than a mere verbal promise. It left the common law unaltered in so far as to permit such promise, contract, or agreement to be made before the granting of the certificate, but required that the evidence of such promise, contract, or agreement be in writing signed by the bankrupt or his authorized agent. Bearing this in mind, it at once becomes clear why Baron Parke, in *Kirkpatrick v. Tattersall*, [130 M. & W. 766], said that it was immaterial whether the promise was made before or after the granting of the certificate, it was

effective so long as it was a written express promise to pay notwithstanding the granting of the certificate. It also must not be overlooked that the English statute was a part of the Bankrupt Act and is regulatory in its nature regarding the status of the bankrupt after adjudication and the conditions under which he may incur liability for a debt provable under the act after adjudication and after discharge. There is no such provision in the United States Bankrupt Act of July 1, 1898. In the United States the matter in this regard is left wholly to state legislation." *Holt v. Akarman*, (1913) 84 N. J. L. 371, 86 Atl. 408.

The defense of a discharge in bankruptcy is personal to the bankrupt. *First International Bank of Portal v. Lee*, (1913) 25 N. D. 197, 141 N. W. 716.

## 1912 Supp., p. 573, sec. 17a (2).

### I. FALSE PRETENSES OR REPRESENTATIONS.

**Liability for obtaining property by false pretenses or false representations.**—To the same effect as the original note, see *In re Nuttall*, (S. D. N. Y. 1912) 201 Fed. 557.

*The statute should be liberally construed* so as to prevent the discharge in bankruptcy from relieving against a liability which would not exist but for the fraudulent conduct of the bankrupt. *Gaddy v. Witt*, (Tex. 1911) 142 S. W. 926.

*Statute refers to property not to services.*—To the same effect as the original note, see *Gleason v. Thaw*, (C. C. A. 2nd Cir. 1912) 196 Fed. 359, wherein the court said: "On June 28, 1906, the defendant, Harry K. Thaw, was indicted for murder committed in the city of New York. Briefly stated, the complaint alleges that in order to secure the services of the plaintiff as chief counsel, the defendant represented that he was the owner of an interest of at least \$500,000 in the estate of his father and had an annual income of \$30,000 in his own right. That relying upon these and other representations, the plaintiff consented to act as counsel for the defendant and performed services for him in that capacity which were worth the sum of \$60,000 over and above all payments. The complaint charges that all of these representations were false and made with fraudulent intent. The defendant, among other defenses, pleaded in a supplementary answer his discharge in bankruptcy by the District Court of Pennsylvania, dated December 29, 1910. To this the plaintiff demurs, insisting that the discharge is insufficient in law, the plaintiff's cause of action being liabilities for obtaining property by false representations. The demurrer was overruled and the plaintiff sues out a writ of error.

"The identical question thus presented was involved in *Gleason v. Thaw*, 185 Fed. 345, 107 C. C. A. 463, 34 L.R.A.(N.S.) 894, decided February 24, 1911. The controversy was between the same parties and was de-

cided adversely to Gleason. It may be that the court might have decided the proposition before them upon some other ground, but there can be no doubt that the question now under consideration was before the court and was decided by it. It is sufficient to state the language of the decision in the Pennsylvania case, as follows:

"The petition for review of this order in matter of law, under section 24(b) of the Bankruptcy Act, brings before us the single question, whether the debt sued for in the action brought by the petitioner against the bankrupt in the Circuit Court for the Southern District of New York was a liability for obtaining property by false pretenses or false representations, within the meaning of section 17(a) of the Bankruptcy Act as amended in 1903."

"The court considers this question at length and answers it in the negative, holding that the obtaining of legal services by false and fraudulent representations is not within the Bankruptcy Act for the reason that such services are not to be regarded as property. This decision cannot be considered as *res judicata*, for the reason that it is not pleaded. The issue upon a demurrer must be confined to the sufficiency of the pleading attacked. The answer fails to allege the prior adjudication. The defense that a discharge has been granted is not equivalent to a defense that a judgment has been rendered in a proceeding between the parties, holding that the effect of the discharge is to bar this action. It is not unlikely that an application to amend the answer by pleading the decision of the Pennsylvania court would have been granted. It is enough, however, that no such amendment was made. We are inclined to the opinion that the doctrine of *stare decisis* may be invoked with propriety. The Court of Appeals of the Third Circuit has decided that obtaining the services of the plaintiff valued at \$60,000 by false and fraudulent representations of the bankrupt as to the amount and value of his property

and income is not obtaining property by false pretenses or false representations, and that the claim of the plaintiff is barred by the discharge of the defendant in bankruptcy. If this question were presented as an original proposition, it is possible that we might take a different view. The construction for which the defendant contends discriminates against the lawyer, the physician, the teacher, and, indeed, every professional man whose capital is his brains and the time, labor and money spent in fitting him to perform services of the highest value to those who employ him. It is, we think, at least doubtful whether Congress intended to discriminate against the professional man and in favor of the business man, because, in the latter case, the bankrupt has obtained goods and in the former he has obtained services by false and fraudulent representations. Did not Congress by the use of the comprehensive word 'property' intend to include both tangible and intangible property? The question, as an original proposition, is not free from doubt. Much may be said in favor of the plaintiff's contention, but it has been decided adversely to him upon the same facts by a court for whose judgments we have the highest respect and we are not so clearly persuaded that their judgment is erroneous as to justify us in disregarding the rule of comity which is peculiarly applicable to the present situation."

*Money is "property"* within the meaning of the word as used in this section. *Hallagan v. Dowell*, (1a. 1913) 139 N. W. 883.

*Reduction of liability to judgment immaterial.*—Under the law as amended by the act of 1903, as well as under the act of 1867, the creditors' claim for a liability created by false representations need not have been reduced to judgment in order to be excepted from the operation of the discharge. *Dilley v. Simmons Nat. Bank*, (1913) 108 Ark. 342, 158 S. W. 144.

*What constitutes—Purchase of goods with intent not to pay.*—In *In re Nuttall*, (S. D. N. Y. 1912) 201 Fed. 557, the court said: "I doubt if our courts will ever hold that the purchase of goods at an agreed price, accompanied by an intent on the part of the purchaser not to pay for them, in the absence of any representation whatever as to the ability of the purchaser to pay, or any representation of a fact tending to induce a sale and secure a delivery of the property, and in the absence of any acts or conduct tending to avoid or prevent inquiry as to financial condition, creates a liability for obtaining property by false pretenses or false representations. Such a holding will be a far advance on the doctrines enunciated in *Dambmann v. Schulting* [75 N. Y. 55, 85 N. Y. 622], *Graham v. Meyer* [99 N. Y. 611], and *Cleaveland v. Richardson* [132 U. S. 318]. In *Atlanta Skirt Co. v. Jacobs*, 8 Ga. App. 299, 68 S. E. 1077, 25 Am. Bankr. Rep. 895, the court did hold that: 'A false representation may consist in the purchasing of goods with no present purpose of paying for them and in contemplation of a fraudu-

lent insolvency. To buy goods without a present intention to pay is a false representation of one's intention. Therefore to buy goods without a present intention to pay will avoid a discharge.' This I am not prepared to sanction. Is it a false pretense or representation not to disclose one's intent not to pay? It may be that the defendants were guilty of fraud (*Ames v. Moir*, 138 U. S. 306, 312, 11 Sup. Ct. 311, 34 L. Ed. 951); but a debt created by the fraud of a person thereafter adjudged a bankrupt is dischargeable, unless same was created by his fraud 'while acting as an officer or in any fiduciary capacity' (*Crawford v. Burke*, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147; *Tindle v. Birkett*, 205 U. S. 183, 27 Sup. Ct. 493, 51 L. Ed. 762). Of course, this does not apply to the 'fraud' involved in 'obtaining property by false pretenses or false representations.'"

*False statements to surety.*—The applicability of this section to obtaining money from a third party as the results of false statements made to a surety was considered but not decided in *In re Dunfee*, (N. D. N. Y. 1913) 206 Fed. 745.

*Promissory notes given by bankrupt.*—In *Rudstrom v. Sheridan*, (1913) 122 Minn. 262, 142 N. W. 313, the facts were as follows: The defendant's husband was indebted to the plaintiff upon certain overdue obligations which he was unable to pay. In settlement of the same the husband made and delivered to the plaintiff several promissory notes payable at future dates. The defendant became a joint maker upon those new notes. The husband and wife at the time of the transaction agreed to procure the indorsement of a relative of the wife, who was financially responsible. This they failed to do. The old notes were not surrendered, nor did plaintiff part with any property or property right in reliance upon the agreement to procure such indorsement. The defendant subsequently became a bankrupt, and in due proceedings in the bankruptcy court was discharged from all her debts. It was held that the transaction stated did not amount to "obtaining property by false pretenses or false representations," and that the defendant was by her discharge released from liability on the notes.

*Constructive fraud.*—To the same effect as the original note, see *Cooper Grocery Co. v. Gaddy*, (Tex. 1911) 141 S. W. 825.

*Effect of waiving the tort.*—A creditor entitled to prosecute a claim against the bankrupt in contract or tort, who accepts a dividend under a composition, is not thereby precluded from suing in tort to recover a balance. *Friend v. Talcott*, (1913) 228 U. S. 27, 33 S. Ct. 505, 57 U. S. (L. ed.) 718.

## II. WILFUL AND MALICIOUS INJURIES.

*Wilful and malicious injuries.*—To the same effect as the original note, see *In re Toklas*, (E. D. N. Y. 1912) 201 Fed. 377.

*The wrongful and fraudulent appropriation of the property of another is a "wilful and*

malicious injury" to such property. *Hallagan v. Dowell*, (Ia. 1913) 139 N. W. 883.

**Forcible detainer.**—A judgment for damages for forcible entry and detainer is not dischargeable in bankruptcy. Thus in the case of *In re Munro*, (N. D. N. Y. 1912) 195 Fed. 817, it appeared that one Kittie Fults obtained a judgment in the Supreme Court of the state of New York against John C. Munro for damages for a wrongful entry on a forcible detainer of certain real estate. The facts disclosed that Mrs. Fults was in possession of the farm owned by Munro under a lease to her husband and assigned by him to her with the knowledge and consent of Munro, who had recognized her as tenant; that summary proceedings to dispossess were commenced against Mr. Fults, to which Mrs. Fults was not made a party, before a justice of the peace, and resulted in the granting by the justice of a warrant to dispossess. Armed with this warrant, an officer and Munro went to the premises, in the absence of the husband, the sole party defendant in the proceedings, and informed Mrs. Fults they had come to put her out and were going to do so. Mrs. Fults denied their right to remove her or put her out of possession and went to consult an attorney. During her absence, Munro and the officer proceeded to take possession of the farm and stock thereon and removed all the household property and belongings of Mrs. Fults from the home and premises and to and across the highway to other premises, where they were left in the limits of the public highway; the horses being tied to the fence. One Lockwood, an assistant of the officer, was put in charge of the premises by the defendant Munro, and Lockwood, armed with a gun, walked up and down in front of Mrs. Fults' things during the night and ordered her and her husband to keep off that side of the road, the side the house and premises were on. Mrs. Fults remained with her things in the highway during the night, and Lockwood walked up and down, and on two or three occasions fired off the gun. The court said: "The right to be and remain on the farm and in the house and to keep her horses in the barn and her interest in the growing crops was a right of property. Deprived of it wrongfully, Mrs. Fults was necessarily injured in her property. She was deprived of her property. When she returned from Syracuse and found Munro and the officer in possession, she entered on the premises to get some puppies. She was told she could not have them and was then forcibly put off the premises by the officer, who took her by the arm and put her off. Here was injury to her person. This woman was not compelled to enter on a physical struggle for the possession, and any unlawful laying on of hands by the officer was an injury to her person. It was not necessary that she be beaten, bruised, or maimed. She was deprived of her lawful shelter, and this was an injury to her person. Only a barbarous court or judge would say that a woman is not injured in her per-

son when unlawfully taken hold of and led from her home, where she has the right to be, to the opposite side of the highway, and left in the public highway with her household goods and personal belongings also unlawfully removed at the same time, and kept out of her home by threats, menacing conduct, and the firing of a gun, all of which acts naturally inspire fear. All this is calculated to shock the nerves and affect and injure the physical condition. In this case there was an actual assault and battery perpetrated in order to make effectual the forcible detainer of which it formed a part. *Wood v. Phillips*, 43 N. Y. 152, 156-158. Was this a willful and malicious injury? It is the settled law of the case as between the bankrupt and Mrs. Fults that there was no authority or justification whatever for the removal of Mrs. Fults from the premises or her detainer therefrom. The removal proceedings were invalid, and so held on appeal. So far as Mrs. Fults was concerned, she was not even a party, and she owned and was occupying under the lease with the knowledge and approval of Munro. After the unlawful entry was consummated, in the absence of Mrs. Fults, the removal of property took place, and while this was going on, Mrs. Fults was assaulted and led from the premises. After possession had been delivered to Munro, one Lockwood was left on the premises by direction of Munro. He was an assistant of the officer in the removal, but made the agent of Munro thereafter and acted as such. After possession was delivered to Munro, the functions and authority of the officer as such and under the warrant of dispossession ceased. Lockwood thereafter was the mere agent of Munro. Munro was therefore responsible for all that took place during the night, and, as the officer and Lockwood were there without any process whatever against Mrs. Fults, neither of them had any warrant or justification for laying hands on her person while her property was being removed. As the Court of Appeals justly said, Munro was responsible for all the force used in detaining Mrs. Fults from the premises or the premises from her. That these unlawful acts were willful is beyond question. The injury was willful. Was it a malicious injury within the meaning of section 17 of the bankruptcy act?

"In the common acceptance of the word 'malice,' it implies hatred, spite, or ill will: but the words 'malicious injuries to the person or property of another' were not used in this sense by Congress in enacting section 17 of the bankrupt act. . . . Injury to person or property in the legal sense is a malicious injury in the absence of hatred, spite, or ill will, provided the act was intentional, wrongful, and without just cause or excuse. It seems to me that the judgment itself in this case under the pleadings establishes that the acts of Munro, constituting the forcible detainer, were unlawful, wrongful, and without just cause or excuse. The record, made a part of the papers here,

establishes this beyond all question. Neither Munro nor Lockwood, his agent, was armed with any process whatever against Mrs. Fufts, the tenant in possession. The warrant of dispossession issued against the husband, William Fufts, had no validity as to him as was subsequently held on appeal, and clearly none against Mrs. Fufts at any time. The acts of Munro and Lockwood, his agent, were therefore wrongful and committed without any just cause or excuse. The acts of Lockwood in denying to Mrs. Fufts the right to take her puppies, in taking her by the arm and leading her from the premises and in marching up and down during the night armed with a gun, which was fired at intervals and without necessity, indicate moral turpitude or wrong. I think a case is within the exception when the act producing injury to person or property was wrongful, intentional, and done without just cause or excuse; that is, a wrongful act was done under circumstances from which with the nature of the act the law implies malice." See also the same case reported in 197 Fed. 450.

### III. MISCELLANEOUS.

**Support of wife or child.**—The bankruptcy statute as it has existed since 1903 expressly provides that alimony due or to become due for maintenance or support of wife or child is exempt from discharge. Although there was no such express exemption in the bankruptcy statute prior to the amendment in 1903, that amendment was merely declaratory of the true meaning and sense of the statute as originally enacted. In *re Williams*, (1913) 208 N. Y. 32, 101 N. E. 853, 46 L.R.A. (N.S.) 719.

**Judgment for breach of promise of marriage accompanied by seduction.**—This section prevents the discharge of a bankrupt for a judgment for breach of promise of marriage accompanied by seduction. In *re Warth*, (C. C. A. 2d Cir. 1912) 200 Fed. 408, wherein the court said: "The action was in form for breach of promise to marry. The seduction was in form but an aggravation of the damage. The strict rule of the common law that a woman who consents cannot complain directly of the greatest possible wrong, had to be adhered to. But the action while in form upon contract was in substance for the gross fraud which the man perpetrated in taking advantage of the confidential relation established by the marriage engagement to accomplish the woman's dishonor. The substantial damages which the petitioner obtained were not for the deprivation of the matrimonial alliance, but for the loss of character and the ever-continuing shame and sorrow.

"It has been the policy of the Bankruptcy Act to discharge honest debtors but not to afford a shield to willful wrongdoers and to avoid the possibility that seducers might take advantage of it. Congress in 1903 passed an amendment providing that liability for

'the seduction of an unmarried female' should not be discharged. The provision is broad and we have no doubt applies and was intended to apply to every case where there is liability for seduction whether the action to enforce such liability be based, as is permitted in some states, directly upon the essential wrong, or by reason of the limitations of the common law, be founded upon the incident—the refusal to marry. To say that Congress intended to distinguish between these cases is to say that it intended to further favor seducers in those jurisdictions where they are already favored by adherence to an artificial form of action which often operates to prevent the enforcement of a morally just demand.

"The contention is made that as the action is in form for breach of contract some portion of the damages awarded must have been for the loss of the matrimonial alliance and that as the judgment cannot be split up all must be discharged. As already pointed out, however, the real wrong for which the plaintiff recovered was for the seduction, and in the absence of any showing to the contrary it will be presumed that the substantial damages were awarded for that."

The above decision was rendered on a petition for the revision of the proceedings of the District Court for the Eastern District of New York. The decision in the District Court was rendered by Judge Veeder and contains a learned exposition of the question, in part as follows: "The earliest case arose in this court under circumstances identical with those involved in the present application. In *re McCauley*, (D. C.) 101 Fed. 223. After the stay granted in that proceeding had expired, the bankrupt moved in the state court for a cancellation of the judgment record, but the application was denied. *Disler v. McCauley*, 66 App. Div. 42, 73 N. Y. Supp. 270. To the same effect is *Biela v. Urbanczyk*, 38 Tex. Civ. App. 213, 85 S. W. 451. These cases hold that the statutory exception refers to actions for torts, and that inasmuch as the right of action for breach of promise of marriage, even when accompanied by seduction, rests entirely upon the contract and its breach, it falls within the general rule rather than the exception.

"On principle no other conclusion seems possible. The action for breach of promise of marriage is in form and substance contractual, and differs from other forms of action on contracts only in permitting damages, on occasion, to be given as for a wrong. *Finlay v. Chirney*, 20 Q. B. D. 494; *Thorn v. Knapp*, 42 N. Y. 474, 1 Am. Rep. 561. While damages for seduction as a distinct ground of action cannot be added to the damages which the plaintiff is entitled to recover for a breach of promise, seduction may, if alleged, be shown in aggravation of damages, on the ground that compensation for the injury sustained by the breach cannot be justly estimated without taking into considera-

tion the increased humiliation and distress to which the plaintiff has been exposed. *Kniffen v. McConnell*, 30 N. Y. 285. In other words, proof of seduction is competent, not to sustain the action, or as constituting a separate cause of action, but to enhance the damages. *Wells v. Padgett*, 8 Barb. (N. Y.) 323. This is necessarily so in jurisdictions where the common-law rule prevails, according to which a seduced woman cannot maintain an action for her own seduction. Such is the rule in this state (*Hamilton v. Lomax*, 26 Barb. (N. Y.) 615; *Getzelson v. Bernstein*, 15 Misc. Rep. 627, 37 N. Y. Supp. 220), although, under exceptional circumstances, such an action was sustained in *Graham v. Wallace*, 50 App. Div. 101, 63 N. Y. Supp. 372. Mutual fault is the explanation of the common law rule. A seduced woman cannot recover because she consents. *Hamilton v. Lomax*, supra. Yet by statute seduction is punishable as a crime. Penal Code (N. Y.) sec. 284.

"What effect, then, is to be given to the express reservation of seduction in the amendment of 1903? Apparently none, unless it be held to determine the conflict of authority as to whether a parent's action for loss of services of his daughter, occasioned by seduction is within the exception. Compare *In re Freche*, (D. C.) 109 Fed. 620, with *In re Sullivan*, 2 Am. Bankr. Rep. 30. For it had been held prior to the amendment that where a seduced woman was permitted by statute to prosecute an action in her own name, the debt was not discharged. *In re Maples*, (D. C.) 105 Fed. 919. And it is clear that where, as in this state, no such action is allowed, no effect whatever can be given to the amendment. The judgment in issue represents a liability either for breach of promise of marriage alone, or for breach of promise of marriage enhanced in amount by seduction. It must necessarily be taken to represent, in part at least, a liability for breach of promise of marriage, because that is the cause of action alleged in the complaint, and the only cause of action that the plaintiff could maintain under the circumstances. Probably it represents also, in

part, a liability for seduction. But how can that be determined upon a general verdict? Even assuming such to be the case, how can it be determined what part of the judgment represents such liability? We have, then, in this case, at the utmost, a judgment on a general verdict representing, in part, a liability for breach of promise of marriage, which is not within the exceptions specified in the act and is therefore dischargeable, and representing, in part, a liability for seduction, which is within the exception, and is therefore not dischargeable. In this situation it is clear that, inasmuch as a debt must be discharged unless it be brought within an exception to the general rule of dischargeability, a composite debt must be held to fall within the general rule. *Cooke v. Plaisted*, 181 Mass. 82, 62 N. E. 1054.

"The petitioner relies upon the case of *Bond v. Milliken*, 134 Iowa 447, 109 N. W. 774, 120 Am. St. Rep. 440, where, after holding that a breach of promise to marry was not a willful and malicious injury within the exception, the court added: 'It may well be that, although the action is technically for breach of contract, if there is seduction as an accompanying fact, the claim, so far as it is for the special recovery of damages due to the seduction, may be held to be a claim for willful and malicious injury to the person; and no doubt, under the amendment to section 17 of the Bankruptcy Act of February 5, 1903, which enlarges the exceptions from the effect of a discharge so as to include liabilities for the seduction of an unmarried female or for criminal conversation, the claim of damages for seduction in an action for breach of promise of marriage is reserved.'

"Undoubtedly, as already indicated, the first suggestion would be sound if it were possible to ascertain how far the judgment is for the special recovery of damages due to seduction. So far as the reference to the amendment of 1903 is concerned, it is sufficient to note that in Iowa an unmarried woman may by statute prosecute an action for her own seduction."

### 1912 Supp., p. 577, sec. 17a (3).

**Debts not duly scheduled.**—To the same effect as the original note, see *Miller v. Guasti*, (1912) 226 U. S. 170, 33 S. Ct. 49,

57 U. S. (L. Ed.) 173; *Raley v. D. Sullivan & Co.*, (Tex. 1913) 159 S. W. 99.

### 1912 Supp., p. 578, sec. 17a (4).

**Fraud.**—The character of fraud necessary to save a demand or judgment from the operation of the bankrupt act is "positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, as does embezzlement, and not implied fraud, or fraud in law, which may exist without imputation of bad faith or immorality." In other words, the character of fraud contemplated by the

bankrupt act is fraud accomplished by false representations, by words or conduct, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another, who acts upon it to his injury. *Louisville & N. R. Co. v. Bryant*, (1912) 149 Ky. 359, 149 S. W. 830.

The term "fraud" in the clause of the bankruptcy act of 1867, defining the debts

from which a bankrupt is not relieved by a discharge under the bankruptcy act, was held to mean positive fraud, or fraud in fact involving moral turpitude or intentional wrong; and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality. While the later bankrupt act differs in language from the act of 1867 the purposes of the acts are the same, and the term "fraud" in the later act is to be given the same meaning as in the act of 1867. *Dilley v. Simmons Nat. Bank*, (1913) 108 Ark. 342, 158 S. W. 144.

**Embezzlement.**—A claim created by embezzlement is by the express provisions of the clause not affected by a discharge in bankruptcy. *Ex parte Butler-Keyser Mfg. Co.*, (1911) 174 Ala. 237, 56 So. 960.

The word "officer" includes an officer of a private corporation. *Tatum v. Leigh*, (1911) 136 Ga. 791, 72 S. E. 236, Ann. Cas. 1912D 216.

**Fiduciary capacity—Express and implied trusts.**—The phrase "in any fiduciary capacity" has reference to express and not to implied trusts. *American Agr. Chemical Co. v. Berry*, (1913) 110 Me. 528, 87 Atl. 218; *American Surety Co. of New York v. Spice*, (1912) 119 Md. 1, 85 Atl. 1031.

The bankruptcy statute does not refer, when using the words "fiduciary capacity," to a debt "founded upon an open contract, or upon a contract express or implied," even though suit may be brought in trover thereon. *In re Toklas Bros.*, (E. D. N. Y. 1912) 201 Fed. 377.

**An agent intrusted by his principal with beer to deliver to laborers under his supervision and to collect the pay therefor and pay the money over to such principal** is not acting in a "fiduciary capacity" within the meaning of this section. *In re Camelo*, (N. D. N. Y. 1912) 195 Fed. 632, wherein the court said: "In *Crawford v. Burke*, [195 U. S. 176, 25 Sup. Ct. 9, 49 L. ed. 147] it was held that a commission merchant and factor who sells for others is not indebted in a fiduciary capacity within the bankruptcy act by withholding the money received for property received and sold by him, and that the same rule applies to a broker carrying stocks on a margin and who sells same and fails to pay over the proceeds to his principal. See *Chapman v. Forsyth*, 2 How. 202, 11 L. Ed. 236; *Neal v. Clark*, 95 U. S. 704, 708, 24 L. Ed. 586; *Hennequin v. Clews*, 111 U. S. 676, 679, 4 Sup. Ct. 576, 28 L. Ed. 565;

*Noble v. Hammond*, 129 U. S. 65, 68, 9 Sup. Ct. 235, 32 L. Ed. 621; *Upshur v. Briscoe*, 138 U. S. 365, 375, 11 Sup. Ct. 313, 34 L. Ed. 931. Under the Bankruptcy Act of 1867, R. S. 5117, the rule was different because of the language of that act, as is clearly pointed out in *Crawford v. Burke*, *supra* at page 189 of 195 U. S., 25 Sup. Ct. 9, 49 L. Ed. 147. But under that act the words 'fiduciary character' had the same meaning as now. *Mulock v. Byrnes*, 129 N. Y. 23, 25, 29 N. E. 244. In that case it was held that a judgment recovered on an indebtedness incurred by defendant because of his failure to pay over rents collected by him as agent was barred by the discharge in bankruptcy; that such a debt is not one incurred while acting in a fiduciary capacity within the meaning of the bankruptcy act."

**Misappropriation by a partner of partnership funds** is not a misappropriation by him while acting in a "fiduciary capacity," within the meaning of the provision excepting certain debts from the effect of a discharge in bankruptcy. *Karger v. Orth*, (1911) 116 Minn. 124, 133 N. W. 471.

The plaintiff and the defendant were equal partners in a private bank of which the former was president and the latter cashier. The cashier was permitted to manage the bank and certain other business of the firm as he chose; the result being a considerable loss. The president sued the cashier for the loss, alleging fraud and mismanagement while acting as partner in a fiduciary capacity or relation. The defendant pleaded a discharge in bankruptcy; the plaintiff, who had notice of the proceedings, having filed no claim therein. It was held that such discharge was a good defense; the relation between partners, under the circumstances indicated, not being the fiduciary relation referred to in section 17. *Inge v. Stillwell*, (1912) 88 Kan. 33, 127 Pac. 527, 42 L.R.A. (N.S.) 1093.

**Facts held to show that moneys sought in a bill for an accounting** were received by the bankrupt in a "fiduciary capacity." *Williams v. Virginia-Carolina Chemical Co.*, (Ala. 1913) 62 So. 755.

**Reduction of liability to judgment.**—The original character of the liability of one acting in a fiduciary capacity is not lost by being reduced to judgment. *Brown v. Hannagan*, (1911) 210 Mass. 246, 96 N. E. 714.

This section is cited in *Morris v. Covey*, (1912) 104 Ark. 226, 148 S. W. 257.

## 1912 Supp., p. 579, sec. 18a.

**Commencement of proceedings.**—To the same effect as the original note see *In re Flatland*, (C. C. A. 9th Cir. 1912) 196 Fed. 310.

The order must designate a day upon which the absent defendant or bankrupt is required to appear and demur, answer or plead. *Sidney L. Bauman Diamond Co. v.*

*Hart*, (C. C. A. 5th Cir. 1911) 192 Fed. 498.

**Publishing order of court.**—The order of the court directing substituted service upon the absent defendant or bankrupt must be published. *Sidney L. Bauman Diamond Co. v. Hart*, (C. C. A. 5th Cir. 1911) 192 Fed. 498.

## 1912 Supp., p. 581, sec. 18b.

**Right to appear and plead.**—*The receiver* appointed by the state court is competent to resist the petition for adjudication. In re Gold Run Mining & Tunnel Co., (D. C. Colo. 1912) 200 Fed. 162.

**Power of court to admit other parties.**—Section 18b provides that the bankrupt or any creditor may appear. That is a grant of right to bankrupts and to creditors, but the statute in no sense declares against the power of the court to admit other parties who are in a legitimate way interested in the questions involved in the proposition of adjudication. *Blackstone v. Everybody's Store*, (C. C. A. 1st Cir. 1913) 207 Fed. 752.

**Appearance within reasonable time.**—If a party who files an involuntary petition desires to put in default all those persons

who have a right to appear and plead to the petition, he should issue the usual subpoena, and then the law fixes the time within which every one who has a right to plead may appear; otherwise, the adjudication will not be binding on those who do not consent to it if they appear within a reasonable time and ask to plead. *B-R Electric & Telephone Mfg. Co. v. Aetna Life Ins. Co.*, (C. C. A. 8th Cir. 1913) 206 Fed. 885.

**Adjudication within five days voidable.**—An order of adjudication in involuntary bankruptcy is voidable by a creditor, if made within five days after the return day, even though the bankrupt voluntarily appears and consents to it. *B-R Electric & Telephone Mfg. Co. v. Aetna Life Ins. Co.*, (C. C. A. 8th Cir. 1913) 206 Fed. 885.

## 1912 Supp., p. 582, sec. 18c.

**Time of verification.**—In the case of *In re Miller*, (N. D. Ia. 1912) 192 Fed. 730, specifications of ground of opposition to a discharge were allowed to be verified after they had been filed.

## 1912 Supp., p. 583, sec. 18d.

**Determination of issues—By judge.**—In the case of *In re Ward*, (C. C. A. 3d Cir. 1912) 194 Fed. 89, trial by jury having been demanded and waived, the parties stipulated that the issues should be tried by the court. In pursuance thereof, witnesses were sworn and heard by the court.

**Effect of adjudication—Time of insolvency.**—While it is true that the filing of a petition and adjudication in bankruptcy

does not generally establish the insolvency of the bankrupt at any date prior to such filing, it is equally certain that in the case of an involuntary proceeding, where insolvency is one of the issues, the bankrupt by the adjudication is conclusively proven to have been insolvent at the time of the commission of the act of bankruptcy. *Lazarus v. Eagen*, (M. D. Pa. 1912) 206 Fed. 518.

## 1912 Supp., p. 586, sec. 18g.

**The adjudication on a voluntary petition is ex parte**, and the creditors are not heard to contest it. *Johnson v. Norris*, (C. C. A. 5th Cir. 1911) 190 Fed. 459.

**Adjudication concurrent with filing of peti-**

**tion.**—By this section adjudication in cases of voluntary bankruptcy is to be concurrent with the filing of the petition and must operate as of that day. *Crowe v. Baumann*, (N. D. N. Y. 1911) 190 Fed. 399.

## 1912 Supp., p. 586, sec. 19a.

**Submission of questions incidental to insolvency—Amount of indebtedness and valuation of property.**—To the same effect as the original note, see *In re Farthing*, (E. D. N. C. 1913) 202 Fed. 557.

**Direction of verdict.**—If the evidence on the question of insolvency is of such a conclusive character that upon it as a whole

the court would feel constrained to set aside a verdict of solvency, if one were rendered, it may direct a verdict of insolvency although there be conflicting evidence as to details not essential to a conclusion. In re *Iron Clad Mfg. Co.*, (C. C. A. 2d Cir. 1912) 197 Fed. 280.

## 1912 Supp., p. 589, sec. 21a.

A broad grant of power to make orders and issue process is conferred by this section. In re *Ironclad Mfg. Co.*, (C. C. A. 2d Cir. 1912) 201 Fed. 66.

"Concerning the property of a bankrupt" means the discovery of the existence, whereabouts, or disposition of property, and cannot be extended so as to draw from unwill-

ing outsiders evidence as to the value of what the bankrupt admittedly owned and had in possession, and which was in the hands of his trustee. In *re Seligman*, (S. D. N. Y. 1911) 192 Fed. 750.

An estate is "in process of administration" after the filing of the petition in bankruptcy and the appointment of a receiver. *Cameron v. United States*, (1914) 231 U. S. 710, 34 S. Ct. 244, wherein the court said: "In order to arrive at the true meaning of § 21a other provisions as well as the purpose of the act must be had in view. The object of the examination of the bankrupt and other witnesses to show the condition of the estate is to enable the court to discover its extent and whereabouts, and to come into possession of it, that the rights of creditors may be preserved. If such examination is postponed until after adjudication, which may not take place for at least twenty days, within which the bankrupt in involuntary bankruptcy is given leave to appear and plead, the estate may be concealed and disposed of and the purpose of the act to hold it and to distribute it for the benefit of creditors defeated. The importance of such early examinations of bankrupts was emphasized in *re Fleischer*, (S. D. N. Y. 1907) 151 Fed. 81. *supra*. By subdivision 9 of § 7 of the act, it is provided that the bankrupt shall, "when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate." Here

is found authority to examine the bankrupt at such other times than the first meeting of creditors as the court may direct. This section should be read with § 21a, and throws light upon its proper construction. In this case the petitioner had invoked the jurisdiction of the court, a receiver had been appointed to take possession of the property, the court was so far in possession of it as to prevent other courts from seizing it and thus defeating the bankruptcy jurisdiction. We are of opinion that the estate was then in process of administration and the examination ordered was within the jurisdiction of the court."

**Who may be examined.**—To the same effect as the original note, see *In re Schwartz & Co.*, (S. D. N. Y. 1912) 201 Fed. 166; *In re Connelly*, (E. D. N. Y. 1913) 204 Fed. 479; *In re Felts*, (N. D. Ia. 1909) 205 Fed. 983.

An adjudication in bankruptcy is not a condition precedent to the proceedings provided for in this section. *Cameron v. United States*, (C. C. A. 2d Cir. 1911) 192 Fed. 548.

**Application for examination.**—In the absence of a showing of an emergency an application for an order for examination will be refused where the bankruptcy petition had been drifting along for nearly 18 months, and (so far as the record discloses) no effort had been made to determine the issues presented by the creditors' petition and the demurrer and the answers thereto. *In re Wilkes-Barre Light Co.*, (C. C. A. 3d Cir. 1913) 208 Fed. 539.

**Conduct of examination.—Determining competency of witness.**—To the same effect as the original note, see *In re Harrison Bros.*, (M. D. Pa. 1912) 197 Fed. 320.

## 1912 Supp., p. 594, sec. 23a.

**Jurisdiction of referee.**—Referees have jurisdiction under this section as well as District Courts. *In re Kornit Mfg. Co.*, (D. C. N. J. 1911) 192 Fed. 392.

**Jurisdiction of court.**—The first clause provides that "the United States Circuit Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy" (thus clearly recognizing the essential difference between proceedings in bankruptcy, on the one hand, and suits at law or in equity, on the other), "between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees," restricting that jurisdiction, however, by the further words, "in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants." This clause, while relating to the Circuit Courts only, and not to the District Courts of the United States, indicates the intention of Congress that the ascertainment, as between the trustees in bankruptcy and a stranger to the bankruptcy

proceedings, of the question whether certain property claimed by the trustee does or does not form part of the estate to be administered in bankruptcy, shall not be brought within the jurisdiction of the national courts solely because the rights of the bankrupt and of his creditors have been transferred to the trustee in bankruptcy. *Lovell v. Newman*, (1913) 227 U. S. 412, 33 S. Ct. 375, 57 U. S. (L. ed.) 577.

This section, it is clear, does not confer jurisdiction upon the Circuit Courts in all controversies in which trustees as such are involved, but only in controversies between a trustee and "adverse claimants" of the bankrupt's property, involving, generally speaking, "the ascertainment as between the trustee in bankruptcy and a stranger to the bankruptcy proceedings of the question whether certain property claimed by the trustee does or does not form part of the estate to be administered in bankruptcy" (*Bardes v. Hawarden First Nat. Bank*, (1900) 178 U. S. 524, 536, 20 S. Ct. 1000, 44 U. S. (L. ed.) 1175), and including a suit by the trustee to recover a money debt



due from the defendant to the bankrupt and claimed by the trustee as the property of the bankrupt (*Bush v. Elliott*, supra, (1906) at page 481 of 202 U. S., at page 668 of 26 S. Ct., 50 U. S. (L. ed.) 1114). This section of the Act, however, has no application where the controversy is not one with an adverse "claimant" as to right or title of the trustee to any property claimed by the trustee to have passed to him under the adjudication in bankruptcy as part of the bankrupt estate, but involves transactions between the defendant and the trustee himself, subsequent to the adjudication. Thus in a suit

by the trustee in trover to recover the value of property that had belonged to the bankrupt estate and had been converted by the defendant to his own use after title to the property had been vested in the trustee by virtue of the adjudication in bankruptcy, jurisdiction of the Circuit Court cannot be maintained under either clause of section 23 of the Bankruptcy Act, but, as in any other case where the requisite amount is involved, may be based upon diversity of citizenship between the trustee personally and the defendant. *McEldowney v. Card*, (E. D. Tenn. 1911) 193 Fed. 475.

## 1912 Supp., p. 595, sec. 23b.

### I. JURISDICTION OF ADVERSE CLAIMS.

**Bona fide adverse claims.**—To the same effect as the original note, see *In re Plymouth Elevator Co.*, (D. C. S. D. 1911) 191 Fed. 633; *In re Iron Clad Mfg. Co.*, (E. D. N. Y. 1912), 194 Fed. 906; *Young v. Allen*, (C. C. A. 6th Cir. 1913) 207 Fed. 318.

A response by a bank to an order of a referee to show cause why it should not pay over to the trustee \$3,424.60 deposited with it by the bankrupt three days before the filing of the petition in bankruptcy, that the money was deposited without solicitation or agreement in a long-standing general deposit account which the bankrupt had with the bank subject to check and that at the time of the deposit the bankrupt owed the bank on an overdraft and on past-due notes \$3,153.20, which it claims to offset against its liability to the bankrupt and the trustee, states an adverse claim and a good plea to the jurisdiction of the referee and the District Court summarily to determine the validity of that claim under section 23b. An order overruling such a plea in the absence of a denial of any of its averments and without the framing, investigation, or decision of the issue whether the adverse claim pleaded thereby is substantial or colorable presents no question of the manner or extent of the summary investigation of that question permitted to the bankruptcy court or the referee. The only question it presents is whether or not the facts set forth in the plea, if true, show that the District Court and the referee are without jurisdiction summarily to try and determine the controversy between the trustee and the adverse claimant. *In re Gill*, (C. C. A. 8th Cir. 1911) 190 Fed. 726.

**Colorable adverse claim.**—To the same effect as the original note, see *In re Iron Clad Mfg. Co.*, (E. D. N. Y. 1912) 194 Fed. 906; *First Nat. Bank of Thomasville, Ga. v. Hopkins*, (C. C. A. 5th Cir. 1912) 199 Fed. 873.

The bankruptcy court has jurisdiction under an order to show cause to investigate and determine whether or not it had at the time the petition for the order to show cause was filed, or at any other time, actual possession of the property involved in the order, and whether those asserting lien or title have a substantial or only a frivolous and

baseless adverse claim. If it had no such possession, and if the claim asserted is actual and substantial, as distinguished from one merely colorable and fictitious, it may proceed no further, but should decline to adjudicate on the merits without consent. *Shea v. Lewis*, (C. C. A. 8th Cir. 1913) 206 Fed. 877.

This section relates only to suits brought by trustees and has no restrictive effect on the right of receivers (or trustees for that matter) to maintain or defend their possession of goods seized as those of the bankrupt. *In re Lipman*, (D. C. N. J. 1912) 201 Fed. 169.

Petition held to fall within the provision of this section. *In re Raphael*, (C. C. A. 7th Cir. 1911) 192 Fed. 874.

**Possession of property gives jurisdiction thereover.**—If the property is not in the possession of the bankrupt at the time he filed his petition but is in other persons claiming adverse rights thereto, then the bankruptcy court has no jurisdiction over the property involved, as a part of the bankrupt estate. *Chicago Title & Trust Co. v. National Storage Co.*, (1913) 260 Ill. 485, 103 N. E. 227.

### III. JURISDICTION BY CONSENT.

**"Consent" defined.**—"Consent" as used in this section means consent to the tribunal in which the controversy is to be carried on and not to the mode of procedure, which is regulated by general principles of law unless other provision is made. *In re Raphael*, (C. C. A. 7th Cir. 1911) 192 Fed. 874.

The consent provided for was not intended to enlarge the jurisdiction of the Circuit Courts of the United States so as to give them a jurisdiction which they would not have because of diverse citizenship and a requisite amount in controversy or by reason of a cause of action arising under the constitution or laws of the United States. *Lovell v. Newman*, (1913) 227 U. S. 412, 33 S. Ct. 375, 57 U. S. (L. ed.) 577.

**Effect of consent.**—To the same effect as the original note, see *Le Master v. Spencer*, (C. C. A. 8th Cir. 1913) 203 Fed. 210.

**Appearing and pleading to the merits in plenary suits by a trustee, without objection to the jurisdiction, is a consent thereto.** De-

*troit Trust Co. v. Pontiac Savings Bank*, (C. C. A. 6th Cir. 1912) 196 Fed. 29.

Consent need not expressly appear of record, but may be sufficiently shown by conduct of the defendant necessarily implying such consent. The authorities are uniform that it is not necessary that the consent of the proposed defendant shall be given in writing or upon the record in express terms or in advance of the institution of the suit, but that he will be deemed to have sufficiently consented if he appears and pleads to the merits, without objection to the jurisdiction for want of consent, and will not be allowed thereafter to withdraw his consent or object to the jurisdiction of the court on the ground of want of consent. *McEldowney v. Card*, (E. D. Tenn. 1911) 193 Fed. 475.

#### IV. RECOVERY OF PREFERENTIAL AND FRAUDULENT TRANSFERS.

**Jurisdiction to recover property fraudulently or preferentially transferred.**—To the same effect as the original note, see *Kraver v. Abrahams*, (E. D. Pa. 1913) 203 Fed. 782.

*By the amendment of 1910.*—To the same effect as the first sentence of the first paragraph of the original note, see *Parker v. Sherman*, (D. C. Vt. 1912) 195 Fed. 648.

#### V. SUMMARY AND PLENARY JURISDICTION.

**Necessity of plenary action.**—To the same effect as the original note, see *In re Mimms*, (W. D. Ky. 1911) 193 Fed. 276; *In re Spalding Cotton Mills*, (N. D. Ga. 1912) 193 Fed. 554; *Johnston v. Spencer*, (C. C. A. 8th Cir. 1912) 195 Fed. 215; *In re Bacon*, (W. D. N. Y. 1912) 196 Fed. 986; *Bear Gulch Placer Mining Co. v. Walsh*, (D. C. Mont. 1912) 198 Fed. 351; *In re Carlile*, (D. C. N. C. 1912) 199 Fed. 612; *In re Boston-Cerrillos Mines Corporation*, (D. C. N. M. 1913) 206 Fed. 794; *Shea v. Lewis*, (C. C. A. 8th Cir. 1913) 206 Fed. 877; *In re Green*, (E. D. Pa. 1913) 207 Fed. 693.

There are two classes of cases arising under the act of 1898 and controlled by different principles. The first class is where there is a claim of adverse title to property of the bankrupt, based upon a transfer antedating the bankruptcy. The other class is where there is no claim of adverse title based on any transfer prior to the bankruptcy, but where the property is in the physical possession of a third party or of an agent of the bankrupt, or of an officer of a bankrupt corporation, who refuses to deliver it to the trustee in bankruptcy. In the former class a plenary suit must be brought, either in law or in equity, by the trustee, in which the adverse claim of title can be tried and adjudicated. In the latter class it is not necessary to bring a plenary suit, but the bankruptcy court may act summarily and may make an order in a summary proceeding for the delivery of the property to the trustee, without the formality of a formal litigation. *In re Cantelo Mfg. Co.*, (D. C. Me. 1912) 201 Fed. 158.

Where a party in possession sets out in

his answer facts, which if true, would constitute an adverse title, the court may not in a summary proceeding, and against his protest, dispose of his rights in property. *In re Blum*, (C. C. A. 7th Cir. 1913) 202 Fed. 883.

**Summary jurisdiction.**—In the case of *In re Logan*, (N. D. N. Y. 1912) 196 Fed. 678, the court said: "It seems to me that, under the decisions of the Circuit Courts of Appeal and the Supreme Court of the United States, the test of jurisdiction to proceed in a summary way or by a summary proceeding to determine controversies in regard to real or personal property is possession of such property in or by the bankrupt at the time of the filing of the petition and adjudication. Of course, mere possession is not enough. The finding must be and the facts must warrant the finding that the bankrupt was the true owner, and that he held as owner. Jurisdiction to proceed in this manner is not defeated by a claim of ownership made by a third person asserted for the first time after a petition in bankruptcy is filed, even though the groundwork for such a claim had been prepared beforehand. Should a bankrupt make, execute, and deliver a formal bill of sale of personal property to another, retaining possession of the property, and agree with such person that he should hold title for the bankrupt until the termination of bankruptcy proceedings, the paper title thus held would be merely colorable, and it seems to me that a summary proceeding would be proper, even though both bankrupt and such vendee should claim that the bankrupt's possession was as agent or bailee of the person holding the bill of sale. I do not see that it makes any difference that the property in question is real estate and not personal property, and that the transfer of title is a deed, and not a bill of sale. Under such circumstances, it cannot be material that the deed was executed and delivered and recorded more than four months prior to the bankruptcy, nor can it be material that the deed of the property came from another party, the bankrupt paying the consideration therefor and the transaction being one intended to cover and conceal the bankrupt's property from creditors and the trustee in bankruptcy when appointed. It cannot be that a plenary suit in such case is necessary in order to reach the property. The property comes at once within the jurisdiction of the bankruptcy court and constructively into its possession, it being in possession of the bankrupt himself, and no claim adverse to the bankrupt having been made prior to the institution of the bankruptcy proceedings."

The bankruptcy court has jurisdiction to draw to itself, and to determine by summary proceedings after reasonable notice to claimants, the merits of controversies between the trustee and such claimants over liens upon and title to property claimed by the trustee as that of the bankrupt which has been lawfully reduced to the actual possession of the trustee or of some other officer of the bankruptcy court as the property of the bank-

rupt. When those in possession are not adverse claimants, but are only representatives of the bankrupt, without claim of lien upon, or right to, the property in themselves, the bankruptcy court may by summary proceeding take the actual possession of the property, and then, when it has thus acquired the actual possession, may by summary proceedings determine the validity of claims or liens upon and titles to it. *Shea v. Lewis*, (C. C. A. 8th Cir. 1913) 206 Fed. 877.

As to the summary jurisdiction of a bankruptcy court to recover property alleged to be a part of the assets of the estate of a bankrupt, the court, in the case of *In re Iron (lad Mfg. Co.)*, (E. D. N. Y. 1912) 194 Fed. 906, said: "The whole line of cases seems to depend upon three principles. First, the property of a bankrupt, held by an agent or bailee without claim of title, can be administered by the court in the bankruptcy proceeding; second, if the property of a bankrupt has been fraudulently transferred to some other person, and can be traced into the hands of that other person, then in a summary proceeding, if the jurisdiction be consented to, or in spite of objection if the fraud be indisputable upon the record presented by the parties, the bankruptcy court may proceed to deal with the property as to which title did not pass by such fraudulent transfer; and, third, if upon the admitted situation of the parties it appears in a summary proceeding that an independent corporation or agent has property to which no title is claimed or which seems to fall within the class just defined, a restraining order, or, if necessary, a receivership with respect to that property may be ordered by the bankruptcy court to prevent irreparable injury, until the property over which the bankruptcy court does have jurisdiction can be located and disposed of."

There is no power in the court by summary order to divest a third party of any title (even a fraudulent one) asserted by him against the bankrupt or his trustee. But this does not prevent the entry of a summary order where the only title set up rests, not upon any matter of fact, but upon a statement of law. In *re Michaelis & Lindeman*, (S. D. N. Y. 1912) 196 Fed. 718.

While a summary action begun in one district to enforce an order made by a court of another district cannot be maintained, yet, if the pleadings are sufficient to constitute it a plenary suit, the action may be maintained as such where, if no bankruptcy had supervened, the action might have been prosecuted by the bankrupt in the federal court. In *re Boston-Cerrillos Mines Corporation*, (D. C. N. M. 1913) 206 Fed. 794.

When the evidence shows without conflict that the sale and delivery of goods occurred after the filing of the bankruptcy

proceeding, and that at the time of filing the possession of the goods was with the bankrupt through his bailee, a summary petition in bankruptcy for an order to restore the property or proceeds thereof to the trustee is the appropriate proceeding. In *re Denson*, (N. D. Ala. 1912) 195 Fed. 854.

A petition by the trustee of a bankrupt corporation praying that an assessment be ordered to be made upon the shares of capital stock of the corporation is not a "suit" within the meaning of the section and the referee in bankruptcy has jurisdiction. In *re Newfoundland Syndicate*, (D. C. N. J. 1912) 196 Fed. 443, wherein the court said: "The stockholders of a bankrupt corporation, in their corporate capacity, are in court from the institution of the bankruptcy proceedings, and are as much bound by the administration of such estate as the corporate entity itself. To ascertain whether there are insufficient corporate assets, and whether capital stock has been issued at less than par value, are administrative matters, not involving any personal judgment affecting such stockholders in their individual capacity. Their personal presence is therefore not necessary when such ascertainment and assessment is made; nor are they entitled to any other notice than the constructive one had by operation of law by the institution of such bankruptcy proceedings. The enforcement of said assessment against the stockholders alleged to be liable thereto, however, is plenary in its nature, and, except with their consent, cannot be made in the bankruptcy court."

The District Court has jurisdiction, by way of injunction, to enjoin the collection of a garnishee judgment against a debtor of the bankrupt. In *re Ransford*, (C. C. A. 6th Cir. 1912) 194 Fed. 658, wherein the court said: "The objection that, by reason of the alleged adverse nature of the claim made by petitioner, the District Court had no jurisdiction to entertain summary proceedings, by way of injunction, cannot be sustained. It follows, from what has been said in the opinion, that the petitioner was not in adverse possession, actual or constructive, of the fund in question. The proceeding in the District Court was a controversy between the trustee in bankruptcy and the petitioner, as to which was entitled to receive payment from the garnishee defendant of the indebtedness primarily owing to the bankrupt's estate. The rights of a garnishing creditor can be no greater than those of an attaching creditor, and as the rights of the latter are voided by a bankruptcy proceeding, the same must be true of those of the former. The title to the indebtedness of the bank was in the trustee and we think for the purpose of this suit the debt should be regarded as constructively in his possession, and that the District Court had jurisdiction to proceed summarily to determine the rights of the parties."

## 1912 Supp., p. 603, sec. 24a.

## I. CONTROVERSIES ARISING IN BANKRUPTCY PROCEEDINGS.

**In general.**—Controversies in bankruptcy proceedings do not mean mere steps in proceedings in bankruptcy but embrace controversies which are not of that inherent character, although arising in the course of proceedings in bankruptcy. *James v. Stone & Co.*, (1913) 227 U. S. 410, 33 S. Ct. 351, 57 U. S. (L. ed.) 573.

The phrase "controversy in bankruptcy" as used in the Bankruptcy Act, must be limited to cases where third parties claim not in and under the administration of the bankrupt's estate in bankruptcy, but on the contrary assert some right hostile to the title of the trustee or going to the right of the court to administer the particular estate in the bankruptcy case. *Snow v. Dalton*, (C. C. A. 4th Cir. 1913) 203 Fed. 843.

*The mere allowance or disallowance of a claim in bankruptcy* is a proceeding in bankruptcy and not a controversy arising in bankruptcy within the intentment of the section. *Tefft, Weller & Co. v. Munsuri*, (1911) 222 U. S. 114, 32 S. Ct. 67, 56 U. S. (L. ed.) 118, followed in *Munsuri v. Fricker*, (1911) 222 U. S. 121, 32 S. Ct. 70, 56 U. S. (L. ed.) 121.

*Sections 24b and 24a contrasted.*—The distinction between "proceedings in bankruptcy" reviewable under section 24b and the "controversies arising in bankruptcy proceedings," appealable under section 24a, is clearly defined; the former including "administrative orders and decrees in the ordinary course of bankruptcy between the filing of the petition and the final settlement of the estate," and the latter including "those independent or plenary suits which concern the bankrupt's estate and arise by intervention or otherwise between the trustees representing the bankrupt's estate and claimants representing some right or interest adverse to the bankrupt or his general creditors." The remedies afforded by the two subsections referred to are mutually exclusive. *Barnes v. Pampel*, (C. C. A. 6th Cir. 1912) 192 Fed. 525.

*The remedies provided by sections 24a and 25a are mutually exclusive.* In *re Martin*, (C. C. A. 6th Cir. 1912) 201 Fed. 31.

Where the order and judgment complained of results from a consideration of disputed facts and depends upon the findings made thereon the proper remedy is an appeal under this section and not a petition to revise under the next section. *T. E. Wells & Co. v. Sharp*, (C. C. A. 8th Cir. 1913) 208 Fed. 399.

**Judgment granting or refusing a discharge.**—The only appeal in bankruptcy proceedings from a judgment granting or refusing a discharge is from the bankruptcy court to the Circuit Court of Appeals. *James v. Stone & Co.*, (1913) 227 U. S. 410, 33 S. Ct. 351, 57 U. S. (L. ed.) 573.

**Decisions held appealable.**—To the same effect as the fourth case cited in the original note, see *Rode v. Phipps*, (C. C. A. 6th Cir. 1912) 195 Fed. 414.

Where a person presents to the referee in bankruptcy a claim to the ownership of property in the hands of a trustee in connection with his claim as creditor of the bankrupt (as dependent upon the determination of the question of ownership) and including questions of priority as between himself and other lien claimants the question is appealable under this section. *Rode v. Phipps*, (C. C. A. 6th Cir. 1912) 195 Fed. 414.

The Circuit Court of Appeals has jurisdiction to review the decision of a District Court exercising ancillary jurisdiction in bankruptcy that it has no jurisdiction to determine whether the proceeds of goods it seizes and sells as the property of the bankrupt are the property of the bankrupt estate or the property of adverse claimants. *Fidelity Trust Co. v. Gaskell*, (C. C. A. 8th Cir. 1912) 195 Fed. 805, wherein the court said: "The cases cited illustrate, and the opinions in them establish, the rule that it is only when the jurisdiction of the trial court as a federal court is in question that its decision is reviewable in the Supreme Court under the first clause of section 5 of the act creating the Circuit Courts of Appeals. When the issue regarding the jurisdiction of the trial court is conditioned, not by its power as a court of the United States, but by its general authority as a judicial tribunal, or by the general principles of jurisprudence and the established rules of practice regarding the disposition of the claims of interveners and other parties to equity and ancillary proceedings, or by the principles and rules which govern the proceedings of courts of concurrent jurisdiction between themselves, its decision is reviewable in the Circuit Court of Appeals. The question of the jurisdiction of the court below in the case at bar was of the latter class. It was conditioned, not by the power of that court as a federal court, but by the general rules and principles governing the action of courts of concurrent jurisdiction in their relations to each other and by the principles of equity and rules of practice which control the disposition of the claims of interveners and other parties to original and ancillary suits in equity. It involved the simple question whether or not a court of equity which in ancillary proceedings in bankruptcy has seized and has in its control the property of a stranger to the original and the ancillary proceedings has jurisdiction to restore it to him or to his creditor who has been prevented by the act of the court from lawfully applying it to the payment of his claim. This court has ample jurisdiction to review the dismissal of the intervening petition challenged by the appeal."

The intervention in bankruptcy proceedings of a secured creditor for the purpose of asserting a title or claim to property in the

possession of the bankrupt's trustee, is an intervention in equity, and a decree is reviewable by appeal to the Circuit Court of Appeals in the exercise of its general appellate powers in equity cases under this section. Upon such an appeal the law and the facts are open for reconsideration. *Houghton v. Burden*, (1913) 228 U. S. 161, 33 S. Ct. 491, 57 U. S. (L. ed.) 780.

A suit brought by the trustee against an adverse claimant by plenary proceedings in equity is appealable. *Kirkpatrick v. Harnesberger*, (C. C. A. 5th Cir. 1912) 199 Fed. 886.

## 1912 Supp., p. 611, sec. 24b.

**Appeal or petition to revise as exclusive or optional right.**—Where an appeal may be taken, there is no right to seek revision by petition, nor does an appeal lie in any case in which the order below may be revised above upon petition. These remedies are mutually exclusive. *Kirsner v. Taliaferro*, (C. C. A. 4th Cir. 1912) 202 Fed. 51.

The "proceedings" reviewable are those administrative orders and decrees in the ordinary course of a bankruptcy between the filing of the petition and the final settlement of the estate, which are not made especially applicable under section 25a infra, p. 623. In *re Loving*, (1912) 224 U. S. 183, 32 S. Ct. 446, 56 U. S. (L. ed.) 725, where in the court said: "The question now propounded is: Was the trustee also entitled to a review in the Circuit Court of Appeals under § 24b by petition for review? Under that section authority, either interlocutory or final, is given to the Circuit Court of Appeals to superintend and revise in matters of law the proceedings of the inferior courts of bankruptcy within their jurisdiction. We think this subdivision was not intended to give an additional remedy to those whose rights could be protected by an appeal under § 25 of the act. That section provides a short method by which rejected claims can be promptly reviewed by appeal in the Circuit Court of Appeals, and, in certain cases, in this court. The proceeding under § 24b, permitting a review of questions of law arising in bankruptcy proceedings, was not intended as a substitute for the right of appeal under § 25. *Coder v. Arts*, (1909) 213 U. S. 233. Under § 24b a question of law only is taken to the Circuit Court of Appeals: under the appeal section controversies of fact as well are taken to that court, with findings of fact to be made therein if the case is appealable to this court. We do not think it was intended to give to persons who could avail themselves of the remedy by appeal under § 25 a review by petition under § 24b. The object of § 24b is rather to give a review as to matters of law, where facts are not in controversy, of orders of courts of bankruptcy in the ordinary administration of the bankrupt's estate." See also *In re Streater Metal Stamping Co.*, (C. C. A. 7th Cir. 1913) 205 Fed. 280.

In the case of *In re Hamilton Automobile*

This section is cited in *Brown v. Detroit Trust Co.*, (C. C. A. 6th Cir. 1912) 193 Fed. 622.

## III. REVIEW BY UNITED STATES SUPREME COURT OF DECISIONS OF CIRCUIT COURT OF APPEALS.

**Source of appellate jurisdiction.**—To the same effect as the original note, see *Hobbs v. Head & Dowst Co.*, (C. C. A. 1st Cir. 1911) 191 Fed. 811.

*Co.*, (C. C. A. 7th Cir. 1912) 198 Fed. 856, it was held that leave to file a petition for a revision of proceedings in the District Court was inadvertently allowed as the petitioner presented no proceedings in bankruptcy reviewable under section 24b. The court said: "The judgment of the District Court whereof review is sought arose in a plenary suit, brought by the trustee in bankruptcy against the petitioner, to recover the value of an alleged unlawful preference, pursuant to section 60b of the Bankruptcy Act; and the rule is well settled that the provision of section 24b is inapplicable to such judgments, so that they are reviewable only on writ of error or appeal pursuant to the general statutes. The Supreme Court has recently approved and adopted this rule, and the distinctions between "proceedings in bankruptcy" and "controversies at law and in equity" arising in the course of bankruptcy proceedings, on which it rests, in answer to a question certified by the Circuit Court of Appeals for the Sixth Circuit, in the case entitled *Matter of Loving*, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. ed. 725. With the interpretation of section 24b thus determined by the Supreme Court, in accord with the prior rulings of this court, it is unnecessary to discuss or mention the various authorities cited in the brief of counsel as lending support to this petition. Review thereunder is unauthorized, and the petition is dismissed."

**Matter of law.**—To the same effect as the original note, see *In re Flatland*, (C. C. A. 9th Cir. 1912) 196 Fed. 310; *In re Roger Brown & Co.*, (C. C. A. 8th Cir. 1912) 196 Fed. 758; *In re Charles Knosher & Co.*, (C. C. A. 9th Cir. 1912) 197 Fed. 136; *Johansen Bros. Shoe Co. v. Alles*, (C. C. A. 8th Cir. 1912) 197 Fed. 274; *In re Zinner*, (C. C. A. 7th Cir. 1912) 202 Fed. 197; *In re Witherbee*, (C. C. A. 1st Cir. 1913) 202 Fed. 896; *Stuart v. Reynolds*, (C. C. A. 5th Cir. 1913) 204 Fed. 709; *Williamson v. Richardson*, (C. C. A. 9th Cir. 1913) 205 Fed. 245; *B-R Electric & Telephone Mfg. Co. v. Aetna Life Ins. Co.*, (C. C. A. 8th Cir. 1913) 206 Fed. 885.

A "matter of law" in the broad sense of the expression arises when an agreed statement of fact is filed and an order entered thereon. *In re J. B. Judkins Co.*, (C. C. A. 1st Cir. 1913) 205 Fed. 892.

*A denial of a motion to dismiss an application of a bankrupt for a discharge on undisputed facts presents a question of law reviewable by a petition to revise under section*

24b. *Lindeke v. Converse*, (C. C. A. 8th Cir. 1912) 198 Fed. 618.

This section is cited in *In re Smith*, (C. C. A. 6th Cir. 1913) 203 Fed. 369.

## 1912 Supp., p. 623, sec. 25a.

**Exclusiveness with respect to section 24a.**—To the same effect as the original note see *In re Streator Metal Stamping Co.*, (C. C. A. 7th Cir. 1913) 205 Fed. 280.

A "bankruptcy proceeding" includes a proceeding before a referee to have a claim against the estate as previously allowed, reconsidered and a substantial portion disallowed. *Kiskadden v. Steinle*, (C. C. A. 6th Cir. 1913) 203 Fed. 375, followed in *Cooper v. Miller*, (C. C. A. 6th Cir. 1913) 203 Fed. 383.

No appeal lies under this section from the District Court of the United States for Porto Rico to the United States Supreme Court, to review an order disallowing claims in bankruptcy proceedings. *Tefft, Weller & Co. v. Munsuri*, (1911) 222 U. S. 114, 32 S. Ct. 67, 56 U. S. (L. ed.) 118, wherein the court said: "This express provision for the exercise of appellate jurisdiction by the courts therein named over the case here presented by necessary implication must be held to exclude the right of this court to exercise appellate jurisdiction over a subject not delegated unless some other provision of the statute compels to a contrary view. But instead of tending to so do, the context of the

statute adds cogency to and makes irresistible the implication arising from the provision of section 25a. . . . This result flows from the careful provision otherwise made by the statute for the exercise of appellate jurisdiction by this court over proceedings in courts of bankruptcy or the orders, judgment and decrees rendered by such courts, none of which embrace the character of case here presented. Indeed, when the context of the statute is considered and the distribution of appellate jurisdiction for which it provides is taken into view, it becomes certain that to extend by remote implication, based upon conceptions of inconvenience, the reviewing power of this court to a subject like the one now in question would destroy the symmetry of the law and would render necessary limitations on the power of this court to review as to important subjects concerning which the power would otherwise obtain."

Appeals under section 25a are governed by the rules in equity appeals, except as to the time within which such appeals shall be taken. *In re Quality Shop Co.*, (C. C. A. 7th Cir. 1912) 202 Fed. 196.

## 1912 Supp., p. 632, sec. 25a (1).

**Refusal to set aside adjudication.**—To the same effect as the original note, see *B-R Electric & Telephone Mfg. Co. v. Aetna Life Ins. Co.*, (C. C. A. 8th Cir. 1913) 206 Fed. 885.

## 1912 Supp., p. 633, sec. 25a (2).

**Judgment on composition.**—An order refusing to confirm a composition on the ground that the judge is not satisfied that it is for the best interests of the creditors is not a bar to a subsequent discharge and therefore is not a final order denying a discharge and appealable under this section. *In re McVoy Hardware Co.*, (C. C. A. 7th Cir. 1912) 200 Fed. 949.

A judgment overruling objections to the application of a bankrupt for a discharge is not one granting or refusing a discharge and is not appealable. *Ragan, Malone & Co. v. Cotton & Preston*, (C. C. A. 5th Cir. 1912) 195 Fed. 69.

## 1912 Supp., p. 634, sec. 25a (3).

Where a claim alleged to be secured by a lien upon the bankrupt's estate is filed against a bankrupt for allowance, an appeal is given as from a judgment allowing or rejecting a claim of \$500 or over. *In re Loving*, (1912) 224 U. S. 183, 32 S. Ct. 446, 56 U. S. (L. ed.) 725.

A ruling made in the course of the determination of an issue as to alleged bankruptcy upon a subordinate issue as to whether or not the petitioning creditors held "prov-

able" claims is not a judgment allowing or rejecting a debt or claim within the meaning of the section. *J. W. Calnan Co. v. Doherty*, (1912) 224 U. S. 145, 32 S. Ct. 460, 56 U. S. (L. ed.) 702.

Order allowing debt or claim held not shown by the facts in the case of *In re Martin*, (C. C. A. 6th Cir. 1912) 201 Fed. 31.

This section is cited in *Adams v. Dickens Valley Lumber Co.*, (C. C. A. 4th Cir. 1912) 202 Fed. 48.

1912 Supp., p. 635. [*Time for taking appeal.*]

Effect of proceedings for rehearing.—An application for an appeal under this section is not seasonably made, although made within ten days after a denial of a motion for a rehearing, when such motion was not made

until more than ten days after the entry of the order complained of, as the right to an appeal, once lost, is not revived by a petition for a rehearing. *Rode v. Phipps*, (C. C. A. 6th ed. 1912) 195 Fed. 414.

## 1912 Supp., p. 638, sec. 25b.

Questions purely administrative concerning as they do, the carrying out of an order of distribution which settled a controversy as to whether a certain claim should be allowed, are not the subject of review by the Supreme

Court. *Wynkoop, Hallenbeck, Crawford Co. v. Gaines*, (1913) 227 U. S. 4, 33 S. Ct. 214, 57 U. S. (L. ed.) 391.

This section is cited in *Lumpkin v. Foley*, (C. C. A. 5th Cir. 1913) 204 Fed. 372.

## 1912 Supp., p. 640, sec. 25b.

The prerequisites for an appeal to the Supreme Court specified in section 25b do not exist, nor can the appeal be entertained, where the Court of Appeals does not make the findings of fact and conclusions of law

required by clause 3 of General Order 36. *J. W. Calnan Co. v. Doherty*, (1912) 224 U. S. 145, 32 S. Ct. 460, 58 U. S. (L. ed.) 702.

## 1912 Supp., p. 646, sec. 29b.

Proof beyond a reasonable doubt.—In the case of *In re Hennebry*, (N. D. Ia. 1913) 207 Fed. 882, the court said: "It is true that it is held by some of the courts of bankruptcy that the offense denounced by section 29b, when alleged to defeat a discharge, is not required to be proved beyond a reasonable doubt. If this be true, then the bankrupt may be denied a discharge by evidence

of an alleged offense, which would be insufficient to convict him of that offense if he was indicted and put upon trial therefor. He might thus be denied a discharge for an alleged offense, and afterwards acquitted thereof. It is not believed that Congress intended this, and in the absence of controlling authority I am unwilling to so hold."

## 1912 Supp., p. 646, sec. 29b (1).

Concealment of assets.—To the same effect see *Stern v. United States*, (C. C. A. 3d Cir. 1912) 193 Fed. 888; *In re Bacon*, (W. D. N. Y. 1913) 205 Fed. 545.

The word "concealed."—In *United States v. Phillips*, (S. D. N. Y. 1912) 196 Fed. 574, the court having before it the meaning of the word "concealed" said: "The statute punishes a bankrupt who has knowingly 'concealed . . . from his trustee any of the property belonging to his estate in bankruptcy.' The indictment charges that Phillips did 'knowingly and fraudulently secrete and conceal' property, to wit, certain pearls, from his trustee. The indictment is obviously drawn on the assumption that 'secrete' and 'conceal' mean the same thing. This assumption and more is justified by the letter of the Bankruptcy Act (section 1, subd. 22), declaring that 'conceal' shall include 'secrete,' 'falsify,' and 'mutilate.' So much has been held in attachment cases in this state (*Jurgens v. Suden*, 32 App. Div. 1, 52 N. Y. Supp. 662); and of the secretion of property it has been said that the three agencies of fraud, assigning, disposing of, and secreting, are legally identical and equivalent. *Sturz v. Fischer*, 15 Misc. Rep. 410, 36 N. Y. Supp. 893. A thing is secreted or concealed from

the officer of the law, and indeed from any one, when the seeker cannot find it, and it is still concealed or secreted when such seeker knows perfectly well who controls it, who has hidden it, and who can reveal it if he desires. Therefore, since the law is not merely a game of hide and seek, that is concealed or secreted which is withheld by means of physical concealment from the lawful officer who is looking for it. The word 'withhold' is wider than either 'conceal' or 'secrete'—e. g., a bankrupt may withhold money by stubbornly refusing to pay, and defying his creditors to get it out of him—but this expression would not necessarily or ordinarily be taken to mean that the bankrupt had obtained certain gold coin or bank notes and concealed the same by burying them in the earth or putting them in a receptacle known only to himself, while such would be the reasonable inference if the bankrupt were accused of concealing money; i. e., he would be understood to have hidden actual cash, like the misers of fairy tales."

If the bankrupt has conveyed property, no matter how fraudulently, so that he has lost all right, title and interest therein, it is not a concealment under the provision of the act. If the bankrupt has parted with all dominion

over the property, if the title is gone out of him and is beyond recall, it is not his property, and therefore is not "property belonging to his estate in bankruptcy." In re Hammerstein, (C. C. A. 2d Cir. 1911) 189 Fed. 37.

**Concealment by corporation—Conspiracy to conceal corporation's assets.**—To the same effect as the first paragraph of the original note, see Roukous v. United States, (C. C. A. 1st Cir. 1912) 195 Fed. 353.

**Criminal intent.**—To the same effect as the original note see In re Reed, (W. D. Okla. 1911) 191 Fed. 920.

**Omission to schedule property.**—The omission of the property from the bankrupt's schedules alleged to have been transferred in fraud of creditors may, in connection with other evidence of a fraudulent concealment of such property, be considered in determining whether or not there has been an intentional fraudulent concealment by the bankrupt of property to hinder, delay, and defraud his creditors; but the omission alone from the schedules of such property, especially when transferred more than four months before the bankruptcy, is not the offense contemplated by section 29b (1) or (2) of the Bankruptcy Act; but the offenses so denounced are concealments of property with-

in the four months preceding the bankruptcy and false oaths in bankruptcy proceedings, other than mere omissions of such property from the schedules, and contemplate the concealment of property by some other act or acts upon the part of the bankrupt than merely omitting it from the schedules, and affirmative false statements of some material fact or facts by the bankrupt in a proceeding in bankruptcy, willfully and intentionally made by him, knowing the same to be false. In re Hennebry, (N. D. Ia. 1913) 207 Fed. 882.

**Evidence—Burden of proof.**—In a prosecution for concealing assets the burden of proof is on the government to establish the guilt of the defendant beyond a reasonable doubt. Chodkowski v. United States, (C. C. A. 7th Cir. 1912) 194 Fed. 858.

**Presumptions.**—In a prosecution of a bankrupt for concealing assets, where it is shown that the defendant conveyed property by a warranty deed, the jury should be instructed that the law presumes that in so doing the defendant acted legally and in good faith, and that they should give him the benefit of that presumption. Chodkowski v. United States, (C. C. A. 7th Cir. 1912) 194 Fed. 858.

## 1912 Supp., p. 650, sec. 29b (2).

**False oath.**—To the same effect as the original note, see Kovoloff v. United States, (C. C. A. 7th Cir. 1912) 202 Fed. 475.

The false oath must have been knowingly and fraudulently made, and an oath may be considered to have been so made when made by a person who states matters which he does not believe to be true, willfully and contrary to his oath. In re Hale, (D. C. N. M. 1913) 206 Fed. 856.

**Oath as to title of property.**—Where a bankrupt swore that he had no real estate and that the interest in certain real estate of which he had the record title was really held by him as trustee for his children, whereas it appeared that the real estate was bought with funds derived from property the

legal title to which was vested in the bankrupt's wife during her lifetime, and that by the law of the state where that property was located the husband had a life interest in one-third of the property of the wife; and it also appeared that the property was actually bought by the wife from money saved out of the husband's salary, and that he treated the property as though it were his own, it was held that he had an interest in the property, and that his oath to the effect that he had no such interest was made knowingly, and with the purpose of withholding from his creditors the knowledge of his affairs to which they were entitled under the Bankruptcy Act. In re Hale, (D. C. N. M. 1913) 206 Fed. 856.

## 1912 Supp., p. 651, sec. 29b (5).

**Extorting money or property.**—This section is not violated by a promise which the bankrupt made with a creditor after the petition was filed but before his discharge, which was in effect that if the creditor could lend him a certain sum of money for use in paying the consideration of a composition with his creditors, he, when the composition was confirmed, would pay the creditor the balance of his debt after deducting there-

from his share of the consideration of such composition. Zavolo v. Reeves, (1913) 227 U. S. 625, 33 S. Ct. 365, 57 U. S. (L. ed.) 676.

A prosecution for concealing property is not maintainable where more than a year before the indictment the bankrupt concealed the property to the knowledge of the trustee. United States v. Phillips, (S. D. N. Y. 1912) 196 Fed. 574.

## 1912 Supp., p. 652, sec. 29d.

**Offense of concealing assets.**—Facts held to show that prosecution of offense of concealing assets was barred by this section. Warren v. United States, (C. C. A. 5th Cir. 1912) 199 Fed. 753.



## 1912 Supp., p. 652, sec. 30a.

**Force and effect.**—To the same effect as the original note, see *In re Nevada-Utah Mines & Smelters Corp.*, (C. C. A. 2d Cir. 1913) 202 Fed. 126.

## 1912 Supp., p. 653, sec. 32a.

**Transfer for convenience of parties.**—To the same effect as the original note, see *In re Sterne*, (E. D. Tex. 1911) 190 Fed. 70.

## 1912 Supp., p. 655, sec. 38a.

**Review of proceedings had before referee.**—To the same effect as the original note, see *In re Co-operative Knitting Mills*, (E. D. N. Y. 1913) 202 Fed. 1016; *In re Holden*, (C. C. A. 6th Cir. 1913) 203 Fed. 229.

**Mode of review.**—To the same effect as the original note, see *In re Turetz*, (E. D. Pa. 1913) 205 Fed. 400.

**Taking exceptions before referees—Formal exceptions unnecessary.**—To the same effect as the original note, see *In re Lane Lumber Co.*, (N. D. Idaho 1913) 206 Fed. 780.

**Time for review.**—To the same effect as the original note, see *In re Verdon Cigar Co.*, (W. D. Mich. 1911) 193 Fed. 813.

By the court rules a petition for revision of a referee's order must be filed within fifteen days. *In re Wink*, (D. C. Md. 1913) 206 Fed. 348.

**Determination on review—Court may consider any point presented by record.**—Although the referee's certificate sets forth no reasons for his disapproval of a trustee appointed by the creditors, the district judge,

in reviewing his order, is not confined to this certificate, and is at liberty to consider any point presented by the record. *In re Kellar*, (C. C. A. 1st Cir. 1912) 192 Fed. 830.

**Weight of referee's finding of fact.**—To the same effect as the original note, see *In re Logan*, (N. D. N. Y. 1912) 196 Fed. 678; *In re Walden Bros. Clothing Co.*, (N. D. Ga. 1912) 199 Fed. 315; *In re Cox*, (D. C. N. M. 1912) 199 Fed. 952; *Salsburg v. Blackford*, (C. C. A. 4th Cir. 1913) 204 Fed. 438.

The findings of fact made by a referee in bankruptcy are presumptively correct, and unless they are clearly against the weight of the evidence, or some obvious error of law has intervened in its application, will not be disturbed; but they are not conclusive, as is the verdict of a jury, or the findings of facts made by the judge in an action at law when a jury has been waived. This is the rule of law applicable to masters in chancery, and is equally applicable to findings made by a referee in bankruptcy. *In re Hawks*, (E. D. Kan. 1913) 204 Fed. 309.

## 1912 Supp., p. 658, sec. 38a (2).

**Production of books.**—A referee in bankruptcy has full and complete jurisdiction to order the bankrupt to produce books of account and papers bearing on his transactions. *In re Soloway & Katz*, (D. C. Conn. 1912) 195 Fed. 103.

## 1912 Supp., p. 659, sec. 38a (4).

**Authority to perform duties of court.**—Where the bankruptcy court has jurisdiction, the referee has also jurisdiction, except when the case is referred to him for a special purpose, or where the bankrupt asks to be adjudged a bankrupt, or seeks a discharge from bankruptcy. *In re Brenner*, (M. D. Pa. 1911) 190 Fed. 209.

**Turning property over to trustee—Summary proceedings.**—"Undoubtedly, one holding property of the bankrupt as an agent or bailee may be required summarily to turn it over to the trustee, and, in a proper case, to a receiver; but we are of the opinion that, whenever the facts alleged on their face disclose possession and a legal right in the party claiming title, the referee has no jurisdiction in a summary proceeding to require the property to be turned over without the

consent of the respondent." *In re Blum*, (C. C. A. 7th Cir. 1913) 202 Fed. 883.

**Examination of accounts of receivers and trustees.**—"The whole policy of the law with respect to bankrupt estates is that they shall be economically administered, and it is the duty of referees, as well as of receivers and trustees, none of whom are entitled to receive greater compensation than is fixed by the bankruptcy law, to see that estates are administered with the strictest economy. But the law imposes specially upon referees the settlement and distribution of estates. They must pass upon the accounts of receivers and trustees, and be satisfied as to their correctness. It is not proper for a referee to assume that an account is correct, or that payments made by an accountant are

proper, simply because no person interested files an exception thereto. What is everybody's business is nobody's business." In re Fullick, (W. D. Pa. 1912) 201 Fed. 463.

**Cancellation of lease.**—A referee in bankruptcy has no power to cancel a lease containing a claim requiring the tenant, who

is the bankrupt, to execute a bond with surety for the payment of at least a substantial portion of the rent for the entire term. In re Sapinsky (W. D. Ky. 1913) 206 Fed. 523.

This section is cited in the case of In re Logan, (N. D. N. J. 1912) 196 Fed. 678.

## 1912 Supp., p. 663, sec. 38a (5).

### **Employment and payment of stenographers.**

—In the case of In re Ellett Electric Co., (W. D. N. Y. 1912) 196 Fed. 400, the court reduced an allowance to a stenographer, saying: "The record consists of 53 pages, of which only about 30 are testimony. The stenographers were allowed \$62.12, which amount is inordinate. Where three duplicate copies are supplied, a charge of 40 cents per page has in other cases that have come before this court been held a fair and reasonable compensation. The assets of the estate were known to the trustee, at the time the Ellett claim against the bankrupt was before the referee, to be insufficient to pay in full the preferred claims; therefore, it would have been sufficient to have taken the substance of the evidence arising on the disputed claim, and a summary disposition would have been proper. If the claimant desired a fuller examination or more complete record, he himself should have borne the stenographer's expenses. By section 38, subd. 5, on the application of the trustee, a stenographer may be employed at the expense of the estate, but the compensation cannot exceed 10 cents per folio for reports and transcripts of the proceedings. In view of the fact that three duplicate copies were furnished, perhaps a reasonable additional compensation would not have been subject

of criticism, though I think that additional copies should be paid for by the parties desiring them. The large outlay for stenographer's fees and charges before referees and special masters in bankruptcy is a serious barrier to an economical administration of estates in bankruptcy, and such expenses should be curtailed whenever possible. In the federal courts, where there is no official stenographer, the expense for taking shorthand notes of examination and transcribing the same is usually divided by the litigants and taxed to the extent of the amount paid in favor of the prevailing party. The record in this case does not show that the trustee authorized the employment of the stenographers or objected thereto. As much of the expense was incurred in conducting the examination relating to the Ellett claim, the expense for stenographer's services should rightly fall on the defeated party, but, as no objection to the employment of a stenographer was made by the trustee, I will allow an expense not exceeding \$21.20, or 40 cents per page for the three copies of testimony to be charged against the estate. As bearing upon the right to employ stenographers in bankruptcy examinations, see In re Rozinsky (D. C.) 101 Fed. 229, and In re Todd (D. C.) 109 Fed. 265."

## 1912 Supp., p. 666, sec. 40a.

**Commissions on moneys paid to secured and unsecured creditors.**—The provisions are comprehensive enough to entitle referees to commissions on moneys paid to secured and unsecured creditors. In re Meadows, (W. D. N. Y. 1912) 199 Fed. 304.

**Extra compensation.**—To the same effect as the original note, see In re Meadows, (W. D. N. Y. 1912) 199 Fed. 304.

## 1912 Supp., p. 668, sec. 41a (1).

**Disobedience as contempt.**—To the same effect as the original note, see In re Mitchell, (E. D. N. Y. 1913) 202 Fed. 806; In re Jamaica Slate Roofing & Supply Co., (E. D. N. Y. 1913) 202 Fed. 810; In re Star Spring Bed Co., (C. C. A. 3d Cir. 1913) 203 Fed. 640; In re Fogelman, (E. D. N. Y. 1913) 204 Fed. 351.

**Contempt dependent on ability to comply with order.**—See to the same effect, In re Reynolds, (M. D. Ala. 1911) 190 Fed. 967; In re Haring, (W. D. Mich. 1912) 193 Fed. 168.

In *Stuart v. Reynolds*, (C. C. A. 5th Cir. 1913) 204 Fed. 709, the court said: "From

the evidence before him, which was of a conflicting nature, the judge was unable affirmatively to find as a fact that the bankrupt, at the time of the making of the order against him by the referee, then had in his possession or under his control either the goods or the money he was directed to turn over to the trustee of his estate. Failing to find this, it was incumbent on the judge to reverse the action of the referee and discharge the rule against the bankrupt. No other order than the one passed by him was compatible with or justified by the judge's view of the evidence and the conclusions entertained by him."

*Mere denial of ability insufficient.*—To the same effect as the original note, see *In re Weber Co.*, (C. C. A. 2nd Cir. 1912) 200 Fed. 404.

*Release from imprisonment.*—In the case of *In re Karp*, (S. D. N. Y. 1912) 196 Fed. 998, which was an application by bankrupts to be purged of contempt and be released from jail on the ground of their inability to comply with an order directing them to turn over property to the trustee, the court said: "The object of these proceedings is to compel the bankrupts to turn over the amount referred to and to uphold the dignity of the court and command obedience to law. If corrupt bankrupts believed that there is any definite period within which they may be released from custody, it may well be that some of them would willingly submit to an order for contempt as a slight penalty for the making away of assets to the detriment of merchants who have extended credit to them. On the other hand, where it appears that bankrupts are not able to respond, there must be some limit to imprisonment, for it certainly was never intended that imprisonment should be perpetual. It is never easy to discover what has become of secreted assets, but it not infrequently happens that such assets are dissipated in the efforts of the corrupt bankrupt to save himself from the penalty of the law, and to support his family obligations during a period when he is unable to get into a new business or employment."

A lawful order by the referee is a condition precedent to action by the court regarding punishment for refusal to obey it. *In re Soloway & Katz*, (D. C. Conn. 1912) 195 Fed. 100.

*Purging oneself of contempt.*—"Punishment for contempt should not be used solely for intimidation, nor in such a way as to prevent or delay the administration of the estate. The first thing to be done is to compel obedience to proper orders and to secure proper results in administration. All contempt that affects merely the authority of the court is in its nature criminal, and should not be acted upon so as to prevent opportunity for reparation. Punishment should include means to secure a proper carrying out of the steps in the bankruptcy proceeding as speedily as possible. So, if a person is in contempt for failure to do what under the bankruptcy law he should do, he should first be allowed to purge himself of the civil contempt by doing what he ought, and by putting the creditors in the position they would have been if no contempt had occurred. The question of punishment for the criminal contempt, however, can be met only by a fine or definite imprisonment, if not excused. The question of compliance with the disregarded order is like restitution of property wrongfully taken, and such a result is the right of the parties, whether or no any sentence for the criminal contempt is imposed." *In re Farkas*, (E. D. N. Y. 1913) 204 Fed. 343.

## 1912 Supp., p. 673, sec. 41a (3).

*Verification of petition to compel production of documents.*—A petition to compel the production of books and papers should be verified. *In re Soloway*, (D. C. Conn. 1912), 195 Fed. 100.

## 1912 Supp., p. 674, sec. 41b.

*Proceedings before judge — Wilful disobedience must be alleged.*—To the same effect as the original note, see *In re Soloway & Katz*, (D. C. Conn. 1912) 196 Fed. 132.

*Punishment.*—When it appears that a sentence to a fixed and absolute term of im-

prisonment has been imposed it can be justified only by showing that it was inflicted in a proceeding for criminal contempt. *In re Kahn*, (C. C. A. 2d Cir. 1913) 204 Fed. 581.

## 1912 Supp., p. 677, sec. 44a.

*Appointment by creditors.*—To the same effect as the original note, see *In re Fisher*, (M. D. Pa. 1911) 193 Fed. 104; *In re E. A. Walker & Co.*, (N. D. Ala. 1913) 204 Fed. 133; *In re Wenatchee-Stratford Orchard Co.*, (W. D. Wash. 1913) 205 Fed. 964.

*Creditor's appointment subject to approval.*—See to the same effect, *In re Margolies*, (E. D. N. Y. 1911) 191 Fed. 369.

*In re Kreuger*, (E. D. Ky. 1911) 196 Fed. 705, which was a proceeding to review an order of a referee refusing to approve the appointment of a trustee, the court said:

"By section 44 of the Bankruptcy Act provision is made that the creditors shall elect, or rather, in the language of the section, 'appoint,' the trustee; and by section 45 the sole qualification prescribed for the position by an individual is that he be 'competent to perform the duties of that office and reside or have an office in the judicial district within which they are appointed.' The sole power conferred by the Bankruptcy Act on the referee or judge in relation to the appointment of a trustee is contained in section 44, where it is provided that, if the

creditors do not appoint, 'the court shall do so.' The act, therefore, contains no provision conferring on the referee or judge the right to disapprove an appointment made by the creditors. The right so to do is to be found in General Order No. 13 (89 Fed. VII, 32 C. C. A. XVII) prescribed by the Supreme Court pursuant to section 30 of the Bankruptcy Act, which provides that 'the appointment of a trustee by the creditors shall be subject to be approved or disapproved by the referee or by the judge, and he shall be removable by the judge only.'

"Collier on Bankruptcy (8th ed.), p. 528, questions the validity of this order, but it has always been accepted by the courts as valid. They all, however, recognize that the primary right of appointment is in the creditors, that the right of disapproval is not to be lightly exercised, and that it cannot be exercised arbitrarily but only for cause. In the case of *In re Lloyd*, (D. C. Wis.) 17 Am. Bankr. Rep. 96, 148 Fed. 92, Quarles, J., said: 'It must be remembered, however, that by the terms of the act the creditors are empowered to select a trustee. It is a serious matter to disfranchise creditors, and deprive them of rights expressly conferred by the Bankruptcy Act.' And in the case of *In re Van De Mark*, (D. C. N. Y.) 23 Am. Bankr. Rep. 760, 175 Fed. 287, Judge Hazel said: 'The statute plainly and unequivocally provided that the creditors shall have the power to appoint a trustee or trustees, subject to the approval or disapproval of the referee; and this statutory right without adequate cause cannot be taken from them by the bankruptcy court.'

"The only cause for disapproval which has thus far been recognized by the courts, so far as my investigation goes, is that the bankrupt has interfered in the appointment of the trustee, so as to bring about the appointment of his choice, and it has been stated to be the only cause for disapproval. In the case of *In re Eastlack* (D. C. N. J.) 16 Am. Bankr. Rep. 529, 145 Fed. 68, which reviews all the earlier authorities, Judge Lanning says: 'These cases establish the rule that the election of a trustee by the creditors is not to be disapproved, unless there is good reason for believing that the election has been directed, managed, or controlled by the bankrupt or his attorney, or by some influence opposed to the creditors' interests.'

"Mr. Collier in his work (page 529) states this as the only ground of disapproval. In the case of *In re Hanson*, (D. C. Minn.) 19 Am. Bankr. Rep. 235, 156 Fed. 717, Judge Lochren states the law in this connection affirmatively in these words: 'But it is well settled by all the authorities that the trustee represents the creditors, and not the bankrupt, in the administration of the estate, and that it is improper that the bankrupt shall actively interfere with the matter of his selection and appointment, and that if he does interfere, and the person aided by him is appointed by votes procured by such

interference, the appointment should for that reason be disapproved.'

"Now, I do not gather, from the referee's statement of the reasons which led him to take the action complained of, that the bankrupt to any extent interfered in the election, or aided in the election or in the bringing about of the appointment, of Rodman. At any rate, such interference and aiding, if any there was, was not regarded by the referee as affecting the validity of the appointment, as he seems to have thought that the bankrupt had a right to interfere and aid. I infer this from his statement that the trustee represents alike the creditors and the bankrupt. This, however, is not correct. The trustee does not represent the bankrupt. He represents the creditors, and them alone. It is because of this that interference and aiding on the part of the bankrupt in the appointment affects its validity.

"It would seem that the sole ground upon which the referee based his action was that Rodman was the special representative of some particular interest or individuals other than the bankrupt. He does not really find that he was, but simply suspects that he was, and, that there might not be any reason to 'suspect in the least degree' that such was the case, he refused to approve the appointment. He does not intimate what special or particular interest or individuals he suspected that Rodman represented. And the only reason he gives for the suspicion is that Rodman had been repeatedly elected trustee in different and remotely separate sections of the state. There is nothing in this circumstance to indicate that in the performance of his duties he would represent the interests of anybody other than the creditors, and those of all the creditors. That he has been repeatedly appointed a trustee in bankruptcy is rather a testimonial in his favor. Its tendency is to show that heretofore he has performed the duties of trustee satisfactorily to the creditors. The case we have here, then, is a disapproval of the appointment by the creditors of a trustee, with no finding that he is under any influence antagonistic to the creditors, and with nothing but a mere suspicion that he is, and the only reason given for such suspicion favoring rather that he is not under such influence. There is no law against the repeated appointment by creditors in different cases of the same person as trustee. Such repeated appointment does not make him an official trustee.

"There is some reference in the referee's statement of reasons to the fact that Rodman lives remote from the place where the trust had to be administered. But such is not a cause of disapproval. It is sufficient that he lives or has an office in the district. The fact that the referee approved the appointment of Baumeister, who lives much farther away, and seems not to live or have an office in this district, but in the western district, and hence was not qualified for the position, indicated that he could not have attached much importance to this circum-

stance. It follows, from all that I have said, that the appointment of Mr. Rodman should have been approved."

**Appointment of attorney for trustee.**—The general rule doubtless is that a trustee should not ordinarily employ the attorney who represents the bankrupt, or an attorney who represents interests in the litigation which are adverse to the general estate, or in conflict with other interests represented by the trustee; and where there are matters

in controversy between different classes of creditors, the court will usually decline to authorize the employment by the trustee of an attorney representing one of such classes. In re Smith, (C. C. A. 6th Cir. 1913) 203 Fed. 369.

**Separate trustees for a partnership and the individual partners** may be appointed, but the power should be exercised only in case of special and peculiar necessity. In re Currie, (E. D. Mich. 1910) 197 Fed. 1012.

## 1912 Supp., p. 680, sec. 45a (1).

**Competency of trustee—Former attorney of bankrupt.**—"On general principles and in the overwhelming majority of cases, it is inexpedient that the former attorney for the bankrupt shall become his trustee. There are many and cogent reasons for so holding. One of the most obvious of these is the always existing possibility that it may become the duty of the trustee to take legal proceedings of some kind against the bankrupt. If it does, the difficulties and embarrassments which may result from recent confidential relations between the two may be of the most serious character. Moreover, for the harmonious, and therefore economical, administration of the bankrupt's estate, it is desirable, if possible, that the trustee shall not only deserve, but shall in fact have, the confidence of the creditors generally, and that his motives shall not be distrusted by even a minority of them. Such confidence is not likely to be given to one who was the adviser of the bankrupt in the commission of the act of bankruptcy, and afterwards,

by his own exertions and that of the bankrupt, contrived to have himself elected trustee. The presumptions against the eligibility as trustee of an attorney for the bankrupt are so strong that it is doubtful whether his choice should ever be confirmed, where he has solicited and obtained the assistance of the bankrupt in securing his election. In such cases the courts need not, and ordinarily, at least, should not, go into nice inquiries as to precisely how many votes had been secured by the direct or indirect influence of the bankrupt. That the *ci-devant* attorney and would-be trustee's relations with the bankrupt are still so close that the former calls upon the latter to aid him in getting votes, and the latter willingly does so, should be, as a rule, sufficient evidence to justify, if not to require, his exclusion from the trusteeship." In re Wink, (D. C. Md. 1913) 206 Fed. 348.

**An attorney for creditors** is "competent to perform the duties of that office." In re Margolies, (E. D. N. Y. 1911) 191 Fed. 369.

## 1912 Supp., p. 681, sec. 46.

The purpose of this provision of the bankruptcy law was to prevent the abatement of suits involving the estate of the bankrupt upon a vacancy in the office of the trustee, and it makes no difference how such vacancy occurs, whether by the death, removal, or

resignation of the trustee, under the law his official successor may be formally made a party to the pending proceedings, and the cause proceeded with just as though it had been originally instituted by such successor. Hull v. Burr, (1912) 64 Fla. 83, 59 So. 787.

## 1912 Supp., p. 682, sec. 47a (2).

**Construed with section seventy.**—In the case of In re Hammond, (N. D. Ohio 1911) 188 Fed. 1020, it was said that the language of the amendment of 1910 might have found a more appropriate place in section 70 of the Act (Fed. Stat. Annot. Supp. 1912, p. 811) and that the two sections must now be construed together, in view of which a trustee cannot be said to have the limited title of the bankrupt he had before the amendment.

**Collection and reduction of assets.**—To the same effect as the original note, see In re Goodman, (N. D. Ohio 1912) 196 Fed. 566.

**Trustee's right to collect assets—Prior to the amendment of 1910** a trustee in bank-

ruptcy was vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time when the trustee's title accrued. He "stood in the shoes of the bankrupt," and had no greater right; and where, under the state law, which was binding on the bankruptcy court, a chattel mortgage was valid as between the bankrupt and the mortgagee, but not against purchasers, mortgagees, or creditors, it was good as against a trustee in bankruptcy. The adjudication of bankruptcy was not an assertion of a lien, and did not put the trustee in the position of creditors who had, through process, acquired specific liens against the property covered by the mort-

gage. In other words, if the mortgage, though not filed, was good between the parties, the trustee was not a purchaser, a mortgagee, nor a lienor. But the amendment changes this rule. In *re Smith*, (E. D. Wis. 1912) 198 Fed. 876. See also *Sattler v. Sloninsky*, (E. D. Pa. 1912) 199 Fed. 592.

Since the amendment of 1910.—To the same effect as the original note, see *In re Hartdagen*, (M. D. Pa. 1911) 189 Fed. 546; *Sturdivant Bank v. Schade*, (C. C. A. 8th Cir. 1912) 195 Fed. 188; *In re Osborn*, (C. C. A. 9th Cir. 1912) 196 Fed. 257; *In re J. S. Appel Suit & Cloak Co.*, (D. C. Colo. 1912) 198 Fed. 322; *In re Dancy Hardware & Furniture Co.*, (N. D. Ala. 1912) 198 Fed. 336; *In re Kreuger*, (E. D. Ky. 1912) 199 Fed. 367; *In re Groezinger*, (N. D. Pa. 1912) 199 Fed. 935; *In re Nuckols*, (E. D. Tenn. 1912) 201 Fed. 437; *In re East End Mantel & Tile Co.*, (W. D. Pa. 1913) 202 Fed. 275; *In re Anson Mercantile Co.*, (N. D. Tex. 1911) 203 Fed. 871; *Millikin v. Second Nat. Bank of Baltimore*, (C. C. A. 4th Cir. 1913) 206 Fed. 14; *In re Waters-Colver Co.*, (E. D. N. Y. 1913) 206 Fed. 845; *Gage Lumber Co. v. McEldowney*, (C. C. A. 6th Cir. 1913) 207 Fed. 255; *In re Codori*, (M. D. Pa. 1912) 207 Fed. 784; *In re Superior Drop Forge & Mfg. Co.*, (N. D. Ohio 1913) 208 Fed. 813; *Corey v. Blackwell Lumber Co.*, (1913) 24 Idaho 642, 135 Pac. 742.

The purpose of the amendment is now reasonably clear. Under the original act several of the Circuit Courts of Appeal had held that the filing of the petition in bankruptcy amounted to a seizure of the property of the bankrupt, and conferred upon the trustee the same rights as a creditor would have obtained by the levy of an execution or attachment at the date of the filing of the petition. But in *York Mfg. Co. v. Cassell*, (1906) 201 U. S. 344, 26 S. Ct. 481, 50 U. S. (L. ed.) 782, the Supreme Court held these decisions to be unsound, and ruled that the trustee simply stood in the shoes of the bankrupt, and took the property subject to every claim that could have been urged against him. The amendment of 1910 was passed for the purpose of reinstating the rule as declared by the Circuit Courts of Appeal. The trustee, therefore, as the amendment plainly declares, "as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon." This language measures the right of the trustee. The history of the statute, as above outlined, shows that those rights are obtained by the filing of the petition in bankruptcy. That act is by the amendment given the same force as the seizure of the property under execution or attachment by a creditor, and cannot be given any retroactive effect. In *re Farmers' Co-operative Co.*, (D. C. N. D. 1913) 202 Fed. 1005. See also *In re Farmers' Supply Co.*, (N. D. Ga. 1912) 196 Fed. 990; *In re Farmers' Co-operative Co.*,

(D. C. N. D. 1913) 202 Fed. 1008; *In re Morris*, (C. C. A. 2d Cir. 1913) 204 Fed. 770; *In re Rutland-Perry Co.*, (E. D. S. C. 1913) 205 Fed. 200; *Pacific State Bank v. Coats*, (C. C. A. 9th Cir. 1913) 205 Fed. 618, Ann. Cas. 1913E 846; *Bank of North America v. Penn Motor Car Co.*, (1912) 235 Pa. St. 194, 83 Atl. 622.

"The amendment does, in fact, give to the bankruptcy proceedings the force of a 'caveat to all the world,' and in effect 'an attachment and injunction,' and the same applies to cases as well of the attempted disposition of property after bankruptcy, as to those asserting title to or lien upon the bankrupt's estate arising out of transactions antedating the bankruptcy. The effect of this change is unquestionably radical and far reaching, as regards the consequence of the institution of bankruptcy proceedings, but it is what Congress had the right to do, and carries out what in the judgment of many should be the effect of such proceeding. It makes the date of the institution of the bankruptcy proceeding the time as of which rights to and claims against the estate should be reckoned with and adjusted, and from and after which period no one creditor or claimant can secure or receive preference or advantage over another." *Waddill, J.*, in *In re Williamsburg Knitting Mill*, (E. D. Va. 1911) 190 Fed. 871, *affirmed* (1912) 193 Fed. 1020, 113 C. C. A. 87.

In *Spark v. Weatherly*, (1912) 176 Ala. 324, 58 So. 280, the court said: "We are of opinion that the clause of the amendment in question was intended to provide that as to property adversely held the trustee should be entitled to proceed in such cases and in such manner as an individual creditor might have proceeded in subjecting the assets of the bankrupt, had the bankruptcy not intervened to prevent; that no enlargement of the rights of the trustee representing creditors was intended over and above the rights conferred upon creditors themselves by the statutes of the state; that as to substantive rights the trustee is in no better position than the bankrupt or his creditors would have been, except that he may come into equity without being required to first exhaust his remedy at law, a matter of advantage to the trustee in some jurisdictions, though not in this, for in this state a creditor at large may proceed against the assets of his debtor adversely held by third persons in fraud of his rights."

And in the case of *In re Whatley Bros.*, (N. D. Ga. 1912) 199 Fed. 326, the court said: "While the courts are not in entire accord, I think it may be considered as settled now that the purpose of the act of June, 1910, was to give the trustee in bankruptcy a lien for the benefit of creditors generally, such as a creditor would have 'by legal or equitable proceedings.' Such is the plain language of the amendment, and there is no escape, so far as I can see, from the conclusion that this was the intent of Congress in its enactment. It is recognized, of course, that the main purpose of the amendatory act

of 1910 was to relieve general creditors from the situation which had been created by many decisions, notably by the decision in the York Manufacturing Company Case, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. ed. 782, by which the liens of unrecorded mortgages and conditional bills of sale, which, under the state laws, would be good as between the parties, were held as good against the bankrupt estate. But, though probably having this particular purpose more distinctly in mind, Congress gave to trustees in bankruptcy this lien, which operates generally and which attaches to all property coming into the custody of the bankrupt court. It has the same effect as a judgment at law or in equity."

The amendment of 1910 was not retroactive. *Arctic Ice Mach. Co. v. Armstrong County Trust Co.*, (C. C. A. 3d Cir. 1911) 192 Fed. 114; *In re Schneider*, (E. D. Pa. 1913) 203 Fed. 589.

A trustee represents the several creditors with varying powers and opportunities appropriate to the different status of the several creditors. *In re Stern*, (N. D. Ohio 1913) 208 Fed. 488. See also *In re Nunemaker*, (N. D. Ohio 1913) 208 Fed. 491.

**Property encumbered by liens.**—"The trustee may elect to refuse to take possession of property encumbered by liens to such an extent that there is not sufficient equity to justify administration thereon; and this not because of any want of power or jurisdiction in the court, but because it would be an abuse of official discretion on the part of the court and its officers to administer upon the property so situated. Until the trustee makes his election, all the property of the bankrupt is in the custody of the court by operation of law. Where the value of property is insufficient to pay off incumbrances, the practice is to declare it burdensome, or, in the alternative, to hold it subject to such application as the mortgagee may make to the court for the satisfaction of his lien." *In re Hasie*, (N. D. Tex. 1913) 206 Fed. 789.

**Recovery of concealed property from bankrupt.**—"When, as here, the evidence shows the recent possession by the bankrupt of thousands of dollars' worth of property and but small sales comparatively, and no money or proceeds if sold, and but a small amount of the property on hand and no uncollected accounts, no loss or destruction, etc., of goods, and, added to this, there is substantial evidence that goods were shipped away by the bankrupt as baggage and not accounted for and the bankrupt made no payments which could account for the disappearance of the proceeds if the goods were sold, we can arrive at but one conclusion, and that is that the bankrupt has either the goods or their proceeds in concealment." *Ray*, District Judge, in *In re Silverman*, (N. D. N. Y. 1913) 206 Fed. 960.

**Date of trustee's lien.**—The trustee's lien given by this section does not relate back beyond the commencement of the bankruptcy

proceedings. *In re Jacobson*, (N. D. Ga. 1912) 200 Fed. 812; *Big Four Implement Co. v. Wright*, (C. C. A. 8th Cir. 1913) 207 Fed. 535.

It has been held that, as between the trustee in bankruptcy and a creditor of the bankrupt, when a trustee is appointed his relation to the property of the bankrupt is fixed, by relation, as of the time of filing the petition, and not merely as of the date of the adjudication. *Toof v. City Nat. Bank of Paducah, Ky.*, (C. C. A. 6th Cir. 1913) 206 Fed. 250.

But in the case of *In re Rose*, (N. D. Ga. 1913) 206 Fed. 991, it was said that, in view of section 70 of the Bankruptcy Act by which the trustee of a bankrupt has title to his property as of the date he is adjudged a bankrupt, it seems that the lien given to the trustee by this section accrues and attaches as of the date the trustee takes title.

And in *Anderson v. Chenault*, (C. C. A. 5th Cir. 1913) 208 Fed. 400, it was held that the date at which the trustee's right as of a judgment or lien creditor accrues, is that of his qualification as trustee.

**Unrecorded conditional sale.**—Before the amendment, the trustee's title as against a claim under an unrecorded conditional sale, though the state law required record, did not prevail. It was to obviate this, among other things, that the section was amended. *In re Bazemore*, (N. D. Ala. 1911) 189 Fed. 236.

In the case of *In re Calhoun Supply Co.*, (N. D. Ala. 1911) 189 Fed. 537, the record presented this one question: Did the amendment of 1910 extend the rights and remedies of the trustee to those of a judgment creditor under the registration act of Alabama so as to avoid in favor of the trustee an unrecorded conditional sale. The answer was in the affirmative. The court said: "Before the amendment to the bankruptcy act, the trustee's title as against a claim under an unrecorded conditional sale, though the state law required record, did not prevail. . . . It was to obviate this, among other things, that section 47, cl. 2, subd. a, of the act, was amended by inserting the words: 'And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon.' Statement of Representative Shirley to the House of Representatives, Congressional Record, 61st Congress, 2d Session, pp. 2552-2554 (36 Stat. 840). And to vest in the trustee the same right to attack secret unrecorded liens, where record was required by the state law, as was given to the judgment creditors and others under that law. It seems to me that the language of the amendment should be construed to effectuate this result if it fairly admits of such construction. If the operation of the amendment is restricted to cases in which a creditor has in fact acquired a lien by legal or equitable proceedings, then it adds nothing to the law

as it was under the original act. By virtue of section 67 (c) of the original act the trustee was subrogated to such a lien, if created within four months, and could enforce it for the benefit of the estate. If created beyond four months from the filing of the petition, it was, of course, valid as against the trustee, under both the original and amended acts. The class of cases unprovided for by the original act and intended to be reached by the amendment, were those in which no creditors had acquired liens by legal or equitable proceedings and to vest in the trustee for the interest of all creditors the potential rights of creditors with such liens. The language admits of this construction. It recites that such trustee 'shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon.' This language aptly refers to such rights, remedies, and powers as a creditor holding such a lien is entitled to under the law, rather than to the rights, remedies, and powers of a creditor who had actually fastened a lien on the property of the bankrupt estate. It is true that the case of *In re Lausman*, (W. D. Ky. 1910) 183 Fed. 647, conflicts with this view. The construction, necessary to effectuate the intention of Congress, does not seem to me to make the amended section conflict with section 64b, cl. 5, as there stated. Under the state law, the conditional vendor has no priority over judgment creditors without notice and the amendment to the bankruptcy act places the trustee in that category. As against his right as conferred by the amended section of the act, the conditional vendor has no priority, and the order of payment provided for by section 64 is not, therefore, interfered with by not allowing the conditional vendor priority of payment."

**Rights against holder of unrecorded chattel mortgage.**—This section does not affect the priority of the holder of an unrecorded chattel mortgage over prior creditors of the mortgagor where the state law makes unrecorded chattel mortgages invalid only as against subsequent creditors of the mortgagor without notice. In *re Riehl*, (D. C. Md. 1912) 200 Fed. 455.

**Trust funds wrongfully appropriated by a bankrupt, and mingled with his own funds in a bank, do not vest in the bankrupt's trustee by virtue of the amendment to this section.** In *re M. E. Dunn & Co.*, (E. D. Ark. 1912) 193 Fed. 212, wherein the court said: "The next question to be determined is: What is the effect of the amendatory act of 1910. By the terms of that act the trustee in bankruptcy 'shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon.' The trustee, therefore, is entitled to the same rights an execution creditor would have if the money in controversy had been seized by an officer under a writ of attachment or execution, or, if deposited in the bank, a writ of garnishment had been served on the depository.

Would such proceedings defeat the claim of intervener? If a deposit is made by one describing himself as agent, attorney, or trustee, the rule of law, according to the great weight of authority, is that presumptively he is the owner of the funds, and the deposit is subject to garnishment by his judgment or attaching creditor; but this is only a presumption which may be rebutted by the principal or true owner of the funds, who, if successful, will have priority over the creditor. . . . The court can conceive of no reason why the same rule does not apply when the money is deposited by the agent in his own name without the addition of the word 'agent' or 'attorney' and mingled with his own funds. An attaching or execution creditor is not a bona fide purchaser entitled to the protection the law affords such purchasers. He can only acquire by the seizure such title or interest as the execution defendant has. The rule that, as money has no earmarks, every one is to be treated as an innocent purchaser, has been modified in cases of this nature."

**Actions by trustee—Necessity of averring deficiency of assets.**—Where a transfer is alleged to have been fraudulent as to creditors, and insolvency is alleged to have existed at the time, the trustee is in the position of a creditor who has proved by an execution returned unsatisfied that a deficiency of assets exists. There is, therefore, no necessity for its averment in the statement of claim. *Kraver v. Abrahams*, (E. D. Pa. 1913) 203 Fed. 782.

**Trespass on the case for conspiracy.**—This section as amended entitles the trustee to bring an action on the case based on a conspiracy to fraudulently secrete and transfer the property of the bankrupt. *Sattler v. Slonimsky*, (E. D. Pa. 1912) 199 Fed. 592.

**Sales of property—Determination of validity of mortgage.**—A bankruptcy court in a proceeding by the trustee asking for authority to sell the land has no jurisdiction to determine the validity of a mortgage on the land against the objection of the mortgagee, but the trustee must proceed by a plenary suit to remove the incumbrance. In *re Henderson*, (N. D. Ga. 1913) 206 Fed. 139.

**Property in the possession of the bankrupt under bailment for sale belongs to the bailor and not the trustee in bankruptcy.** In *re Reynolds*, (E. D. Ky. 1912) 203 Fed. 102.

**Real property.**—There seems to be some doubt as to whether this section applies to real estate. In *re Snelling*, (D. C. Mass. 1912) 202 Fed. 259, wherein the court said: "The debates over the amendment indicate that the attention of Congress was directed to personal property only; and the word 'custody,' on which the trustee's rights are made to depend, is wholly inapplicable to real estate. However that may be, the premises in question here have been for more than ten years, and are now, in the exclusive possession of the petitioner, who holds them under a claim of right. Under such circum-



stances, the property is certainly not in the 'custody' of the trustee, or of the court."

The law of the particular state determines the rights, remedies and powers as to the bankrupt's real estate which would belong to the creditor. *Clark v. Snelling*, (C. C. A. 1st Cir. 1913) 205 Fed. 240.

A defectively acknowledged mortgage constitutes a superior lien to the demand of a

trustee in bankruptcy. *Pacific State Bank v. Coats*, (C. C. A. 9th Cir. 1913) 205 Fed. 618, Ann. Cas. 1913E 846.

This section is cited in *In re Waite-Robins Motor Co.*, (D. C. Mass. 1911) 192 Fed. 47; *In re Downing*, (N. D. N. Y. 1912) 192 Fed. 683; *In re Merry*, (D. C. Me. 1913) 201 Fed. 369; *Crawford v. Mandell*, (Mich. 1912) 138 N. W. 705.

## 1912 Supp., p. 686, sec. 47a (11).

**Setting apart exemptions.**—To the same effect as the original note, see *In re Finklestein*, (M. D. Pa. 1912) 192 Fed. 738; *In re Kelly*, (M. D. Pa. 1912) 199 Fed. 984.

The law expressly lays upon the trustee the duty to select and set apart the exemption. In other words, if the bankrupt has clearly indicated his intention not to waive

his exemption and has also specified the particular class of property owned by him from which he claims his exemption, it then becomes the duty of the trustee to select and sever the exemption from the mass of property belonging to the estate of the character, and in the class, indicated. *In re Andrews*, (W. D. Mich. 1911) 193 Fed. 776.

## 1912 Supp., p. 689, sec. 47c.

This clause is directory only and does not affect the principle that the bankrupt's title passes by operation of law to the trustees in

bankruptcy as upon the date of his adjudication. *Hull v. Burr*, (1911) 61 Fla. 625, 55 So. 852.

## 1912 Supp., p. 689, sec. 48 (a).

**Trustee's compensation.**—To the same effect as the original note, see *In re Ellett Electric Co.*, (W. D. N. Y. 1912) 196 Fed. 400.

The provisions of this section are comprehensive enough to allow to trustees commissions on all sums disbursed by them out of the assets of the bankrupt estate, which obviously includes moneys paid for fees and expenses in the administration thereof. *In re Meadows*, (W. D. N. Y. 1912) 199 Fed. 304.

**Extra compensation.**—To the same effect as the original note, see *In re Meadows*, (W. D. N. Y. 1912) 199 Fed. 304.

**Commissions on sales of encumbered property.**—"The bankruptcy court has jurisdiction of all property in the possession of the bankrupt at the time of the filing of the petition, including that on which there are liens. It has the right to sell free from liens, to preserve the equity for the estate. It has the right to determine whether such equity exists for that purpose. If there is no equity, the property should be turned back to the lienholder. In that event, there is no reason for the administration of the property through the bankruptcy court, and for the charge against the lienholder of referee's and trustee's commissions for handling the proceeds of the sale of the property. It is difficult in many cases to determine the existence of an equity in advance of sale. However, in cases in which, upon a sale in the bankruptcy court, the property fails by a large sum to satisfy the liens upon it, it is at least *prima facie* evidence that the bankruptcy court should not have administered it, and in such cases it seems to me

that the estate should pay the commissions of the referee and the trustee, and not the lienholder. I think the amendment to the act, so far as it may be construed to authorize payment of such commissions from the proceeds of the sale of the incumbered property, can only apply to cases in which the bankruptcy court rightfully exercised its jurisdiction to sell free from liens, or where the lienholder consents to such sale. In this case there was no consent, and the property brought largely less than the amount of the liens upon it. A contrary rule would not only be unjust to the lienholder, but would put a premium upon the taking possession of incumbered property by the officers of the bankruptcy court for the purposes of administration." *Grubb, D. J.*, in *In re Holmes Lumber Co.*, (N. D. Ala. 1911) 189 Fed. 178.

But in the case of *In re Howard*, (N. D. N. Y. 1913) 207 Fed. 402, it was held that the amendatory act of 1910 settled what was before a disputed question as to the right of trustees to commissions on moneys received by them and disbursed by them, which were derived from the sales of mortgaged property, and which moneys were covered by, and properly applicable to the payment of, the lien, and that the right now clearly exists by virtue of the words "or turned over to any person, including lienholders."

**Allowance for service of custodian.**—In the case of *In re Pickhardt*, (E. D. Wis. 1912) 198 Fed. 879, a trust company, acting as trustee in bankruptcy, was held not to be entitled to an allowance for the service of a custodian. The court said: "A receiver or trustee in bankruptcy, whatever other duties may be cast upon him, is certainly the legal

and actual custodian of the property which is the subject of the proceeding; and, under the rule of this court (bankruptcy rule No. 3), a receiver, unless otherwise ordered, can 'act only as custodian to care for the property (and have the same insured) for delivery to the trustee.' It is rightly presumed that the duty to so act, as every other duty, must, in the first instance, be performed by the receiver or the trustee personally, as an incident to or burden of the office, and in consideration of whatever compensation may be allowed. The right to assistance, at the cost of the property in custody, in addition to such compensation, must arise out of circumstances or conditions disclosing a burden beyond the reasonable possibility of performance by the single individual charged therewith. Such situations are found when the property is of great bulk, situated in different localities, or where, in its care and preservation, service of a special or unusual character is required. The referee has applied these general elementary principles to a corporation—a trust company, acting in the capacity of receiver or trustee. Manifestly, such a corporation should be subject to the same rules as individuals. It can act only through its officers or agents; but it must be ready through them to perform the duties of the office or the trust, just as an individual must perform them. It is merely empowered to discharge the functions as an individual otherwise might, but not at

greater cost nor burden to the estate. This brings us to an application of these principles to the facts before us. A stock of goods located in a store building, where the bankrupt conducted his business, is turned over to the corporate receiver. The property is insured, and it is alleged that, in order to effect insurance, a caretaker was required to be and was placed in immediate charge of the property. It is not made to appear that the watchfulness thus bestowed by the receiver through his hired servant—at the behest of the insurer—was something beyond or in addition to the service contemplated to be performed by an individual or corporate receiver, charged solely with a custodianship. The intimation that, except for the demand made by the insurer, the receiver would not have placed a watchman in direct charge of the property, by no means satisfies the requirement of reasonable necessity in casting an additional burden upon the property. The presence of a watchman is necessary, if at all, as an incident to the general custodianship involving the particular duty to insure, and the service thus rendered is, as above stated, one which the receiver or trustee personally must perform, unless absolved by reason of situations arising as indicated. The necessity for its performance by an agent or another cannot arise out of or be demonstrated by the mere fact of its being so performed."

### 1912 Supp., p. 690, sec. 48 (d).

**Attorney's fees.**—The Bankruptcy Act does not contemplate that the number of attorneys employed shall enter into the allowance of attorney's fee, but that the allowances shall be made as though one attorney was employed. In *re Falkenberg*, (D. C. N. M. 1913) 206 Fed. 835.

Services performed in obtaining the receiver's appointment, or other matters purely preliminary to such appointment, are rendered, not to the receiver, but in the interest of the moving creditors; and this is a matter for settlement as against the estate in the hands of the trustee, when the question of an allowance to the moving creditors is sought under section 62 of the Bankruptcy

Act. In *re Falkenberg*, (D. C. N. M. 1913) 206 Fed. 835.

"A mere custodian" means one whose services are merely those of a keeper. It does not include everyone not carrying on the business of the bankrupt, but a person discharging general duties as a receiver, not limited to those of a custodian, may be allowed compensation within the limits specified in the general provision of this clause. In *re Ginsburg*, (E. D. Tenn. 1913) 208 Fed. 160.

For allowances under this section, see In *re Charles Knosher & Co.* (C. C. A. 9th Cir. 1912) 197 Fed. 136.

### 1912 Supp., p. 692, sec. 48 (e). [*Compensation for conducting business.*]

**Amount of compensation.**—As much as 12 per cent. on the first \$500 or less, and 8 per cent. on moneys in excess of \$500 and less than \$1,500, may be allowed receivers who carry on the business. In *re Falkenberg*, (D. C. N. M. 1913) 206 Fed. 835.

**Continuing business for remainder of day.**—Where a receiver, who took possession of

the business of a bankrupt, allowed the employees of the bankrupt to continue the business for the remainder of the day, he was held not to be conducting the business within the meaning of this section so as to receive compensation therefor. In *re Charles Knosher & Co.*, (C. C. A. 9th Cir. 1912) 197 Fed. 136.

**1912 Supp., p. 692, sec. 48 (e).** [*Notice to creditors.*]

**Sufficiency of notice.**—Where the only notice given creditors, of an application for an allowance of compensation to a receiver, is that the receiver's report will be submitted for approval by the referee on a date

named, it is insufficient, as it should show the amount asked for by the receiver. In re Falkenberg, (D. C. N. M. 1913) 206 Fed. 835.

**1912 Supp., p. 700, sec. 57a.**

**Necessity and manner of proving claims—In general.**—Under the Bankrupt Law, creditors have an interest in each claim presented, and a right to know its nature. They can know this only through the proof of claim. The statement of the claim and of its consideration must be full and explicit, in order to enable creditors to investigate its adequacy. A claim cannot be said to be "proved," and entitled to allowance, unless the proof of it is properly verified, and gives sufficient facts to advise the creditor of its justice and legality, and the consideration for it. In re United Wireless Telegraph Co., (D. C. Me. 1912) 201 Fed. 445.

**Positive averments.**—The vital facts to

support a proof of claim should be made to appear by positive averments, founded upon the deponent's knowledge, and not upon his belief. In re United Wireless Telegraph Co., (D. C. Me. 1912) 201 Fed. 445.

**Amendment of proof.**—To the same effect as the original note, see In re Fairlamb, (E. D. Pa. 1912) 199 Fed. 278.

**Who may prove claims—Proof by assignee.**—To the same effect as the original note see In re McCarthy Portable Elevator Co., (D. C. N. J. 1913) 205 Fed. 986.

The provability of a claim depends upon its status at the time the petition is filed, and not at a time subsequent. In re Simon, (W. D. N. Y. 1912) 197 Fed. 105.

**1912 Supp., p. 702, sec. 57b.**

**Failure to file a written instrument.**—To the same effect as the original note, see Kelsey v. Munson, (C. C. A. 8th Cir. 1912) 198 Fed. 841.

This section is cited in the case of In re Greenfield, (E. D. Pa. 1912) 193 Fed. 98.

**1912 Supp., p. 703, sec. 57c.**

**Sufficient filing.**—Proof that a claim was delivered to an employee of the trustee does not show a filing without proof that the delivery was made at the trustee's office, and proof of the capacity in which the person to whom the claim was delivered was employed, if it also appears that the claim was never in fact filed in the trustee's office. In re Lathrop, Haskins & Co., (C. C. A. 2d Cir. 1912) 197 Fed. 164.

**Creditor non compos mentis.**—A creditor, not actually insane, but *non compos mentis*, who has not been adjudged as incapable by a court of competent jurisdiction, and who has no guardian or committee, may file a claim in a bankruptcy court by his next friend. In re Kronberg, (E. D. Ark. 1913) 208 Fed. 203.

**1912 Supp., p. 703, sec. 57d.**

**Allowance of claims—Effect of formal proof.**—A sworn proof of claim is prima facie evidence of its allegations, even in case the claim is objected to. Bankruptcy proceedings are somewhat summary in their character, and the proof of claim is regarded as a deposition rather than a pleading. It has the force of evidence. In re United Wireless Telegraph Co., (D. C. Me. 1912) 201 Fed. 445.

**Necessary steps.**—"Three steps are necessary to complete the allowance of a claim. Section 57a shows how a claim shall be 'proved.' This is the claimant's act. Section 57c provides that proved claims 'may, for the purpose of allowance, be filed.' Filing is the ministerial act of the clerk or referee. That filing is not allowance is estab-

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lished by the language that the claim is filed 'for the purpose of allowance.' It may be that the command of section 57d, 'shall be allowed upon receipt by or upon presentation to the court,' would entitle a claimant to an order of allowance instantan unless objections were at once interposed, or unless the court upon its own motion should postpone consideration. But 'allowance,' different from the party's act of 'proving' and the ministerial act of 'filing,' is a judicial act. This is found, not only by comparing with each other the several provisions of section 57, but also by recurring to section 2 (2), relating to the powers and duties of bankruptcy courts, wherein the acts of allowing, disallowing, and reconsidering claims are all given the same quality. In practice it may

be common to forego formal orders of allowance, and to treat as allowed, for purposes of distributing dividends, all claims to which objections have not been filed. But the inclusion of proved and filed claims in an order of distribution may be considered as an indirect order of allowance. Until a direct or indirect order of allowance is made, objections may properly be filed. And, until a direct or indirect order of allowance is made, it is not necessary to proceed under section 57k and l, for a reconsideration of a claim and a recovery of dividends already paid." In re Two Rivers Woodenware Co., (C. C. A. 7th Cir. 1912) 199 Fed. 877.

*The allowance need not be for the full amount but may be for a part of the amount.* In re Goldstein, (D. C. Mass. 1912) 199 Fed. 665.

**Objections to allowances — Who may object.**—"The claimant says that after the trustee has been elected and has qualified he is the proper person, and the only proper person, to dispute the validity of claims made against the estate. If this contention be correct, it still remains true that upon applications of creditors the court will in a proper case instruct the trustee to contest what appear to be doubtful claims, provided the objecting creditors will indemnify the estate against the cost of so doing. In this case the creditors by making their objections and conducting the controversy in their own names voluntarily assumed liability for costs and expenses. Now that the case has been fully presented, to ignore all that had been done, and to instruct the trustee to begin the litigation over again, would be to carry respect for technical regularity too far. It would be wasting both time and money." Rose, D. J., in In re Canton Iron & Steel Co., (D. C. Md. 1912) 197 Fed. 767.

## 1912 Supp., p. 704, sec. 57e.

**Proof of secured claim not obligatory.**—To the same effect as the original note, see Ward v. First Nat. Bank of Ironton, Ohio, (C. C. A. 6th Cir. 1913) 202 Fed. 609.

**Security received from surety.**—Where a creditor had received from the debtor's surety, as additional security, a note given by

**Duty of referee.**—A referee is not justified in allowing a claim against an estate in bankruptcy when the proofs filed do not comply with the statute or general orders promulgated by the Supreme Court, whether creditors or the trustee raise specific objections to the sufficiency of the proofs filed or not. It is the duty of the referee to examine the proofs filed and see that they are sufficient. As a rule a majority of the creditors of a bankrupt cannot afford to go to the expense of employing an attorney to attend and examine the claims filed, and the duty rests on the referee before allowing a claim to see to it that the proofs filed comply with the statute and general orders. In re Goble Boat Co., (N. D. N. Y. 1911) 190 Fed. 92.

**"Parties in interest"** include all persons who have an interest in the res which is to be administered. Rosenbaum v. Dutton, (C. C. A. 8th Cir. 1913) 203 Fed. 838.

It has been held that "parties in interest" do not include stockholders of a bankrupt company who may be assessed to pay the debt which they seek to have expunged. In re Pittsburg Lead & Zinc Co., (W. D. Mo. 1912) 198 Fed. 316.

**Form of objections.**—To the same effect as the original note, see Spencer v. Lowe, (C. C. A. 8th Cir. 1912) 198 Fed. 961.

**"Duly proved."**—A claim is not "duly proved" when on its face the proofs fail to comply with the general orders promulgated by the Supreme Court as to the proof of claims. In re Goble Boat Co., (N. D. N. Y. 1911) 190 Fed. 92.

This section is quoted in the case of In re Goble Boat Co., (N. D. N. Y. 1911) 190 Fed. 92.

the debtor to the surety, it was held that the creditor had the right, on the subsequent bankruptcy of the debtor, to receive dividends both on the note and on the original claim for which he received the note as additional security. In re H. V. Keep Shirt Co., (S. D. N. Y. 1912) 200 Fed. 80.

## 1912 Supp., p. 706, sec. 57f.

**Determination.**—The presentation of a promissory note, accompanied by a duly verified claim, throws upon the objecting creditor the burden of furnishing some evidence to rebut that furnished by possession of the note and by the verified allegations of the claim. In re Schwarz, (E. D. N. Y. 1912) 200 Fed. 309.

**Objections by trustee.**—A trustee in bankruptcy can avail himself of only those defenses to a claim on a note which would have been available to the maker of the note. In re Schwarz, (E. D. N. Y. 1912) 200 Fed. 309.

## 1912 Supp., p. 706, sec. 57g.

**Surrender essential.**—To the same effect as the original note, see Cooper v. Miller, (C. C. A. 6th Cir. 1913) 203 Fed. 383; In re

Greenberger, (N. D. N. Y. 1913) 203 Fed. 583.

The surrender clause of the statute is in-

tended simply to prevent a creditor from creating inequality in the distribution of the assets of the estate by retaining a preference and at the same time collecting dividends from the estate by the proof of his claim against it, and consequently whenever the preference has been abandoned or yielded up, and thereby the danger of inequality has been prevented, such creditor is entitled to stand on equal footing with other creditors and prove his claims. *In re Elletson Co.*, (N. D. W. Va. 1912) 193 Fed. 84.

### 1912 Supp., p. 709, sec. 57h.

**Sale of mortgaged property.**—In the case of *In re Rose*, (E. D. Ky. 1911) 193 Fed. 815, it was held that it was error for a referee to order the sale of mortgaged personalty, to wit, an organ belonging to the bankrupt, under the circumstances shown, it appearing that the mortgage was so large as to leave no equity in the mortgagor. The court said: "The claim of the trustee was that, there being nothing in the organ for general creditors, it was burdensome to the bankrupt's estate. The fact is that the real burden of the trustee's taking possession and selling it will fall on the mortgagee. The proceeds of the mortgaged property will have to bear the expense of selling it. What ought to be done is for the trustee to negotiate with the mortgagee, and see if he will not take the organ in satisfaction of his claim. I have no doubt that he will do so. In this way regard will be had for his interest, and the estate will be saved any claim to share in the funds for general distribu-

"Any creditor" does not include a secured creditor though of course, if a secured creditor attempts to have his claim allowed as an unsecured claim for any sum in excess of the value of his security, he comes clearly within the terms of this section. He can not have the excess allowed without surrendering the preference. *In re Keystone Press*, (D. C. Minn. 1913) 203 Fed. 710.

tion. If he will not take it, still the property should be rejected, for there is nothing in it for the general creditors. A sale is not essential to ascertain how much the mortgagee should be allowed to prove against the general estate. Section 57h (Act July 1, 1898, c. 541, 30 Stat. 560) provides other means than conversion into money for the ascertainment of the value of the security in order to know how much the secured creditor can be allowed to prove against the general estate. I do not mean to hold that in no case is it proper for the trustee to convert into money incumbered property where the incumbrance exceeds the value of the incumbered property. I simply hold that in this case it is not proper. Regard for the interest of the mortgagee when no good will come of it to the bankrupt estate or the settlement thereof is sufficient to lead me to hold that in this case it is not proper for the trustee to take possession of the property involved here and sell it."

### 1912 Supp., p. 710, sec. 57j.

**Penalties imposed on a corporation for failure to return an increase of capital stock.**—To the same effect as the original note, see *Commonwealth v. Pennsylvania v. York Silk Mfg. Co.*, (C. C. A. 3d Cir. 1911) 192 Fed. 81, *affirming* (M. D. Pa. 1911) 188 Fed. 735.

**Penalty or forfeiture.**—A recovery on a recognizance is essentially the recovery of a penalty, and is a forfeiture. *In re Caponigri*, (S. D. N. Y. 1912) 193 Fed. 291, wherein the court said: "In substance, an obligation is penal when its amount is measured neither by the obligee's loss nor

by the valuation placed by him upon what he has given in exchange. Here the recognizance was clearly of that sort. The sum was fixed at so much that its prospective loss would presumably coerce the defendant to appear or the bail to produce him. It had, of course, no relation to any loss suffered by the United States or anything given by it; for it is perverted to regard the failure to try the defendant as being valued by the United States at so much money, or his temporary freedom from arrest as being exchanged for the sum of the recognizance."

### 1912 Supp., p. 711, sec. 57k.

**Who may apply for reconsideration—Trustees.**—To the same effect as the original note, see *In re Mexico Hardware Co.*, (D. C. N. M. 1912) 197 Fed. 650.

**Remedy of creditors dissatisfied with allowance of claim of other creditor.**—Where a general creditor is dissatisfied with the allowance of the claim of another creditor, his proper remedy is a demand upon the trustee to move for a reconsideration or review of

such claim, or, if the trustee upon demand declines to act, then by a motion to the District Court that the trustee be required to move, or that the objecting creditor be permitted to move in his own name. *In re Mexico Hardware Co.*, (D. C. N. M. 1912) 197 Fed. 650.

**Laches.**—A delay of more than one year, without other facts appearing, and before a dividend has been declared or paid, is not of

itself such laches as to bar a re-examination. In *re Globe Laundry*, (M. D. Tenn. 1912) 198 Fed. 365, wherein the court said:—

"Section 57k of the Bankruptcy Act provides that claims which have been allowed may be reconsidered for cause 'before, but not after, the estate has been closed.' This provision indicates that as a general rule reconsideration should be allowed before the estate has been closed, there being no other limitation expressed in the Act as to the time within which such reconsideration may be made.

"It is true that in *Loveland on Bankruptcy* (4th Ed.) § 349, p. 721, it is said that: 'A trustee has been held to be barred by laches to petition for a re-examination of a claim once allowed.'

"Two cases are cited in support of this proposition. In one, *In re Hinckel Brewing Co.*, (D. C.) 123 Fed. 942, it was held that where the claim of a landlord for rent of premises occupied by the bankrupt's receiver had been filed against the estate and allowed without objection, and so stood until after the receiver had settled his accounts and been discharged and no claim therefor could be made against him, the trustee was precluded by reason of laches from thereafter

having the allowance reviewed; the basis of this decision being that to allow a review at that time would aid in the perpetration of a fraud upon the claimant, who, relying upon the allowance of the claim, had changed his position for the worse and lost remedies he might otherwise have asserted. In the other, *In re Hamilton Furniture Co.* (D. C.) 116 Fed. 115, it was held that, where one creditor petitioned for the re-examination and disallowance of a number of claims after they had been allowed and participated in a dividend, and the trustee appeared and objected to the re-examination of such claim, the petitioning creditor was barred by his laches.

"I am of opinion that these cases rest upon entirely different principles from that involved in the present case. In the only one of these cases which deals with a petition of the trustee for re-examination of claims, namely the *Hinckel Brewing Co.* case, the trustee's petition was disallowed for laches that if not held a bar would have worked great prejudice to the creditor whose claim had been allowed, by reason of the change of status. No such state of affairs is shown here."

## 1912 Supp., p. 712, sec. 57m.

**Amendment after one-year period.**—A creditor who proves a claim as unsecured may, after the lapse of a year from the adjudication, amend the proof so as to assert that it is secured, where the failure to make the proper proof of the claim in the first place was a mere mistake which hurt no one. *Maxwell v. M'Daniels*, (C. C. A. 4th Cir. 1912) 195 Fed. 426, wherein the court said: "An amendment changing a claim from a secured or preferred to an unsecured claim does not make a new claim. A creditor may waive or release his security. If the circumstances are such that under the general rules of law applicable to like transactions he would in other tribunals be estopped from recalling his waiver or questioning his release, he is equally estopped in bankruptcy. Acts relied on as a waiver or a release must either be done with intent to waive or to release or else they must be such as might

reasonably have led, and in point of fact did lead, other persons to act to their hurt upon the assumption that the waiver or release had been made. There is nothing in the record to show that either the trustee or any of the other creditors are to-day in any different position from that which they would have occupied had the claim been originally proved as a secured one. When the creditor first filed the claim in the bankruptcy proceedings, she did not intend to waive or release security. At that very time through her attorney at law and in fact she gave public, though oral, notice that she relied upon it. The referee then allowed it as a secured claim. Everything which happened in the bankruptcy proceedings shows that the failure to make the proper proof of the claim in the first place was a mere mistake and a mistake which hurt no one."

## 1912 Supp., p. 712, sec. 57n.

**Time for proving claims—One-year limitation.**—To the same effect as the original note, see *In re Lathrop, Haskins & Co.*, (C. C. A. 2d Cir. 1912) 197 Fed. 164.

One, if not the main, object of the Bankruptcy Act is to secure equality of distribution of the bankrupt's estate among his creditors. The clause requiring the proving of claims within the year, while in the nature of a limitation upon the creditors' rights, is clearly intended to facilitate the liquidation of bankrupts' estates. To administer such estates, it is needful to know

the amount of the claims that are to share the assets, and the year limit for proving such claims is primarily for such purpose. That it operates to exclude claims not proven within such period is but incidental. In *re McCarthy Portable Elevator Co.*, (D. C. N. J. 1913) 205 Fed. 986.

In *In re Knosco*, (N. D. Ohio 1913) 208 Fed. 201, the court said: "A long line of decisions by the federal courts, district and of appeals, holds that this section is not only a limitation of the time within which claims may be proven, but that it is a prohibition

upon the court to allow claims subsequent to the expiration of one year; and such is the judgment of the commentators on the Bankruptcy Act. The latest decision dealing extensively with the subject is that of *In re Meyer*, (D. C. Ore. 1910) 181 Fed. 904. . . . Indeed, this seems to be the necessary conclusion, giving to the language of the statute its ordinary meaning. None of these authorities, however, nor the cases upon which they are based, refer to the case of *Bailey v. Glover*, (1874) 21 Wall. 342, 22 U. S. (L. ed.) 636, a case under the old Bankruptcy Act, in which it is contended the Supreme Court takes a position inconsistent with the construction so unanimously placed upon section 57n. We have read this decision two or three times, with sympathy for the proposition that the court, if possible, should so construe section 57n that the fruits of a fraudulent concealment of assets should not be realized upon; but we are unable to find in this case an answer to the great current of authority, which declares that the section under consideration should be construed as it reads. The section of the act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517) under consideration in *Bailey v. Glover* was simply a statute of limitation touching the maintainability of an action at law or in equity, in which any person claimed an interest adverse to the interest of the bankrupt estate in the property involved. The court holds this statute to be substantially section 5057 of the Revised Statutes, modified to suit the aim of the bankruptcy law to secure the speedy disposition of the bankrupt's assets, and applies to the statute the principle which is common to most statutes of limitation that in case of fraud they begin to run only when the cause of action is known. A little thought, it seems to us, will show the distinction between the statute of limitation and the language of section 57n and the things with which it deals.

*Other creditors not injured by neglect.*—Neglect in proving a claim until the year allowed by the Bankruptcy Act has nearly expired cannot affect the rights of a creditor where other creditors have not been injured and will not be injured by the creditor's delay. *In re Dunlap Carpet Co.*, (E. D. Pa. 1913) 206 Fed. 726.

*Cannot allow claim nunc pro tunc.*—To the same effect as the original note, see *In re Co-Operative Knitting Mills*, (E. D. N. Y. 1913) 202 Fed. 1016.

## 1912 Supp., p. 716, sec. 58a (4).

*Notice of confirmation of sale.*—This section does not require the giving of notice to a creditor of an application to confirm a sale. *In re Nevada-Utah Mines & Smelter Corporation*, (S. D. N. Y. 1912) 198 Fed. 497.

## 1912 Supp., p. 717, sec. 58c.

*In the preliminary matter of calling a meeting of creditors to authorize a trustee to interpose objection to a bankrupt's discharge the general provisions of this section apply.* *In re Hockman*, (E. D. Pa. 1912) 205 Fed. 330.

*Time of proving claims liquidated by litigation.*—To the same effect as the original note, see *In re Salvator Brewing Co.*, (C. C. A. 2d Cir. 1912) 193 Fed. 989; *In re Venstrom*, (W. D. Wash. 1913) 205 Fed. 325; *In re Cahill*, (N. D. Ohio 1912) 208 Fed. 193.

*The phrase "liquidated by litigation."*—In the case of *In re Lyons Beet Sugar Refining Co.*, (W. D. N. Y. 1911) 192 Fed. 445, the court said: "The trustee further contends that the words 'liquidated by litigation' were intended to preserve solely to litigant creditors their rights against the bankrupt estate, and not to a surety on an appeal bond in an action between the bankrupt and a third party; but I am unable to agree with this contention."

*Amendment after one-year period.*—To the same effect as the original note, see *In re Basha*, (S. D. N. Y. 1912) 193 Fed. 151; *In re Basha*, (C. C. A. 2d Cir. 1912) 200 Fed. 951.

*Final dividend declared before expiration of year.*—This section does not prevent the declaration of a final dividend after four months, and before the expiration of the year limited, as provided for in sec. 65b of this act. Therefore after a decree of final distribution is made at the expiration of four months it will not be set aside on petition of creditors. *In re Coulter*, (W. D. Pa. 1913) 206 Fed. 906.

*A claim of ownership of property adverse to the bankrupt and his estate is not the sort of claim affected by this section.* *Nau-man Co. v. Bradshaw*, (C. C. A. 8th Cir. 1912) 193 Fed. 350, wherein the court said: "The context of paragraph 'n' read with the associated paragraphs of the section shows that the ordinary debts or demands against the estate were intended, and not adverse claims of title which are ordinarily asserted by intervention in the bankruptcy proceedings. For the former the section prescribes in detail the method of proofs and allowance, but for the latter a compliance with the ordinary practice in equity is sufficient. An assertion of ownership of property in the possession of the trustee, or of its proceeds in a case like that here, is not one of a debt of the bankrupt or of his estate. Indeed, it not infrequently happens that the claimant of property or its proceeds in the possession of the trustee is not even a creditor of the bankrupt and has no debt or demand against his estate."

## 1912 Supp., p. 717, sec. 59a.

**Corporations.**—In the case of *In re Guancevi Tunnel Co.*, (C. C. A. 2d Cir. 1912) 201 Fed. 316, there was an adjudication in voluntary bankruptcy of a mining corporation created by the laws of Arizona. The court said: "The petitioner contends that the voluntary petition was filed without authority, because he alleges that the corporation is solvent (in the sense of the Bankrupt Law), and because only the majority of shareholders can, by the laws of Arizona, dissolve a corporation prior to the time fixed in the articles of incorporation. We will examine this contention, although we think it is one which a creditor has no standing to make in the case of a voluntary petition. The petition offers to surrender all the company's assets for the benefit of its creditors, and does not ask for the dissolution of the corporation. Only the state of Arizona,

which created the corporation, can dissolve it. There is nothing to show what authority is given to the directors by the charter and by-laws. In the absence of any restriction, by statute or by the charter and by-laws, the power of the board to make a general assignment of the property of a corporation which is unable to meet its current obligations for the benefit of creditors or to apply for a receivership is to be presumed. The voluntary petition for adjudication as a bankrupt is tantamount to such proceedings. The petition charges that the corporation is unable to meet its current obligations, which is commercial insolvency. The Bankruptcy Act itself permits any person who owes debts to file a petition to be adjudicated. 'Any qualified person may file a petition to be adjudged a voluntary bankrupt.' Section 59a."

## 1912 Supp., p. 718, sec. 59b.

## I. WHO MAY FILE PETITION IN INVOLUNTARY BANKRUPTCY.

**Creditors having provable claims.**—To the same effect as the original note, see *In re Wyoming Valley Co-Op. Ass'n*, (M. D. Pa. 1912) 198 Fed. 436.

**Creditors who are stockholders.**—Creditors of a corporation who happen also to be stockholders and directors in the company are not precluded by reason of such relation from commencing proceedings in involuntary bankruptcy against the corporation. But the stockholders of a corporation have no standing either as representatives of the corporation or its creditors to file a petition for the involuntary bankruptcy of the corporation. *In re Eureka Anthracite Coal Co.*, (W. D. Ark. 1912) 197 Fed. 216.

A relative within the third degree by affinity may be a sole petitioner in an involuntary proceeding under the second clause

of this section. *Perkins v. Dorman*, (D. C. N. M. 1913) 206 Fed. 858.

**Disqualification of creditors as petitioners**—*Having receivers appointed.*—Of similar effect to the original note, see *In re Gold Run Mining & Tunnel Co.*, (D. C. Colo. 1912) 200 Fed. 162.

## II. FORM, AVERMENTS, AND AMENDMENTS OF PETITION.

**Number of creditors and amount of claims.**—To the same effect as the original note, see *In re Stone*, (E. D. Pa. 1913) 206 Fed. 356.

**Averment of commission of act of bankruptcy.**—To the same effect as the original note, see *In re Stone*, (E. D. Pa. 1913) 206 Fed. 356.

**Amendment of petition.**—To the same effect as the original note, see *In re Richardson*, (D. C. Mass. 1911) 192 Fed. 50.

## 1912 Supp., p. 727, sec. 59e.

The purpose of this section is plain. Employees and near relatives are presumably under the influence of, or at least in sympathy with, the alleged bankrupt. If these may be counted as creditors to defeat a proceeding by less than three creditors, the temptation will often exist to use them fictitiously for such purpose, and thus to defeat the ends of the act. Congress, by the provision above quoted, says that this may not be done, and plainly indicates that if it is sought to oust

the jurisdiction of a bankruptcy court, by proof that a sufficient number of creditors out of the total list of creditors have not moved, the latter list must be made up of those who are clearly creditors, not those who, by reason of their relationship to the defendant, may in all probability be only colorably such. The intent is to remove the temptation and danger of using employees and relatives by way of defense. *Perkins v. Dorman*, (D. C. N. M. 1913) 206 Fed. 858.

## 1912 Supp., p. 727, sec. 59f.

**Opposing petition—Involuntary proceedings.**—A creditor whose debt is in part secured by a chattel mortgage has a clear right to make a defense against the adjudication of his debtor in bankruptcy. *Johansen Bros. Shoe Co. v. Allee*, (C. C. A. 8th Cir. 1912) 197 Fed. 274.



## 1912 Supp., p. 729, sec. 59g.

This section is cited in *In re Sig. H. Rosenblatt & Co.*, (C. C. A. 2d Cir. 1912) 193 Fed. 638.

## 1912 Supp., p. 729, sec. 60a.

## I. CREATION OF PREFERENCES.

**In general.**—A preference was valid at common law, and is not rendered tortious by the Bankruptcy Act, nor is it penalized in any other way than is expressly pointed out in that act. *Wilson v. Mitchell-Woodbury Co.*, (1913) 214 Mass. 514, 102 N. E. 119.

The object of the section is to enforce equality among the bankrupt's creditors. *Utah Ass'n of Creditmen v. Boyle Furniture Co.*, (Utah 1913) 136 Pac. 572.

Sections 3a and this section as amended by the act of 1903 are to be construed in harmony. *In re Donnelly*, (N. D. Ohio 1912) 193 Fed. 755.

**Fraudulent transfers that are not preferences** are not covered by this section. *Underleak v. Scott*, (1912) 117 Minn. 136, 134 N. W. 731.

**Preference created by judgment.**—To the same effect as the original note, see *Grant v. National Bank of Auburn*, (N. D. N. Y. 1912) 197 Fed. 581.

**Preference created by transfer.**—To the same effect as the original note see *In re Tomlinson*, (E. D. N. Y. 1912) 193 Fed. 101; *Brown City Savings Bank v. Windsor*, (C. C. A. 8th Cir. 1912) 198 Fed. 28; *In re Watson*, (E. D. Ky. 1912) 201 Fed. 962; *In re Stiger*, (D. C. N. J. 1913) 202 Fed. 791; *In re Farmers' Co-operative Co.*, (D. C. N. D. 1913) 202 Fed. 1005; *Collett v. Bronx Nat. Bank*, (C. C. A. 2d Cir. 1913) 205 Fed. 370; *In re Jacob Y. Shantz & Son Co.*, (W. D. N. Y. 1913) 205 Fed. 425; *Northern Neck State Bank v. Smith*, (C. C. A. 4th Cir. 1913) 205 Fed. 894.

Where a creditor procures a judgment against an insolvent debtor, and thereafter procures execution thereon to be issued and levied on personal property of the debtor, and at the execution sale such property is sold and the proceeds of the sale paid to the creditor in satisfaction of the debt, such execution sale and payment of the proceeds thereof constitutes a transfer of his property by the debtor, within the meaning of those words as used in the act. *Galbraith v. Whitaker*, (1912) 119 Minn. 447, 138 N. W. 772, 43 L.R.A.(N.S.) 427.

**Money is "property"** within the meaning of this section. *In re Starkweather*, (W. D. Mo. 1913) 206 Fed. 797.

**A transfer of exempt property like a homestead** does not constitute a preference. *Huntington v. Baskerville*, (C. C. A. 8th Cir. 1911) 192 Fed. 813.

**Money due from a bankrupt as trustee**, and which cannot be distinguished from any other moneys in his possession or under his control, or which is due from him only because he has used trust funds for his own purposes, or otherwise misapplied them, can-

not be considered as property held by the bankrupt in trust, and a transfer of the same creates a preference when the other elements of a preference are present. *In re Dorr*, (C. C. A. 9th Cir. 1912) 196 Fed. 292.

**Transfer made to another for creditor's benefit.**—To constitute a preference, it is not necessary that the transfer be made directly to the creditor. It may be made to another for his benefit. If the bankrupt has made a transfer of his property, the effect of which is to enable one of his creditors to obtain a greater percentage of his debt than another creditor of the same class, circuitry of arrangement will not avail to save it. A "transfer" includes "the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security." Sec. 1 (25). It is not the mere form or method of the transaction that the act condemns, but the appropriation by the insolvent debtor of a portion of his property to the payment of a creditor's claim, so that thereby the estate is depleted and the creditor obtains an advantage over other creditors. The "accounts receivable" of the debtor, that is, the amounts owing to him on open account, are of course as susceptible of preferential disposition as other property; and if an insolvent debtor arranges to pay a favored creditor through the disposition of such an account, to the depletion of his estate, it must be regarded as equally a preference whether he procures the payment to be made on his behalf by the debtor in the account—the same to constitute a payment in whole or part of the latter's debt—or he collects the amount and pays it over to his creditor directly. This implies that, in the former case, the debtor in the account, for the purpose of the preferential payment, is acting as the representative of the insolvent and is simply complying with the directions of the latter in paying the money to his creditor.

But, unless the creditor takes by virtue of a disposition by the insolvent debtor of his property for the creditor's benefit, so that the estate of the debtor is thereby diminished the creditor cannot be charged with receiving a preference by transfer. *Western Tie & Timber Co. v. Brown*, (1905) 196 U. S. 502, 509, 25 S. Ct. 339, 49 U. S. (L. ed.) 571; *Rector v. City Deposit Bank Co.*, (1906) 200 U. S. 405, 419, 26 S. Ct. 289, 50 U. S. (L. ed.) 527. "These transfers of property, amounting to preferences, contemplate the parting with the bankrupt's property for the benefit of the creditor and the consequent diminution of the bankrupt's estate." *National Bank of Newport, N. Y. v. National Herkimer County Bank of Little Falls*,

(1912) 225 U. S. 178, 32 S. Ct. 633, 56 U. S. (L. ed.) 1042.

*Where property is transferred to a person on his promise to give security and after giving the security he becomes a bankrupt* the general creditors cannot defeat the security given in good faith, when but for the promise of it the person would never have come into possession of the property. *Greey v. Dockendorff*, (1913) 231 U. S. 513, 34 S. Ct. 166.

*Securities delivered by a broker to a bank* immediately preceding his bankruptcy to secure a loan made by the bank held under the circumstances shown to be a preference, *National City Bank of New York v. Hotchkiss*, (1913) 231 U. S. 50, 34 S. Ct. 20; *Mechanics' & Metals Nat. Bank of New York v. Ernst*, (1913) 231 U. S. 60, 34 S. Ct. 22.

*Transfer of newspaper route.*—In the case of *In re Martin*, (C. C. A. 3d Cir. 1912) 200 Fed. 940, it appeared that the bankrupt had acted as "agent" of several metropolitan newspapers and owed the publishers about \$2000. His arrangement with them had existed for several years. It was verbal and informal, but its terms appeared with sufficient clearness. In reality, he was not an agent at all in the usual meaning of that word, but a wholesale buyer and a retail seller of newspapers. The publishers were willing to give him certain advantages in the market, but they did not agree to sell exclusively to him, although in practice they sold to no other person in the city. As long as he paid his bills regularly it was likely that he would be the only person to receive their journals, but they were under no contract to that effect. They did not pay him for what he did. His profits came solely from selling at a higher price than he paid. His subscribers were under contract with him, and not with the publishers. Neither he nor the publishers were bound to continue the relation. In order to secure money to pay the publishers he went through the form of selling his route to third parties who advanced him the money and they went through the form of agreeing to sell it back to him whenever he should repay the money advanced. The publishers had knowledge of the agreement but expressly stipulated that their own rights should not be affected in any way thereby to their prejudice, and that they should remain free to protect their own interests in any way they should deem advisable, declaring that they were not to be deemed in any way the guarantors of the transaction. About a year thereafter the bankrupt fell into arrears again, and the publishers notified the persons who had advanced the money; as the bankrupt could not pay they were practically driven to pay, and therefore the publishers exercised their right to discontinue selling to the bankrupt and sold to the third parties instead who carried on the business for a few months and then sold out to other parties. The court said: "As already stated, the bill avers a preferential transfer; but it is clear that no such transaction took place. The bankrupt

did not transfer anything to the defendants, and took no part in what was done. He could, therefore, have had no intent to prefer, and the defendants could not be charged with knowledge of a nonexistent intent. If the privilege had been tangible property belonging to the bankrupt, and if the defendants had taken possession of it, the trustee might have recovered it, or its value, by an appropriate action at law; but there was no such property and no such suit."

*Property transferred to a person under a valid conditional contract of sale* may be recovered back on the buyer becoming a bankrupt as there is no "preference" involved in such a transaction. *John Deere Plow Co. of Moline v. Edgar Farmer Store Co.*, (1913) 154 Wis. 490, 143 N. W. 194.

*Delivery of stock by broker to customer.*—When a broker agrees to carry stock for a customer he may buy stocks to fill several orders in a lump; he may increase his single purchase by stock of the same kind that he wants for himself; he may pledge the whole block thus purchased for what sum he likes, or deliver it all in satisfaction of later orders, and he may satisfy the earlier customer with any stock that he has on hand or that he buys when the time for delivery comes. Yet he is bound to keep stock enough to satisfy his contracts; the customer is held to have such an interest that a delivery to him by an insolvent broker is not a preference. *Sexton v. Kessler & Co.*, (1912) 225 U. S. 90, 32 S. Ct. 657, 56 U. S. (L. ed.) 995.

If a broker buys shares of stock for a customer, the customer is entitled to a transfer of these shares even though the broker has since become insolvent, and if the identical shares purchased for him have been disposed of, he is entitled to other shares of the same stock in the hands of the broker. *Gorman v. Littlefield*, (1913) 229 U. S. 19, 33 S. Ct. 690, 57 U. S. (L. ed.) 1047, following *Richardson v. Shaw*, (1908) 209 U. S. 365, 28 S. Ct. 512, 52 U. S. (L. ed.) 835, 14 Ann. Cas. 981.

*Preference created by mortgage.*—To the same effect as the original note, see *In re Levine*, (E. D. N. Y. 1912) 196 Fed. 589; *Butcher v. Werksman*, (E. D. N. Y. 1913) 204 Fed. 330; *Lathrop Bank v. Holland*, (C. C. A. 8th Cir. 1913) 205 Fed. 143.

The lien of a preferential mortgage "is within the ban of the Bankruptcy Act," and no state statute giving the mortgage a priority over an earlier unrecorded mortgage can save it from being discharged. *Petition of Rouse*, (C. C. A. 6th Cir. 1913) 208 Fed. 881.

*Preferences created by attachment* are not within the definition of this section. *Folger v. Putnam*, (C. C. A. 9th Cir. 1912) 194 Fed. 793, wherein the court said: "This definition of a 'preference' confines its sufferance or acquirement to two classes of transactions, namely, a judgment obtained within four months before the time of the filing of the petition in bankruptcy and before adjudication, and a transfer made by the bank-

rupt within the same period of time. It will be noted, also, that by the classification it contradistinguishes the preference by transfer from that by procuring or suffering a judgment to be entered. There is here a complete absence of all mention of an attachment in any form or stage as constituting a preference."

**Banking transactions—The deposit of money in bank.**—To the same effect as the original note, see *In re Wright-Dana Hardware Co.*, (N. D. N. Y. 1913) 207 Fed. 636.

**Payment of discounted notes.**—Where it appeared that a bankrupt, within four months prior to bankruptcy, paid some notes he had discounted at the bank by check on his general account, and the bank within the same period charged some notes of the depositor against his account, the transaction all being in good faith and in the general cause of business, it was held that there was no voidable preference. *Studley v. Boylston Nat. Bank of Boston*, (C. C. A. 1st Cir. 1912) 200 Fed. 249.

## II. CONSTITUENT ELEMENTS.

**In General.**—A preference is recoverable by a trustee when the following elements exist: (1) The insolvency of the debtor. (2) A preference obtained within four months prior to the filing of the petition in bankruptcy. (3) The debtor has suffered or procured a judgment to be entered against himself, or had made a transfer of any of his property, which operates as a preference. (4) The person receiving such preference, or to be benefited thereby, or his agent acting therein, has reasonable cause to believe that the enforcement of such judgment or transfer will effect a preference. *Galbraith v. Whitaker*, (1912) 119 Minn. 447, 138 N. W. 772, 43 L.R.A.(N.S.) 427.

To constitute a preferential transfer within the meaning of the Bankruptcy Act there must be a parting with the bankrupt's property for the benefit of the creditor and a consequent diminution of the bankrupt's estate. *Continental & Commercial Trust & Savings Bank v. Chicago Title & Trust Co.*, (1913) 229 U. S. 435, 33 S. Ct. 829, 57 U. S. (L. ed.) 1208.

**Insolvency.**—To the same effect as the original note, see *Ogden v. Reddish*, (E. D. Ky. 1912) 200 Fed. 977; *Mayes v. Palmer*, (C. C. A. 8th Cir. 1913) 208 Fed. 97.

A transfer by a bankrupt within four months of the filing of the petition does not create a voidable preference unless he is "insolvent"; that is to say, unless his property at a fair valuation is insufficient to pay his debts at the time of the transfer. *Paper v. Stern*, (C. C. A. 8th Cir. 1912) 198 Fed. 642.

In a suit by the trustee in bankruptcy of a partnership to recover a voidable preference knowingly obtained by a creditor, as defined in the foregoing sections, to authorize a recovery, it must be shown that the firm and the partners individually were also insolvent at the time the judgment was suf-

ferred to be entered against it. *Rodolf v. First Nat. Bank of Tulsa*, (1912) 30 Okla. 631, 121 Pac. 629, 41 L.R.A.(N.S.) 204.

**Preference must be given to creditor.**—To the same effect as the original note, see *Ogden v. Reddish*, (E. D. Ky. 1912) 200 Fed. 977; *Aiello v. Crampton*, (C. C. A. 8th Cir. 1912) 201 Fed. 891; *Keystone Warehouse Co. v. Bissell*, (C. C. A. 2d Cir. 1913) 203 Fed. 651.

It is not every transfer by an insolvent within the four months' period that is voidable by the trustee. It must be on account of a pre-existing debt. When one gives an insolvent present value for a transfer of property or when he makes an exchange of property, there is no preference. *Ernst v. Mechanics' & Metals Nat. Bank of City of New York*, (C. C. A. 2d Cir. 1912) 201 Fed. 664.

**A surety or indorser.**—To the same effect as the original note, see *Lazarus v. Eagen*, (M. D. Pa. 1912) 206 Fed. 518.

A guarantor, an indorser, an accommodation maker, or a surety, on the obligation of a bankrupt, is a "creditor" and the fact that the guarantor or indorser did not pay or induce the payment of the debt, but the payment was made by the bankrupt, does not except the case from the operation of the rule. *Paper v. Stern*, (C. C. A. 8th Cir. 1912) 198 Fed. 642.

An accommodation indorser before the notes are paid is a creditor; his claim is provable as a contingent claim founded on contract; and therefore, such an indorser must refund to the estate any preferential part payments made by the maker to the holder on account of the notes before he can prove his own claim for payments as indorser. *Platt v. Ives*, (1913) 86 Conn. 690, 86 Atl. 579.

**Time of obtaining preference.**—To the same effect as the original note, see *Jackson v. Sedgwick*, (E. D. N. Y. 1911) 189 Fed. 508; *Sturdivant Bank v. Schade*, (C. C. A. 8th Cir. 1912) 195 Fed. 188; *Mayes v. Palmer*, (C. C. A. 8th Cir. 1913) 208 Fed. 97.

The four months does not begin to run until the creditors have in some form received actual or constructive notice of the transfer. *Gill v. Ely-Norris Safe Co.*, (1913) 170 Mo. App. 478, 156 S. W. 811.

Under section 60a all liens acquired four months before the filing of the petition remain valid liens under the bankrupt laws, and are not disturbed by any bankruptcy proceedings. *Williams v. Bosworth*, (1912) 102 Miss. 160, 59 So. 6.

A pledge of bank stock given to and received by a bank more than four months before bankruptcy cannot be held to be a preference, though given to secure a pre-existing unsecured debt, and sale within four months, pursuant to the pledge, would not affect this result. *First Nat. Bank of Lake Charles v. Lanz*, (C. C. A. 5th Cir. 1913) 202 Fed. 117.

In *Marsh v. Wilson*, (Minn. 1914) 144 N. W. 959, it appeared that the defendant brought suit against one Grossman on April

27, 1912, and garnished one Galbraith. Nothing further was done with the garnishment. On June 15, 1912, it took judgment against Grossman, and levied upon the debt due him by the garnishee. Grossman filed his petition in bankruptcy on September 14, 1912. It was held, that the four months specified by the bankrupt act commenced to run in June, not in April, and that the trustee in bankruptcy could recover as a preference the money collected by the defendant on its execution.

An inchoate lien by garnishment cannot be tacked to the lien of an execution on the judgment against the defendant, and levied upon the indebtedness owing by the garnishee, so as to make up the period of four months. *Marsh v. Wilson*, (Minn. 1914) 144 N. W. 959.

The fact that the transfer of securities was made pursuant to a prior agreement made more than four months before the bankruptcy, is not sufficient to deprive the taking of the security within the four months before the bankruptcy, of its character as a voidable preference. *Citizens' Trust Co. of Paterson, N. J. v. Tilt*, (C. C. A. 3d Cir. 1912) 200 Fed. 410.

*Effect of previous negotiation.*—See to the same effect, *Tilt v. Citizens' Trust Co.*, (D. C. N. J. 1911) 191 Fed. 441.

*Where recording required.*—To the same effect as the original note, see *L. A. Becker Co. v. Gill*, (C. C. A. 8th Cir. 1913) 206 Fed. 36. See also *In re Donnelly*, (N. D. Ohio 1912) 193 Fed. 755.

"Under the bankrupt law as originally enacted, a transfer dated as of the time it was actually made without regard to the date of filing or recording. Cases consequently arose in which preferential transfers, though fraudulent and constituting acts of bankruptcy, could not be successfully assailed, even though the instruments evidencing them were filed or recorded, as the case might be, within four months of the filing of the petition in bankruptcy, because the transfers were made prior to the beginning of the four months' period. The withholding of such transfers from the files or record thus operated to defeat the benefit contemplated by the establishment of such period. To correct this defect in the law, the amendment of February 5, 1903, was made, whereby the words 'within four months before the filing of the petition, or, after the filing of the petition and before adjudication,' were eliminated from section 60b and inserted in section 60a, and also the words, 'where the preference consists of a transfer, such period of four months shall not expire until four months after the date of recording or registering the transfer, if by law such recording or registering is required,' were added at the end of section 60a. The purpose of section 60a, as originally enacted, was to define what judgments and what transfers are preferential, and it still performs that office. The added sentence prolonging the four months' period until four months after

the date of recording or registering the transfer applies only to cases 'where the preference consists in a transfer,' and the conditional clause, 'if by law such recording or registering is required,' we interpret to mean, if by the law of the state by which the validity of the mortgage against contesting creditors is determined, such recording or registering is required. The purpose of the amendment was, we think, as stated in *Re Sturtevant*, to prevent preferential fraudulent transfers from escaping the four months' provision, unless they were filed or recorded, as the case may be, before that period began to run. It did not change the date as to which such transfers are to be judged in determining their voidable character." *In re Klein*, (C. C. A. 6th Cir. 1912) 197 Fed. 241.

The word "required," as used in the amendment, refers to the character of the instrument giving the preference or making the transfer, without reference to the fact that as to certain persons or classes of persons it may be good or bad according to circumstances. If to be valid against certain classes of persons, the law of the state "requires" the constructive notice of registration it is a transfer which under the amendment is "required" to be recorded. This takes account of the purpose and policy of recording acts, remedies the evil which flourished under the law before the amendment, gives effect to the plain purpose of Congress, and gives some effect and force to a provision which would otherwise be meaningless, and brings sections 3 and 60a and 60b into harmony of purpose and meaning. *Ragan v. Donovan*, (N. D. Ohio, 1911) 189 Fed. 138, *following Loeser v. Savings Deposit Bank & Trust Co.*, (C. C. A. 6th Cir. 1906) 148 Fed. 975, 18 L.R.A. (N.S.) 1233.

It seems that the weight of authority, and reason as well, is to the effect that the recording or registering of a transfer is not deemed to be required, unless, under the state law, the same is essential to validate the transfer as against the creditors represented by the trustee, though some of the cases seem to go considerably beyond this. *Telford v. Hendrickson*, (1913) 120 Minn. 427, 139 N. W. 941.

In *Pew v. Price*, (1913) 251 Mo. 614, 158 S. W. 338, a contention that if recording or registering was required for any purpose though not for all it was to be deemed as "required" within the meaning of this section, was rejected.

A state statute providing that "every assignment of a debt, unless the same be in writing and be filed with the clerk of the town or municipality in which the assignor resides, shall be presumed to be fraudulent and void as against his creditors, unless those claiming thereunder make it appear that it was made in good faith and for a valuable consideration," does not "require" a "recording or registering," and hence, where a written assignment of a claim was actually made more than four months prior to the filing of a petition in bankruptcy by the

assignor, it could not be avoided by the trustee in bankruptcy as being a preference under section 60, clauses "a" and "b" though it was never filed. *Telford v. Hendrickson*, (1913) 120 Minn. 427, 139 N. W. 941.

Where by state law, as between the parties to the chattel mortgage and against all ordinary creditors the recording of the mortgage is immaterial, such mortgage is not one that is "required" to be recorded within the meaning of this section. *In re Jacobson*, (N. D. Ga. 1912) 200 Fed. 812.

In a state where an unrecorded deed of trust is valid as between the parties and as against general creditors it is not such an instrument within the meaning of the section, as is required by the laws of the state to be recorded, and its recordation within four months of the filing of the petition of bankruptcy is immaterial. *Laurel Oil & Fertilizer Co. v. Horne*, (1911) 101 Miss. 629, 57 So. 624, 58 So. 652.

In *Benner v. Scandinavian American Bank*, (1913) 73 Wash. 488, 131 Pac. 1149, a contention that no instrument was required to be recorded by the bankruptcy act in order to be valid, unless such instrument was invalid without recording as against all persons, was overruled. The court said: "We cannot accept this construction of the statute. It will be remembered that section 60 of the bankruptcy act as originally enacted did not contain the last sentence now in the section above quoted. This was added by the amendment of 1903 and had as its purpose the prevention of giving secret preferences made possible under the law as it was originally enacted by withholding from record instruments creating liens. It is plain that, if the appellant's construction of the statute is adopted, the amendment is rendered nugatory, as no statute of the United States or of any state, in so far as we are aware, requires instruments conveying or creating liens upon property to be recorded in order to be valid as against all persons. Usually, and universally in so far as our examination goes, they are valid between the parties and some classes of persons having actual notice without recording. These facts were known at the time the amendment was enacted, and it will hardly do to say that it was the purpose of Congress to do an idle thing. There is no necessity that requires the construction contended for. The act can be held operative as to those persons whom the recording statutes favor without doing violence to any of its terms."

In *Debus v. Yates*, (E. D. Ky. 1910) 193 Fed. 427, the court said: "We have seen that the meaning is that, in case a preferential transfer is recordable, it shall remain a preference as long as it is not recorded, or, if recorded, four months has not elapsed from its recordation. Has it any further significance? Is the effect of it that, in case

the transfer has been recorded, the question as to whether it is a preferential transfer—i. e., whether in other respects it is a preference, and as to whether in such respect it is a voidable and obstructive preference—is to be determined as if it had been made at the date of recording; i. e., had then first come into being?" This question was answered in the negative.

The provision of the statute that where the preference consists in a transfer, such period of four months shall not expire until four months after the recording or registering of the transfer, if, by law, such recording or registering is required, was intended to postpone the time within which a transfer is open to attack as a preference until four months after the date of the recording of the transfer, where such recording is required by the local law; but while the statute postpones the time within which the transfer can be attacked the statute cannot properly be so applied as to materially alter the essential character of the transaction. If the transfer is one which is required to be recorded, the four-months period during which it may be attacked does not begin to run until the conveyance is recorded, but if the transfer when made was based upon a present consideration, a delay in recording the instrument does not warrant treating the conveyance as if it were made as security for an antecedent debt, because to do so would be to create by construction a transaction different from the actual one. *In re Jackson Brick & Tile Co.*, (S. E. D. Mo. 1911) 139 Fed. 636.

*Instrument valid under state law.*—To the same effect as the original note, see *In re Klein*, (C. C. A. 6th Cir. 1912) 197 Fed. 241.

*Greater percentage.*—To the same effect as the original note, see *Ogden v. Reddish*, (E. D. Ky. 1912) 200 Fed. 977; *Mayes v. Palmer*, (C. C. A. 8th Cir. 1913) 208 Fed. 97.

"It is a necessary condition precedent to a preference that there has been a transfer of property by the bankrupt, whereby a creditor is enabled to obtain a greater percentage of his debt than other creditors of the same class. If, therefore, the conveyances in question were originally, and remained, a nullity as against the grantor's trustee in bankruptcy, there was no transfer within this definition." *Rosenbluth v. De Forest & Hotchkiss Co.*, (1911) 85 Conn. 40, 81 Atl. 955.

*Pleading.*—It is essential to allege in the complaint that the transfer or payment complained of will have the effect of giving the creditor to whom it was made a greater percentage of his claim out of the bankrupt's estate than other creditors of the same class will obtain. *Utah Ass'n of Creditmen v. Boyle Furniture Co.*, (Utah 1913) 136 Pac. 572.

## 1912 Supp., p. 739, sec. 60b.

## I. ELEMENTS OF VOIDABILITY.

In general.—At no time did the Bankrupt Act of 1898 give to the trustee the right to recover property transferred within four months prior to proceedings in bankruptcy, unless the elements prescribed by section 60b were shown to exist. In *re Carlile*, (D. C. N. C. 1912) 199 Fed. 612.

Construction of section in connection with section 67f.—This section presupposes that the judgment or transfer specifically referred to has been so far effected or realized upon as to amount to a preference, because it is expressly provided that they are voidable by the trustee, and that the *property* or *its value* may be recovered from the person receiving, or benefited by, the preference. In other words, section 60b applies to executed preferences, section 67f to liens unrealized upon. In *re Peterson*, (C. C. A. 7th Cir. 1912) 200 Fed. 739.

A transaction obnoxious to the provisions of section 67e may be attacked under this section if reprehended by it as well. *Walters v. Zimmerman*, (N. D. Ohio 1913) 208 Fed. 62.

For the definition of the word "preference," as used in section 60b, recourse must be had to section 60a. In *re Carlile*, (D. C. N. C. 1912) 199 Fed. 612.

Reasonable cause to believe transaction would effect preference.—To the same effect as the original note, see *Kimmerle v. Farr*, (C. C. A. 6th Cir. 1911) 189 Fed. 295; In *re Varley & Bauman Clothing Co.*, (N. D. Ala. 1911) 191 Fed. 459; In *re Gibson*, (D. C. S. D. 1911) 191 Fed. 665; *Alter v. Clark*, (D. C. Nev. 1911) 193 Fed. 153; *Merklein v. Hurley*, (E. D. N. Y. 1912) 197 Fed. 183; *Grant v. National Bank of Auburn*, (N. D. N. Y. 1912) 197 Fed. 581; *Benner v. Blumaer-Frank Drug Co.*, (W. D. Wash. 1912) 198 Fed. 362; *Fowler State Bank v. White*, (C. C. A. 8th Cir. 1912) 198 Fed. 631; In *re Hirshowitz*, (M. D. Pa. 1912) 199 Fed. 202; *Ogden v. Reddish*, (E. D. Ky. 1912) 200 Fed. 977; In *re Sam Z. Lorch & Co.*, (W. D. Ky. 1912) 199 Fed. 944; *Young v. Burley*, (C. C. A. 6th Cir. 1912) 200 Fed. 258; In *re Trazin*, (C. C. A. 2d Cir. 1912) 201 Fed. 86; *Burnes v. Epstein*, (D. C. Conn. 1913) 201 Fed. 393; *Balcomb v. Old Nat. Bank*, (C. C. A. 7th Cir. 1912) 201 Fed. 679; In *re Harrison*, (M. D. Pa. 1912) 202 Fed. 243; *Boden v. Lovell*, (C. C. A. 5th Cir. 1913) 203 Fed. 234; *Moore v. Smith*, (W. D. N. Y. 1913) 205 Fed. 431; In *re Herman*, (N. D. Ia. 1913) 207 Fed. 594; *Mayes v. Palmer*, (C. C. A. 8th Cir. 1913) 208 Fed. 97.

Some confusion exists in the cases as to the meaning of the phrase "having reasonable cause to believe such a person is insolvent." Dicta are not wanting which assume that it has the same meaning as if it had read "having reasonable cause to suspect such person is insolvent." But the two phrases are distinct in meaning and effect. It is not

enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debts. To make mere suspicion a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further, he may feel anxious about his claim, and have a strong desire to secure it, and yet such belief as the act requires may be wanting. Obtaining additional security, or receiving payment of a debt, under such circumstances, is not prohibited by the law. The debtor is often buoyed up by the hope of being able to get through with his difficulties long after his case is, in fact, desperate, and his creditors, if they knew anything of his embarrassments, either participate in the same feeling, or at least are willing to think that there is a possibility of his succeeding. To overhaul and set aside all his transactions with his creditors, under such circumstances, because there may exist some grounds of suspicion of his inability to carry himself through, would make the bankrupt law an engine of oppression and injustice. In *re Carlile*, (D. C. N. C. 1912) 199 Fed. 612.

*Mere grounds of suspicion.*—Proof of knowledge or notice of facts which give a creditor, or a person to be benefited by a preference, reasonable cause to believe at the time of the transfer that it is intended to give a preference thereby, is indispensable to the establishment of a voidable preference. Suspicion, fear, and facts that arouse suspicion and fear in the mind of the creditor, or the party to be benefited, but give no reasonable ground for him to believe that a preference is intended by the transfer, do not make such a preference voidable. *Paper v. Stern*, (C. C. A. 8th Cir. 1912) 198 Fed. 642.

"Then" as used in the following clause: "If at the time of the transfer, or of the entry of judgment, the bankrupt be insolvent, and the judgment or transfer then operate as a preference, and the person receiving it, or to be benefited thereby, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable," etc., apparently refers to the time the judgment was entered. It would seem that a creditor may enforce a judgment entered at a time when he has not cause to believe the debtor is insolvent, though at the time he enforces it he has such cause to believe or has actual knowledge that the enforcement of his judgment will give him a preference. *Galbraith v. Whitaker*, (1912) 119 Minn. 447, 138 N. W. 772, 43 L.R.A.(N.S.) 427.

**Financial embarrassment.**—The fact alone that a creditor, knowing his debtor to be financially embarrassed, presses for the payment of his claim, is not sufficient to charge him with having reasonable cause to believe his debtor to be insolvent, or that the payment thus obtained is intended as a preference. In *re Dorr*, (C. C. A. 9th Cir. 1912) 196 Fed. 292.

**Reasonable cause to believe that a mortgage would effect a preference is reasonable cause to believe that it would operate as a preference.** *Ogden v. Reddish*, (E. D. Ky. 1912) 200 Fed. 977, wherein the court said: "Effect a preference and operate as a preference I understand to be the same thing. The requirement in terms is not that the mortgagee or his agent should have reasonable cause to believe that the bankrupt was insolvent and the mortgage would effect a preference, but only that it should have had reasonable cause to believe that the mortgage would effect a preference. Belief that the mortgage would effect a preference—i. e., that the property covered thereby was a greater percentage of the bankrupt's property than on a distribution thereof amongst his creditors would be received by his other creditors of the same class—necessarily involved belief that the bankrupt was insolvent, for not otherwise could the mortgagee have had such belief. The requirement, therefore, is not only that the bankrupt was insolvent and that the mortgage covered such greater percentage of his property, but that the defendant company, the mortgagee, had reasonable cause to believe both these things. It had such reasonable cause if it had that, the reasonable effect of having which was such a belief. To have such a thing was to know such a thing. The requirement, therefore, is that the mortgagee knew that, the reasonable effect of knowing which was such belief. It seems to point to knowledge of something short of insolvency, and that the mortgage covered such greater percentage. And it would seem that, to comply therewith, it is not necessary that it appear just what the mortgagee knew. If he acted as if he so believed, the reasonable inference therefrom should be that he had the required knowledge, even though it may not appear just what that knowledge was. The burden was on the plaintiff to establish each one of these three essentials."

**Payment under compromise agreement.**—Where the agent of a debtor made a compromise agreement with creditors of the debtor by which they were to accept 60 cents on the dollar, the money to be raised in part by a loan from the debtor's relatives, and in part by a sale of the debtor's property, and pursuant to such agreement the property was sold and the debts of one of the creditors paid according to the compromise, and thereafter the debtor became insane whereupon his relatives refused to carry out their part of the agreement, it was held that the payment to the creditor referred to did not constitute a voidable preference. *Templeton v.*

*Wollens*, (C. C. A. 2nd Cir. 1912) 200 Fed. 257.

**Where it appeared that a bank, which held a note against a depositor, on threat of setting off the note against the depositor's account, obtained from the depositor a post dated check to apply on the note which check was afterwards cashed by the bank out of subsequent deposits, made within five months of bankruptcy, the depositor at the time being insolvent, and the bank had reasonable cause to know of his insolvency, it was held that a voidable preference was created.** In *re Starkweather*, (W. D. Mo. 1913) 206 Fed. 797.

**Intent to prefer.**—It is no longer necessary, in order to establish a preference, to prove the existence of the debtor's intent to prefer. It is sufficient if it is shown that the creditor receiving the alleged preference payment had, at the time when it was made, reasonable cause to believe that the bankrupt was insolvent, and that in accepting and retaining the same he would receive a larger per cent. of his debt than the other creditors of the same class. *R. H. Herron Co. v. Moore*, (C. C. A. 9th Cir. 1913) 208 Fed. 134; *Rogers v. American Halibut Co.*, (Mass. 1913) 103 N. E. 689. Compare *Debus v. Yates*, (E. D. Ky. 1910) 193 Fed. 427.

If the transferee has a reasonable cause to believe that a preference was intended it is sufficient to constitute a preference within this section although the debtor had no intention to give a preference. *Hotchkiss v. National City Bank of New York*, (S. D. N. Y. 1911) 200 Fed. 287.

In the case of *In re Dorr*, (C. C. A. 9th Cir. 1912) 196 Fed. 292 the court said: "The intent of the debtor, in the absence of other proof, may be shown by its equivalent in law, proof of the inevitable result of the transaction which in the case at bar was to give a preference and create an unequal distribution of the bankrupt's estate. The bankrupt not only knew that he was insolvent, but he knew that he was so irretrievably so that he could not hope to continue his business, and he knew that he could not make the payment which he did make without disparity in his payments to his other creditors. If the effect of the act was to create a preference and such was its natural consequence, he must be presumed to have intended to do that which was the necessary result of his act."

Where the position of the officer of the bankrupt corporation, through whom it is alleged that the preference was made, was such that it was his duty to know the bankrupt's financial condition, and where his conduct indicates a thorough knowledge of its embarrassment and general business conditions, and where a conveyance of property is made to a creditor not in the ordinary course of business, but under extraordinary conditions which render imperative the result that other creditors shall be hindered, delayed or prevented in the payment of their claims, the inference of an intent, on the part of the debtor to prefer becomes in-

evitable. The inference follows as matter of law from circumstances of overwhelming probative force, even though the buoyant hopefulness of the particular individual may be so great as to prevent him from having a settled and clear-cut purpose to prefer one creditor over others. *Wilson v. Mitchell-Woodbury Co.*, (1913) 214 Mass. 514, 102 N. E. 119.

**Positive knowledge unnecessary.**—To the same effect as the original note, see *Tilt v. Citizens' Trust Co.*, (D. C. N. J. 1911) 191 Fed. 441; *McGirr v. Humphreys Grocery Co.* (N. D. Ohio 1911) 192 Fed. 55; *L. A. Becker Co. v. Gill*, (C. C. A. 8th Cir. 1913) 206 Fed. 36; *Lazarus v. Eagen*, (M. D. Pa. 1912) 206 Fed. 518; *Walters v. Zimmerman*, (N. D. Ohio 1913) 208 Fed. 62.

**Knowledge presumed.**—To the same effect as the original note, see *Ernst v. Mechanics' & Metals Nat. Bank of New York*, (S. D. N. Y. 1911) 200 Fed. 295; *Collett v. Bronx Nat. Bank*, (D. C. N. Y. 1912) 200 Fed. 111.

Where the inevitable effect of a transfer is to give a preference, it will be conclusively presumed that it was so intended. *Lazarus v. Eagen*, (M. D. Pa. 1912) 206 Fed. 518. See to the same effect *Kimmerle v. Farr*, (C. C. A. 6th Cir. 1911) 189 Fed. 295, wherein the court said: "The intention to give a preference may be shown not merely by proof of actual intent, but by its equivalent in law—that is, by proof that the necessary result of the transaction was to create a preference—in which case the intention to give a preference will be presumed. Where the inevitable result of a transaction between a debtor and creditor is to create a preference, the law will conclusively impute to the debtor the intention to bring about the result necessarily arising from the nature of the act which he does. However, a presumption of law that the debtor intended to give a preference does not arise from the fact alone that he knew himself to be insolvent. It will often, if not generally, happen that a person, though in fact insolvent, will, while continuing his business in the usual way, make payments without a thought of disparagement to other creditors and with confidence in his ability to pay them all."

**Knowledge of insolvency.**—Before one can be said to have "reasonable cause to believe that a preference was intended," it must appear that the creditor alleged to have been preferred had reasonable cause to believe that the debtor was insolvent at the time of the alleged preference. In *re The Leader*, (W. D. Ark. 1911) 190 Fed. 624. See also *Shelton v. First Nat. Bank of Mannsville*, (1912) 31 Okla. 217, 120 Pac. 959, wherein it was held that under this portion of this section, providing that a preference, given by an insolvent debtor within four months before the filing of a petition in bankruptcy, shall be voidable by the trustee, if the creditor had "reasonable cause to believe that it was intended thereby to give a preference," such cause of belief on the part of the creditor implies, as its foundation, reasonable

cause to believe that the debtor is insolvent, within the meaning of that term as defined by section 1, clause 15, 1912 Supp. 465, and that mere knowledge that a promissory note of the debtor due the defendant bank, and twice extended, was paid by the debtor from the proceeds of a sale to his sureties on said note, without the knowledge of the bank of a certain piece of property, with checks drawn by said sureties against funds loaned them by and placed to their credit in said bank, and secured by promissory note payable to said bank, is not sufficient, in the absence of fraud, to charge defendant with such notice, though no inquiries were made by defendant as to the debtor's solvency.

In *Rogers v. American Halibut Co.*, (Mass. 1913) 103 N. E. 689, the court said: It is unnecessary to show actual knowledge or belief by the creditor. If the circumstances are such as would lead the ordinarily prudent man of affairs to the conclusion that his debtor is insolvent, he obtains a preferential payment within the meaning of the statute, by accepting payment in whole or in part of the debt, where the transaction takes place within four months prior to adjudication; and other creditors of the same class, because of the greater percentage received, must accept decreased dividends. See also *Utah Ass'n of Credit Men v. Boyle Furniture Co.*, (1911) 39 Utah 518, 117 Pac. 800.

Where there is reasonable cause to believe that at the date of transfer within the statutory period the debtor is insolvent, and payment is accepted of a debt overdue, it is immaterial whether the creditor actually believes what may have been disclosed as to the true state of affairs. If he prefers to draw inferences favorable to himself, and to ignore information which would have led to knowledge that his debtor was in failing circumstances, he cannot set up his own judgment to the contrary even if honestly entertained, as a reason why he should be permitted to retain a prohibited advantage. *Hewitt v. Boston Straw Board Co.*, (1913) 214 Mass. 260, 101 N. E. 424.

Reasonable cause to believe that a transfer and the effect of its enforcement will operate as a preference does not exist where the creditor examines the debtor's books, which do not reveal insolvency. In *re Klein*, (C. C. A. 6th Cir. 1912) 197 Fed. 241.

In determining whether the creditor had reasonable cause to believe a transfer by the debtor would effect a preference, facts which are sufficient to put an ordinarily prudent man upon inquiry as to his debtor's solvency charge such person with all the knowledge he could have acquired by the exercise of reasonable diligence. *Galbraith v. Whitaker*, (1912) 119 Minn. 447, 138 N. W. 772, 43 L.R.A.(N.S.) 427.

**Knowledge of agent.**—By section 60b, knowledge possessed by his agent binds the creditor, but this provision is to be taken with the qualification that, where the agent is acting in furtherance of his own adverse interest or fraudulently, his principal is not bound. *Rogers v. American Halibut Co.*,



(Mass. 1913) 103 N. E. 689. See also Hewitt v. Boston Straw Board Co., (1913) 214 Mass. 260, 101 N. E. 424, wherein the court said: "By the express words of the amendatory act, which are merely declaratory of the rule of law, that knowledge possessed by an agent may be imputed to his principal, the defendant is bound by information acquired by its attorney."

Where it appeared that the claimant purchased the note on which the claim was founded and after maturity and nonpayment gave it to the payees who intrusted it to their "credit man" to take to the makers, who secured some payments on the notes, and who was informed of such facts concerning the makers as must have given him reasonable grounds to believe that insolvency existed, it was held that knowledge by the claimant of the insolvency of the maker of the note must be presumed. *Constam v. Haley*, (C. C. A. 6th Cir. 1913) 206 Fed. 260.

Knowledge of a town trustee of the insolvency of his brother charges the town with knowledge. *Painter v. Napoleon Tp., Henry County, Ohio*, (N. D. Ohio 1910) 190 Fed. 637.

This section is considered in detail in the case of *In re Watson*, (E. D. Ky. 1912) 201 Fed. 962.

## II. RECOVERY OF VOIDABLE PREFERENCE.

**Trustee only may sue.**—Security, which is only voidable under the Bankruptcy Law, can be avoided only at the instance of the trustee and for the benefit of the creditors. It cannot be attacked by the bankrupt. *Laurel Oil & Fertilizer Co. v. Horne*, (1912) 101 Miss. 629, 57 So. 624, 58 So. 652.

**Notice to creditor.**—Where the trustee when appointed demands the property alleged to have been transferred as a preference it is sufficient notice to the creditor that he elects to treat the transaction as a preference. *Grant v. National Bank of Auburn*, (N. D. N. Y. 1912) 197 Fed. 581.

**Recovery of the "property or its value"** is expressly provided for by this section. *Ernst v. Mechanics' & Metals Nat. Bank of City of N. Y.*, (C. C. A. 2d Cir. 1912) 201 Fed. 664.

**Jurisdiction.**—To the same effect as the original note, see *Davis v. Planters' Trust Co.*, (W. D. Ky. 1912) 196 Fed. 970.

**Pleadings.**—The pleadings, in an action to recover a voidable preference, should contain a direct averment of the exact amount of the unsecured claims and should also show the amount of preferred debts, or debts entitled to priority, if any, as well as the amount of several debts. *Grant v. National*

*Bank of Auburn*, (N. D. N. Y. 1912) 197 Fed. 581.

In *Kraver v. Abrahams*, (E. D. Pa. 1913) 203 Fed. 782, a statement of claim which sought to recover upon the grounds of an unlawful preference under section 60b, and a transfer for the purpose of hindering, delaying, and defrauding creditors under section 67e, was held not demurrable because a payment may have been at the same time a preference, and a payment made with intent to hinder, delay, and defraud creditors.

In order to allege a voidable preference where the act complained of is the procuring of or suffering a judgment to be entered against the bankrupt in favor of any person, it is necessary, among other averments, to allege that at the time of the rendition of the judgment the judgment debtor was insolvent, and that by suffering said judgment to be entered against him he intended thereby to give a preference, and that the judgment creditor had reasonable cause to believe that the judgment debtor so intended, and that the judgment creditors benefiting thereby would receive a greater percentage of their debt than other creditors of the same class. *Rodolf v. First Nat. Bank of Tulsa*, (1912) 30 Okla. 631, 121 Pac. 629, 41 L.R.A.(N.S.) 204.

A petition drawn under the provisions of sections 60a and 60b, which fails by proper averments to charge that the creditor receiving or benefiting by the alleged voidable preferences at the time had reasonable cause to believe that it was intended thereby to give a preference, fails to state a cause of action. *Rodolf v. First Nat. Bank of Tulsa*, (1912) 30 Okla. 631, 121 Pac. 629, 41 L.R.A.(N.S.) 204.

**Evidence.**—To the same effect as the original note, see *In re Klein*, (C. C. A. 6th Cir. 1912) 197 Fed. 241.

*A decree of a court of bankruptcy, adjudicating a person an involuntary bankrupt*, conclusively establishes his insolvency as of the date of the alleged act of insolvency so as to make all payments to creditors after that date voidable as preferences. *Lazarus v. Eagen*, (M. D. Pa. 1912) 206 Fed. 518.

The statute of limitations for the institution of actions on open accounts, express or implied, as set forth in the Georgia Civil Code, 1910, §§ 4362, 4368, does not apply to an action by a trustee in bankruptcy, under section 60b, against a transferee for value of goods received from the bankrupt in payment of a pre-existing debt less than four months prior to the filing of the petition in bankruptcy. *Arnold Grocery Co. v. Shackelford*, (1913) 140 Ga. 585, 79 S. E. 470.

## 1912 Supp., p. 747, sec. 60d.

**Previous services.**—In the case of *In re Cummins*, (S. D. N. Y. 1912) 196 Fed. 224, the trustee opposed the confirmation of the report of the special master, which, in effect, upheld the transfer of an automobile (agreed

to be worth \$800) to an attorney for professional services. The facts as stated by the court were as follows: The claimant, Frank L. Crocker, was retained by the bankrupt as his attorney on January 14, 1911, and for

some weeks examined into the complicated financial affairs of the bankrupt, evidently hoping to disentangle them, but finally concluding that bankruptcy was inevitable. On February 21, 1911, while in Nashville (where the bankrupt had certain property and interests), the bankrupt, being then without ready funds, transferred an automobile to Mr. Crocker, stating that he would be glad to have Mr. Crocker take it and sell it, and apply the proceeds on account of disbursements and fees for services rendered and which might thereafter be rendered. Mr. Crocker testified that his services and disbursements down to the date of the transfer amounted to \$600, and he did not make any claim for services rendered from that date until April 11, 1911, when the petition in bankruptcy was filed. Mr. Crocker relied upon section 60d of the Bankruptcy Law, while the trustee urged that the transfer was preferential, and was not saved by the section above mentioned because the payment was for services already rendered and not to be rendered. On these facts the report of the special master was confirmed. The court said: "The contention of the trustee is in effect that, if the debtor in contemplation of the filing of a petition by or against him retains an attorney to advise and act for him, the attorney must then and there get his fee, else he will become a general creditor. In other words, a lawyer is to be deprived of the safeguard of the statute because he has the decency not to insist on an immediate retainer in money or property, and is willing to wait until he can decide what

his fee ought to be in the light of service actually rendered. There is no reason why statutes, under familiar canons, cannot be construed sensibly. The Congress has given the court full power to re-examine such a transaction with a view of ascertaining its good faith, and then determining whether the fee is reasonable. What is meant, by the statute, is that a debtor, under the circumstances therein described, may fully pay an attorney reasonable compensation for services to be rendered, and it is immaterial whether the payment is made at or after the professional engagement is entered into. Upon the re-examination provided for by the statute, it should not be difficult to determine either the bona fides or the reasonableness of the charge. In this case, the attorney acted in strict accord with his professional obligations, and, indeed, his fee was noticeably moderate."

**Services rendered after institution of proceedings.**—To the same effect as the original note, see *In re Stolp*, (E. D. Wis. 1912) 199 Fed. 488.

**Nature of proceedings.**—It is plain that it was in the mind of Congress to make the adjustment of attorney's fees, as covered by section 60d, no elaborate or plenary proceeding. The bankruptcy court alone in the first instance has jurisdiction to pass upon the justice of the fee, and it has such jurisdiction only when the matter is presented in such a manner as to fully advise the respondent of the investigation. *In re Raphael*, (C. C. A. 7th Cir. 1911) 192 Fed. 874.

## 1912 Supp., p. 753, sec. 63a.

The date of filing the petition in bankruptcy marks the line of separation between debts that are provable and those that are not provable against the bankrupt's estate. Those that are not provable remain subsisting obligations of the bankrupt, and he is not released therefrom by his discharge. The adjudication of bankruptcy does not dissolve

contractual relations between the bankrupt and others. It takes from him his property and devotes it to the payment of debts, which are provable under sections 63a and 63b of the bankruptcy act, but it does not absolve him from the obligations of his contracts. *Colman Co. v. Withoft*, (C. C. A. 9th Cir. 1912) 195 Fed. 250.

## 1912 Supp., p. 753, sec. 63a (1).

**Judgments.**—To the same effect as the original note, see *In re Putman*, (N. D. Cal. 1911) 193 Fed. 464.

**Stipulation for attorney's fees.**—To the same effect as the original note, see *In re Jenkins*, (W. D. S. C. 1912) 192 Fed. 1000.

**Equitable claims.**—"There is nothing in the bankruptcy act which indicates any intention on the part of Congress to discriminate against equitable claims. In section 2 of that act all courts of bankruptcy are invested 'with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings . . . (1) adjudge persons bankrupt; . . . (2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates.' It has always been the law in England that equitable demands can

be proven in bankruptcy, and such claims are provable under our present bankruptcy law if within the purview of the general rules of equity, even though they have no status in courts of law." *In re Putman*, (N. D. Cal. 1911) 193 Fed. 464.

**Provability as affected by person holding claim.**—*Claim by bankrupt's wife.*—A claim of the bankrupt's wife will not be disallowed merely because of laches in enforcing it. *In re Remmerde*, (N. D. Ia. 1913) 206 Fed. 826.

**Contingent claims.**—To the same effect as the original note, see *In re Gallacher Coal Co.*, (N. D. Ala. 1913) 205 Fed. 183.

**Claims barred by limitation.**—To the same effect as the original note, see *In re Putman*, (N. D. Cal. 1911) 193 Fed. 464.

A debt must be a fixed liability in order

to be provable in bankruptcy. *Synnott v. Tombstone Consol. Mines Co.*, (C. C. A. 9th Cir. 1913) 208 Fed. 251.

**Rent.**—Where the whole amount of rent is to become due in case of a default in payment of an installment, if a default occurs the whole amount becomes a "fixed liability" within the meaning of the statute. *In re Miller Bros. Grocery Co.*, (N. D. Ohio 1913) 208 Fed. 573.

A fine imposed for a civil contempt of a state court is not a provable debt under this section. *People v. Sheriff of Kings County*, (E. D. N. Y. 1913) 206 Fed. 566.

Stock in a corporation, received in exchange for a stock of merchandise, is not a provable claim against the corporation after bankruptcy. *In re Le Sueur County Co-Operative Co.*, (C. C. A. 8th Cir. 1912) 195 Fed. 926.

## 1912 Supp., p. 760, sec. 63a (3).

**Costs incurred by creditors.**—On review of a referee's order refusing to allow a creditor to prove for costs and expenses incurred in a suit against a bankrupt on the ground that the costs were not incurred in good faith, the court said: "The record, however, which it is assumed, pursuant to the requirement of law, contains all of the relevant testimony to this review, fails to disclose this. The facts are that some time in 1911 the claimants prosecuting this review sued the bankrupt. They seasonably prosecuted their case to judgment, which was signed the early part of January, 1912. Thereafter execution was duly sued out and levied upon the stock of the bankrupt, which was taken into custody by the sheriff. The claimants were proceeding after the proper advertisement to sell the property under execution, when on April 1, 1912, Harnden filed his petition to be adjudicated a bankrupt, which was granted on the same day. It is difficult to see how these facts sustain the imputation of bad faith in incurring these costs. The claimants were simply asserting their legal rights, or, as it is expressed in *Re Beaver Coal Co.*, (D. C.) 107 Fed. 98, 101, they were simply doing what 'they had a right to do.' Under such circumstances they are entitled to their costs. . . . It is said, however, on behalf of the referee's ruling, that the claimants manifestly acted in bad faith, because they knew that Harnden was insolvent, or at least in a failing condition, when they levied their execution. There is no proof to sustain the referee's finding that claimants knew he was insolvent.

The mere fact that they believed him to be in financial straits did not preclude their proceeding to assert their legal rights. The law favors the vigilant, and certainly cannot impute bad faith because creditors, believing those indebted to them to be in close circumstances financially, proceed to attempt a collection of what is due them. Indeed, proceedings to collect a debt are usually the result of a conviction by the creditor that he is otherwise in danger of losing his claim. The referee seems also to have been influenced in his decision by the fact that these costs did not inure to the benefit of the estate. This, however, is no part of the requirements of statute making such costs a provable debt. Such a consideration is germane if there be an attempt to give such a claim priority in the administration of the assets; but here there is no such attempt. The relief sought is simply that these costs may be received as provable claims. . . . Some question is also raised by the referee as to the reasonableness of these costs. There is no proof, however, that they are unreasonable. They are all based upon charges made to the claimants by officers of the law. These latter are presumed to do their duty in claiming costs. If the charges made are excessive, the burden was upon the trustee to establish this as against the assessment of costs by the clerk and the sheriff. This he made no attempt to do. Certainly the question as to the reasonableness of a few of the items is no justification for rejecting the claim entirely." *In re Harnden*, (D. C. N. M. 1912) 200 Fed. 172.

## 1912 Supp. p. 760, sec. 63a (4).

**Contracts and open accounts.**—To the same effect as the original note, see *In re Camelo*, (N. D. N. Y. 1912) 195 Fed. 632.

**Only debts existing when petition filed.**—The debts founded upon open account or upon contract, express or implied, that are provable under this section include only such as existed at the time of the filing of the petition in bankruptcy. *Zavelo v. Reeves*, (1913) 227 U. S. 625, 33 S. Ct. 365, 57 U. S. (L. ed.) 676, wherein the court said: "This court in effect adopted that construction when, in promulgating the General Orders and Forms in Bankruptcy, 1898, under the authority conferred by § 30, a form of discharge was prescribed (Forms in Bankruptcy, No. 59), by which it is ordered that the bankrupt 'be discharged from all debts and

claims which are made provable by said acts against his estate, and which existed on the day of . . . A. D. . . ., on which day the petition for adjudication was filed him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.' And the forms prescribed for proof of debts all declare that the indebtedness existed 'at and before the filing of the said petition.'"

**An unpaid stock subscription** against the alleged bankrupt is founded upon a contract and is provable in bankruptcy. *In re Putman*, (N. D. Cal. 1911) 193 Fed. 464.

**Installments of salary**, which have not been earned and are not due at the time of the filing of the petition in bankruptcy, are not then debts absolutely owing. *In re*

*D. Levy & Sons Co.*, (D. C. Md. 1913) 208 Fed. 479.

**Renting contracts.**—To the same effect as the original note, see *Colman Co. v. Withoft*, (C. C. A. 9th Cir. 1912) 195 Fed. 250; *In re Abrams*, (N. D. Ia. 1913) 200 Fed. 1005; *In re Scruggs*, (S. D. Ala. 1913) 205 Fed. 673; *In re Sapinsky*, (W. D. Ky. 1913) 206 Fed. 523; *In re Caswell-Massey Co.*, (S. D. N. Y. 1910) 208 Fed. 571.

Where a landlord has taken advantage of a clause in a lease allowing him to take possession for any breach of the covenants of the lease, he cannot recover rent for that part of the term subsequent to the time he retakes possession. *South Side Trust Co. v. Watson*, (C. C. A. 3d Cir. 1912) 200 Fed. 50.

**Claims for tort.**—To the same effect as the original note, see *In re Nuttall*, (S. D. N. Y. 1912) 201 Fed. 557.

**A conversion for trust funds creates a liability provable in bankruptcy.** *Clarke v. Rogers*, (1913) 228 U. S. 534, 33 S. Ct. 587, 57 U. S. (L. ed.) 953.

**Contingent claims.**—A claim arising out of the contract of two lessees, jointly liable for rent, whereby one, the bankrupt, agreed to reimburse the other for all the payments which it might make in excess of one-half of the rental, and to pay it one-half of such sum as it might be required to pay in gross, not to exceed \$100 per month for the unexpired term, to obtain a rescission of the lease, was held not to be provable against the estate, where it appeared that after the petition was filed the other lessee paid the interest that had accrued and also paid a sum for the cancellation of the lease. *Colman Co. v. Withoft*, (C. C. A. 9th Cir. 1912) 195 Fed. 250, wherein the court said: "At the time when the petition was filed, not only was the bankrupt not indebted to the appellant, but it could not then be known that he ever would be indebted to it, either for money to be paid for rent or for money to be paid for the rescission of the lease. As far as the rent was concerned, there were the contingencies that the lessee might cancel the lease, or that the trustee in bankruptcy might elect to pay the rent, or that the appellant might fail to pay more than its half thereof. As to the agreement looking to a rescission of the lease, there were the contingencies that the agreement, which was without consideration, might be revoked

by either party thereto before it was acted upon, or that it might be impossible to secure rescission on the terms stipulated by the bankrupt."

In the case of *In re Lyons Beet Sugar Refining Co.*, (W. D. N. Y. 1911) 192 Fed. 445, it was held that the referee should have allowed a claim of a surety on an appeal bond under the following circumstances. The bankrupt was adjudicated on June 21, 1910, and the disallowed claim was filed with the referee on September 13, 1911, more than one year subsequent to the adjudication. At the time the petition in bankruptcy was filed there was pending a suit against the bankrupt in the Supreme Court of the state, and a judgment had been affirmed by the Appellate Division, from which an appeal was taken by the bankrupt to the Court of Appeals; the claimant becoming surety for costs on the appeal bond. The decision of the Appellate Division was affirmed, and thereupon the surety filed a claim for the costs against the bankrupt estate, which he had paid as surety on the bond. The trustee objected to proving the claim, on the grounds (1) that it was not filed within one year after the adjudication, as required by section 57n; and (2) that it was not "a fixed liability absolutely owing," under section 63a. The referee was of the opinion that the claim was not liquidated by litigation, and therefore it could not be proved under section 57n. On these facts the court said: "Taking into consideration section 63, subd. 1, of the bankruptcy act, in connection with subdivision 4, I think that the claim was provable as one founded 'upon contract express or implied,' and the language of subdivision 1, i. e., 'fixed liability absolutely owing,' does not limit the broad term of subdivision 4."

The words "absolutely owing at the time of the filing of the petition against him," in section 63a (1) of this act, should be read into this section. *Colman Co. v. Withoft*, (C. C. A. 9th Cir. 1912) 195 Fed. 250.

**Outlawed obligations.**—The trustee in bankruptcy may plead the statute of limitations to outlawed obligations, and the statute is properly pleaded, although the bankrupt, after the filing of the petition in bankruptcy, acknowledges the indebtedness, for after that time he is without power to waive the statute. *In re George Zorn & Co.*, (E. D. Pa. 1912) 193 Fed. 299.

## 1912 Supp., p. 764, sec. 63a (5).

**Judgments recovered after adjudication.**—If a suit antedate the adjudication, this section allows it to be prosecuted to judgment; and reasons may readily exist to make even a postdated suit desirable, e. g., to avoid the possible bar of the statute of

limitations, or to liquidate the claim, or to fix a secondary liability on another person. *Chase v. Farmers' & Merchants' Nat. Bank of Commerce*, (C. C. A. 3d Cir. 1913) 202 Fed. 904.

## 1912 Supp., p. 765, sec. 63b.

**Claims capable of liquidation and proof.**—To the same effect as the original note, see

*In re American Vacuum Cleaner Co.*, (D. C. N. J. 1911) 192 Fed. 939; *Pratt v. Auto*

Spring Repairer Co., (C. C. A. 1st Cir. 1912) 196 Fed. 495.

**Liquidation of claims for tort—Injury to person.**—A cause of action for negligent injury to the person, being an unliquidated claim for damages, is not provable in bankruptcy. *Imbriani v. Anderson*, (1912) 76 N. H. 491, 84 Atl. 974, wherein the court said: "The contention that section 63b of the bankruptcy act enlarges the class of provable claims has not been adopted by the federal courts. This paragraph 'adds nothing to the class of debts which might be proved under paragraph 'a' of the same section. Its purpose is to permit an unliquidated claim, coming within the provisions of section 63a, to be liquidated as the court shall direct."

### 1912 Supp., p. 766, sec. 64a.

**Taxes entitled to priority.**—In the case of *In re Oxley*, (W. D. Wash. 1913) 204 Fed. 826, on the peculiar facts there shown, a referee's order, denying an application of a county for the payment of certain taxes for the years 1910 and 1911, to the exclusion of the costs of administration of the bankrupt estate, was affirmed. The court said: "The authorities on the general question of whether state and county taxes are to be preferred to the costs and expenses of administration do not appear to be uniform. . . . The bankruptcy statute directs the court, in making provision for the payment of claims, to order the trustee to pay all taxes 'legally due and owing by the bankrupt to the United States, state, county, district or municipality, in advance of the pay-

**Claims against government contractor.**—A claim against a government contractor for coal furnished a subcontractor, and which in effect amounts to a suit on the contractor's bond, cannot be proven in bankruptcy in view of the provisions of the act of Congress of February 24, 1905, ch. 778, 32 Stat. L. 811, 10 Fed. Stat. Annot. 343, which provides for a suit on a contractor's bond to recover for labor or materials furnished a contractor in the construction of public works. *In re Hawley*, (W. D. Wash. 1912) 194 Fed. 751.

**An unliquidated claim by a former partner of the bankrupt, arising out of the partnership, is within this section.** *In re Hirth*, (D. C. Minn. 1911) 189 Fed. 926.

**ments of dividends to creditors.** In construing this statute, no sufficient reason appears for disregarding principles of equity, which are to be applied generally in bankruptcy proceedings."

**Subrogation as to tax claims.**—To the same effect as the original note, see *In re M. I. Hibbler Mach. Supply Co.*, (W. D. N. Y. 1912) 192 Fed. 741.

**"Due and owing."**—"It does not follow that taxes are not due and owing from the citizen because they are not debts upon the one hand, or because the state has prescribed some method exclusive in its character for their collection." *Hecox v. Teller County*, (C. C. A. 8th Cir. 1912) 198 Fed. 634.

This section is cited in *In re Crowell*, (D. C. Mass. 1912) 199 Fed. 659.

### 1912 Supp., p. 770, sec. 64b (1).

**Receiver's charges.**—The rejection of charges against receiver in bankruptcy for expenses incurred under receiver's orders or contracts looking to the care or preservation of the bankrupt estate is within the discre-

tion of the bankruptcy court, and no appeal lies therefrom under the bankruptcy law. *O'Brien v. Ely*, (C. C. A. 5th Cir. 1912) 195 Fed. 64.

### 1912 Supp., p. 772, sec. 64b (3).

**Attorney fees allowed.**—The whole theory upon which the bankruptcy law authorizes the allowance of fees to the attorneys for petitioning creditors is that such creditors are acting for the joint benefit of themselves and all other unsecured creditors who will, by reason of their efforts, share equally with them in the unincumbered assets of the bankrupt. It is right and just that for this reason the fund secured to common creditors should, as against such creditors equally participating in it, share the expense incurred in securing it. *In re Gillaspie*, (N. D. W. Va. 1911) 190 Fed. 88.

Technically the allowances should be made to the creditors for their expenses in employing counsel, and not to the attorneys themselves. *In re Medina Quarry Co.*, (C. C. A. 2d Cir. 1911) 191 Fed. 815.

An allowance may be made to creditors for attorneys' fees where property, transferred or concealed by a bankrupt, has been, through the efforts of such counsel, recovered for the benefit of the estate. *In re Medina Quarry Co.*, (C. C. A. 2d Cir. 1912) 197 Fed. 308.

**Services must be beneficial.**—Whether fees claimed by the attorney for the bankrupt are allowable depends upon whether the services rendered were for "cost of administration;" that is, whether as rendered they conduced to the benefit of the estate and its prompt administration. Under this rule services by the attorney for the bankrupt in securing a reduction in the taxes charged against the estate are properly for compensation out of the estate, where rendered just before bankruptcy proceedings and with the view thereto, and where the effect was to

reduce considerably what would otherwise have been a paramount lien upon the estate. Under this rule, and for reasons similar to those last given, services in securing a stay order against the prosecution of an attachment suit in the state court, pending at the date of adjudication, are properly considered in fixing the fee, as are services in drawing the schedules and other papers necessary to the adjudication, and services necessarily performed in attending the bankrupt before the referee. In *re Duran Mercantile Co.*, (D. C. N. Mex. 1912) 199 Fed. 961.

**Showing to warrant attorney's fee.**—To warrant an allowance for an attorney's fee for professional services actually rendered to an involuntary bankrupt, it must first appear, not only that services were rendered and were valuable, but that the conditions were such that by operation of law an obligation to pay therefor is imposed upon the estate. The inquiry therefore, has three branches: Was a service performed? Was such service reasonably necessary to enable the bankrupt to discharge its duties under the law? And what was it reasonably worth? The burden is upon the claimants to make a prima facie showing upon each of these three heads. In *re Lane Lumber Co.*, (N. D. Idaho 1913) 206 Fed. 780.

**Amount of attorney's fees.**—*Fees not necessarily proportional to amount of estate.*—It seems that there is no very material or direct relation between the mere aggregate of the assets and liabilities of a bankrupt estate, as shown by the schedules, and the compensation to be allowed to the bankrupt's attorneys. In *re Lane Lumber Co.*, (N. D. Idaho 1913) 206 Fed. 780.

**Fees for making schedule.**—Services rendered in the preparation of schedules are, in the main, such as a competent clerk or accountant might perform, and compensation should be awarded on that basis. In *re Lane Lumber Co.*, (N. D. Idaho 1913) 206 Fed. 780.

**Allowance confined to one fee.**—In *re Coney Island Lumber Co.*, (E. D. N. Y. 1912) 199 Fed. 197, the court said: "The statute provides that one allowance shall be made to the attorneys for petitioning creditors (section 64b) for 'the professional services actually rendered, irrespective of the number of attorneys employed.' This court has frequently ruled (and it has been so construed generally) this provision to mean that but one allowance, based upon actual value, can be made for all services rendered, under the authority of the statute, to the parties whose rights are embodied in and depend upon the application of the petitioning creditors. If more than one attorney or set of attorneys render these services, there shall be a division of the fee, rather than duplication or multiplication. Hence, if one set of attorneys act for the petitioning creditors and are succeeded by others, or if the court sees fit or deems it necessary to allow some of the services on behalf of the petitioning creditors to be rendered by other attorneys, this will result in a division of the allowance, and

not increase its amount. The provisions of the law must be complied with and the estate protected, and the statute is clearly broad enough to justify the court in protecting the estate, and in not allowing maladministration, through willful neglect, or through unintentional failure on the part of one set of attorneys to do what is necessary."

**Attorney's fee denied.**—In the case of *In re Lane Lumber Co.*, (N. D. Idaho 1913) 206 Fed. 780, the evidence was held to be insufficient to warrant the referee in granting certain items of a bill for attorney's fees.

**Fees for opposing baseless claims.**—An attorney's fee will be denied for services in contesting baseless claims by a receiver of the bankrupt's property for services and attorney's fees as it is the trustee's function and duty, and also the right of the creditors, to oppose such claims. In *re Lane Lumber Co.*, (N. D. Idaho 1913) 206 Fed. 780.

**Fees for attending bankrupt at creditor's meeting and sessions of court.**—Ordinarily fees should not be allowed out of the bankrupt's estate for services of an attorney for attending the bankrupt at creditors meetings, or at sessions of the court where he is required to give information or submit to examination under oath. In *re Lane Lumber Co.*, (N. D. Idaho 1913) 206 Fed. 780.

**Services rendered to voluntary trustees prior bankruptcy.**—are not services for which an attorney is entitled to compensation as against the estate in bankruptcy. In *re Marble Products Co.*, (E. D. N. Y. 1912) 199 Fed. 668.

**Services rendered a bankrupt in securing his discharge** may not be allowed for in fixing the attorney's fee. In *re Duran Mercantile Co.*, (D. C. N. Mex. 1912) 199 Fed. 961, wherein the Court said: "The wording of the statute—Bankruptcy Act, § 64b (3)—is 'for cost of administration,' including an attorney's fee for one attorney for the bankrupt in voluntary cases. When, therefore, we look at the attorney's fee, we must look at it in the light of the question as to whether or not it is "cost of administration"; that is, whether the services rendered went to the benefit of the estate or the progress of the administration of the estate. Now, the discharge of a bankrupt is a collateral matter. If he does not care to be discharged, he need never be, and in that event the estate will nevertheless be closed. His discharge is of no relevancy to the creditors. It is a matter that concerns him and his future, not the state. I think, therefore, that the cost for this is not to be allowed as part of the compensation of the attorney for the bankrupt, and it will be accordingly disallowed."

**Unsuccessful application for discharge.**—In the case of *In re Keller*, (S. D. N. Y. 1913) 207 Fed. 118, the court, in commenting on whether an allowance to the bankrupt's attorneys should be allowed in proceedings brought to secure the discharge of the bankrupt, said: "Judge Brown held in *In re Kross*, (S. D. N. Y. 1899) 96 Fed. 816, that

in voluntary cases the statute—Act July 1, 1898, c. 541, § 646 (3) 30 Stat. 563, (U. S. Comp. St. 1901, p. 3447)—permitted an allowance to the bankrupts' attorneys for procuring a discharge, though the rule is certainly different in involuntary cases. That allowance where the proceedings were not contested was the docket fee of \$20, and Judge Brown said obiter that in cases of contest the referee may allow further sums. It seems to me clear enough that the bankrupt should be allowed nothing for an unsuccessful application for discharge, but in voluntary cases, if the trustee at the instance of the creditors conducts an unsuccessful contest, I cannot see why the estate should not bear a fair allowance. Where, however, a single creditor or several creditors oppose the discharge, the question should be treated as one arising inter partes, and the estate generally ought not to suffer from an ill advised contest. If the creditor loses, the question of the propriety of the contest may

be then decided and he may have to bear costs. Usually no costs are given against a creditor; but in any case the question is to be determined in that proceeding. In this case the trustee did not conduct the opposition, and the allowance will be limited to a docket fee of \$20."

The reasonable rent of a store containing the bankrupt's property, from the time the trustee takes possession until the settlement of the estate, may be allowed an expense of administration. In re Abrams, (N. D. Ia. 1913) 200 Fed. 1005.

The "duties" referred to in this section mean the duties of the bankrupt as prescribed by section 7 of this act. In re Lane Lumber Co., (N. D. Idaho 1913) 206 Fed. 780.

Services after proceedings instituted.—This section refers to services rendered after the bankruptcy proceedings are instituted, to aid the bankrupt in performing his duties under the act. In re Stolp, (E. D. Wis. 1912) 199 Fed. 488.

## 1912 Supp., p. 774, sec. 64b (4).

**Wages entitled to priority.**—Claims for wages are entitled to priority over all other creditors. In re Blackstaff Engineering Co., (S. D. Ga. 1912) 200 Fed. 1019.

Claims for labor have priority even over claims of the United States, other than taxes. Guarantee Title & Trust Co. v. Title Guaranty & Surety Co., (1912) 224 U. S. 152, 32 S. Ct. 457, 56 U. S. (L. ed.) 706.

**Who may claim wages—Clerks.**—The fact that a claimant is a director or officer of a corporation does not disable the corporation from employing him as a clerk also. If the labor performed by him is so performed under his employment as clerk, and is not performed as a part of his duties as an officer, then he is entitled to priority for his wages as a clerk. In re H. O. Roberts Co., (D. C. Minn. 1912) 193 Fed. 294.

**The general manager, assistant general manager, and treasurer** of a business corporation are not entitled to priority under this section. In re Crown Point Brush Co., (N. D. N. Y. 1912) 200 Fed. 882.

**The manager of a branch store** is not "a workman, clerk or servant," within this section. In re Greenberger, (N. D. N. Y. 1913) 203 Fed. 583, wherein the court said: "The bankrupt ran two stores, one at the city of Glens Falls, N. Y., and for about 11 months prior to June 6, 1912, he ran a branch store in the city of Rutland, Vt. The claimant, Samuel Cohen, was manager of this branch store in the city of Rutland, and so testified repeatedly. It appears that lady clerks were employed in this store. Cohen kept the accounts and managed the business, except that he did not hire or discharge help or pay the bills for goods, as a rule. However, he was the manager, and managed the business. He had a regular salary as such manager, and at the time the petition in bankruptcy was filed there was a balance due him on such salary of \$198. It appears

from his testimony that, in addition to the performance of his duties as manager, he sold goods and kept the store clean, for the reason he would not turn this duty over to the lady clerks. It appears fairly from the evidence that the clerical work performed by him, as well as the work done in keeping the store clean, was merely incidental to the performance of his duties as general manager of the store. He was not employed as a cleaner or workman or clerk, and so far as appears all that he did in selling goods and cleaning the store was voluntary on his part. . . . It can make no material difference that Greenberger was carrying on this business as an individual. Cohen was neither a workman, clerk, traveling or city salesman, nor servant. The fact that, as incident to the performance of his duties as general manager of this store, he kept it clean and did some clerical duty does not change the character of his employment. He was not employed to do that work, but to manage the business, and he was paid for managing it, and not for performing such menial service as he did perform as incident to the management. The claim is for salary and for salary as manager, not for services as a clerk or general workman and compensation as such. The referee was right in holding that the claim of Cohen could not be allowed as one entitled to priority. It would hardly do to hold that the general manager of the business of a corporation or individual, employed and paid as such, becomes entitled to priority, for the reason he incidentally sweeps the floor, dusts the counters, and assists in selling goods. Adopt this rule and general managers of a business would be sure to do enough menial work to bring themselves within the section of the bankruptcy act giving priority to workmen, clerks, salesmen, and servants."

*The president of a commercial corporation.*—To the same effect as the original note, see *In re Crown Point Brush Co.*, (N. D. N. Y. 1912) 200 Fed. 882.

*Steward.*—A steward of a bankrupt restaurant corporation, who was also a "dummy" director, secretary, and stockholder of the corporation, was held to be entitled to priority for a claim for services as steward, no part of which was for services as director or secretary. *In re Swain Co.*, (N. D. Cal. 1912) 194 Fed. 749.

*A person employed by the bankrupt to deliver milk at the bankrupt's premises, with his team, at a fixed price per month, is not a workman, clerk, or servant within this section.* *Spruks v. Lackawanna Dairy Co.*, (M. D. Pa. 1911) 189 Fed. 287.

*An unemancipated son cannot claim wages against his father's estate which is in bankruptcy.* *In re Riff*, (E. D. Ark. 1913) 205 Fed. 406.

*Time of earning wages—Commissions.*—Where a salesman sells goods on commission, with an agreement that the commissions are not to be paid until the goods sold are paid for, his commissions are not "earned" until payment is made for the goods, and consequently where a sale is made by a salesman for a bankrupt, more than three months before bankruptcy, but the goods are paid for within three months, the commissions of the agent are, under this section, entitled to priority. *In re National Marble & Granite Co.*, (N. D. Ga. 1913) 206 Fed. 185.

## 1912 Supp., p. 777, sec. 64b (5).

*Priorities accorded by state or federal laws.* To the same effect as the original note, see *Spruks v. Lackawanna Dairy Co.*, (M. D. Pa. 1911) 189 Fed. 287; *In re Charles Town Light & Power Co.*, (N. D. W. Va. 1912) 199 Fed. 846; *In re Keith-Gara Co.*, (E. D. Pa. 1913) 203 Fed. 585; *In re Scruggs*, (S. D. Ala. 1913) 205 Fed. 673; *In re I. Rheinstrom & Sons Co.*, (E. D. Ky. 1913) 207 Fed. 119.

*Priority dependent on state law.*—To the same effect as the original note, see *In re New Galt House Co.*, (W. D. Ky. 1911) 199 Fed. 533.

*Landlord's right to priority.*—Where a state statute gives a landlord a lien for a year's rent on any property of the tenant on the leased premises such lien is protected, under this section of the Bankruptcy Act, for rent due or to become due although such rent is not a provable debt under sec. 63a(4) of this act. *In re Sapinsky*, (W. D. Ky. 1913) 206 Fed. 523.

## 1912 Supp., p. 783, sec. 66b.

This section relates to unclaimed dividends only, and when there is a surplus of a voluntary bankrupt's estate, after the payment of all proved claims and interest thereon to the date of the filing of the petition, such

surplus should be applied first to the payment of the interest accruing on the claims subsequent to the filing of the petition, and the remainder only returned to the bankrupt. *Johnson v. Norris*, (C. C. A. 5th Cir. 1913) 203 Fed. 851.

*Lien created.*—In the case of *In re Me-David Lumber Co.*, (N. D. Fla. 1911) 190 Fed. 97, affirmed (C. C. A. 5th Cir. 1912) 193 Fed. 647, the court, answering a contention that this section did no more than provide for the order of distribution of the assets after satisfaction had been made of valid liens recognized by section 67d, said: "It is clear that the trust fund arising from the administration is distinctly charged by the act in favor of wages to the extent provided by section 64b, and, if it cannot be said to constitute technically a lien, its effect is tantamount to any claim or privilege created by state statute. It will not be denied that, where liens have attached before bankruptcy administration and are not dissolved by the act, they will be respected as criteria in the order for distribution of the estate, except preferred claims under the bankruptcy act which unquestionably supercedes the state law. . . . It should be the policy of the law and the primary duty of society to protect the wages of the laborer in every contingency. Congress has indicated its purpose, and courts should declare the law."

*State laws.*—The fact that in dealing with workmen, clerks, traveling or city salesman, and servants, the state law may be broader and more liberal than the Bankruptcy Act is not warrant for enlarging the priority given those classes by such act. *In re Crown Point Brush Co.*, (N. D. N. Y. 1912) 200 Fed. 882.

*Right of secured creditors to prove generally.*—When, by a state law, a person furnishing materials or supplies to another for use in a business is allowed a lien upon the property used in the business on the subsequent bankruptcy of the debtor, and such property proves insufficient to pay the debt, he may prove the balance as a general claim against the estate of the bankrupt. *In re Floyd & Bohr Co.*, (W. D. Ky. 1912) 200 Fed. 1016.

*Effect on priorities given by previous sections.*—In considering claims to priority under this section, it must be remembered that a state statute has no application to enlarge the priority given by the Bankruptcy Act to a certain class of claims or claimants. *In re Crown Point Brush Co.*, (N. D. N. Y. 1912) 200 Fed. 882.

This section is cited in the following cases. *In re O'Malley*, (M. D. Pa. 1911) 191 Fed. 999; *In re Huxoll*, (C. C. A. 6th Cir. 1912) 193 Fed. 851.



1911) 190 Fed. 459, wherein the court said: "The balance meant is not a surplus, but the remainder of unclaimed dividends—the remainder of sums allotted to creditors who have failed to claim them; the remainder, after satisfying in full the claims of other creditors who have not failed to claim their dividends. This section gives no authority to pay a surplus to the bankrupt which has never been embraced in a declaration of dividends, and it shows that the act neither

contemplates the existence nor provides for the disposition of any surplus which shall not be embraced in the declaration of dividends. But, unquestionably, a surplus after paying in full all debts, including all interest due on the debts accruing before and subsequent to the filing of the petition, would equitably belong to the bankrupt, and no statute would be needed to authorize the court to direct its payment to the bankrupt."

## 1912 Supp., p. 783, sec. 67a.

**Validity determined by state law.**—To the same effect as the original note, see *Holt v. Crucible Steel Co. of America*, (1912) 224 U. S. 262, 32 S. Ct. 414, 56 U. S. (L. ed.) 756; *Sturdivant Bank v. Schade*, (C. C. A. 8th Cir. 1912) 195 Fed. 188; *In re Clough*, (D. C. Vt. 1912) 197 Fed. 185; *In re Charles Town Light & Power Co.*, (N. D. W. Va. 1912) 199 Fed. 846; *In re Harnden*, (D. C. N. M. 1912) 200 Fed. 175; *In re United States Lumber Co.*, (W. D. Wash. 1913) 206 Fed. 236; *Schaupp v. Miller*, (D. C. Ore. 1913) 206 Fed. 675; *In re Waters-Colver Co.*, (E. D. N. Y. 1913) 206 Fed. 845; *In re Rose*, (N. D. Ga. 1913) 206 Fed. 991.

## 1912 Supp., p. 785, sec. 67c.

**In so far as section 67c is in conflict with section 67f.**—To the same effect as the original note, see *Cook v. Robinson*, (C. C. A. 9th Cir. 1912) 194 Fed. 785; *Folger v. Putnam*, (C. C. A. 9th Cir. 1912) 194 Fed. 793.

**Notwithstanding the repugnancy of subdivision c to subdivision f, and that the provisions of the latter are controlling, those of the former still remain for the purpose of interpretation, as the intentment of the act must be gathered from a reading of all its provisions as enacted in *pari materia*.** *Folger v. Putnam*, (C. C. A. 9th Cir. 1912) 194 Fed. 693.

**Attachment under mesne process.**—This section recognizes a preference obtainable through an attachment, acquired upon mesne process pursuant to a suit or proceeding at law or in equity, the condition being that the attachment shall have been made while the debtor was insolvent, and its existence

**Purpose of section.**—"The United States statute in question was designed to preserve rights under attachments and liens that actually existed, and not to create rights under attachments that had ceased to exist at the time of the filing of the petition in bankruptcy. *Gary v. Graham*, (1911) 108 Me. 452, 81 Atl. 666. The obvious purpose of it was to preserve to the creditors property which they would otherwise lose by an adjudication in bankruptcy, and to prevent the intervention of other liens to their prejudice."

**A chattel mortgage made by a bankrupt may be set aside at the suit of the trustee on the ground of fraud.** See *In re Geiver*, (D. C. S. D. 1912) 193 Fed. 128.

**and enforcement will so operate; that is, as a preference.** *Folger v. Putnam*, (C. C. A. 9th Cir. 1912) 194 Fed. 793.

**Liens acquired more than four months before bankruptcy.**—Under this section and section 67f all liens obtained in pursuance of any suit or proceeding, at law or in equity, are undisturbed by bankrupt proceedings, if the liens have been acquired more than four months before the filing of the petition. *Williams v. Bosworth*, (1912) 102 Miss. 160, 59 So. 6.

**Liens determined by state law.**—The Bankrupt Act leaves to each state the right to say when a lien is established by virtue of its law. It is not intended by the Bankrupt Act to disturb vested rights under liens acquired more than four months before the petition in bankruptcy, and each state determines when a lien exists according to its own laws. *Williams v. Bosworth*, (1912) 102 Miss. 160, 59 So. 6.

## 1912 Supp., p. 786, sec. 67d.

**Valid liens remain undisturbed.**—To the same effect as the original note, see *In re Zehner*, (E. D. La. 1912) 193 Fed. 787; *Parker v. Bates*, (S. D. Ga. 1913) 203 Fed. 294.

**A real estate mortgage, given for bona fide cash advances, is a valid lien notwithstanding that at the time the mortgagor is insolvent and his insolvency is known to the**

**mortgagee.** *Lindley v. Ross*, (C. C. A. 7th Cir. 1912) 200 Fed. 733.

**The state law governs.**—To the same effect as the original note, see *In re Weiland*, (N. D. Ga. 1912) 197 Fed. 116; *In re Jacobson & Perrill*, (N. D. Ga. 1912) 200 Fed. 812.

**Chattel mortgages.**—A chattel mortgage, filed for record before the institution of bankruptcy, is a valid lien as against the

trustee in bankruptcy. In re Jacobson & Perrill, (N. D. Ga. 1912) 200 Fed. 812.

Unrecorded chattel mortgage.—Where a state law makes recordation of a chattel mortgage necessary to its validity, an unrecorded chattel mortgage is not good as against a trustee in bankruptcy. Millikin v. Second Nat. Bank of Baltimore, (C. C. A. 4th Cir. 1913) 206 Fed. 14.

Mechanics' and kindred liens.—To the same effect as the original note, see Grainger & Co. v. Riley, (C. C. A. 6th Cir. 1913) 201 Fed. 901.

Lardlords' liens.—To the same effect as the original note, see In re Meyer & Bleuler, (E. D. La. 1912) 195 Fed. 653.

Trust deeds.—To the same effect as the original note, see In re Hasie, (N. D. Tex. 1913) 206 Fed. 789.

Clearance loans.—For a discussion of clearance loans by banks to stockbrokers as preferential liens, see Hotchkiss v. National

City Bank of New York, (S. D. N. Y. 1911) 200 Fed. 287.

Statute protects obligation, not remedy.—It has been repeatedly held that the provision of the Bankruptcy Act that valid liens shall not be affected by the bankruptcy proceedings has reference only to the validity of the contract, and not to the remedy for enforcing the lienholder's rights, which may be changed without impairing the obligation of the contract, provided an equally efficient and adequate remedy is substituted. In re Zehner, (E. D. La. 1912) 193 Fed. 787; In re Hasie, (N. D. Tex. 1913) 206 Fed. 789.

Liens invalid as to creditors.—"The rule that the trustee takes the estate of the bankrupt in the same plight as the bankrupt held it is not applicable to liens which, although valid as to the bankrupt, are invalid as to creditors." In re Thomas, (N. D. N. Y. 1912) 199 Fed. 214.

## 1912 Supp., p. 792, sec. 67e.

Purpose of section 67e.—This section nullifies all conveyances of any part of the bankrupt's property made within four months of the filing of the petition in bankruptcy with the intent to hinder, delay, or defraud any of his creditors "except as to purchasers in good faith and for a present fair consideration." It also nullifies all conveyances made by him within the same period while insolvent, which under the state laws are null and void, as against his creditors. In re Lipman, (D. C. N. J. 1912) 201 Fed. 169.

Intent to hinder, delay, or defraud, essential.—To the same effect as the original note, see In re Thomas, (N. D. N. Y. 1912) 199 Fed. 214; In re Thweatt, (N. D. Ga. 1912) 199 Fed. 319; Ogden v. Reddish, (E. D. Ky. 1912) 200 Fed. 977; Johnson v. Dismukes, (C. C. A. 5th Cir. 1913) 204 Fed. 382.

To avoid a transfer under this section it is incumbent upon the complainant to show actual fraud in fact in the conveyance of the property to the deceased, as distinguished from constructive fraud. A transfer by one to another of his property in good faith, either beyond or within the four months immediately preceding the filing of a petition in bankruptcy by or against him, to pay an honest antecedent debt, is not of itself sufficient to establish actual fraud in fact, or an intent on his part, or on the part of the creditor receiving the property, to hinder, delay, or defraud other creditors of the debtor within the meaning of this section. Meservey v. Roby, (C. C. A. 8th Cir. 1912) 198 Fed. 844.

A purchaser is not in good faith who makes no effort to determine whether one may make a transfer which will not be in violation of the Bankruptcy Act. Fraud is not to be presumed, but that does not imply that fraud may not be proved by circumstances as well as by direct evidence. Fraud may be actual arising from facts and circum-

stances of imposition. It may be apparent from the intrinsic nature and subject of the bargain itself. Lumpkin v. Foley, (C. C. A. 5th Cir. 1913) 204 Fed. 372.

A payment made immediately before bankruptcy, or filing a petition in bankruptcy, to renew an outlawed debt and to enable the creditor to come in and share in the distribution, the one receiving it having no reasonable cause to believe it will operate as a preference, is not a fraud on creditors or the law. In re Banks, (N. D. N. Y. 1913) 207 Fed. 602.

Chattel mortgages.—To the same effect as the original note, see In re Walden Bros. Clothing Co., (N. D. Ga. 1912) 199 Fed. 315.

Effect of discharge in bankruptcy.—The discharge of a bankrupt does not affect the right of the trustee in bankruptcy or his creditors to have property previously disposed of by the bankrupt for the purpose of defrauding his creditors applied to the payment of his debts. This right of the trustee is expressly conferred by this section and section 70e. Blick v. Nimmo, (1913) 121 Md. 139, 88 Atl. 116.

A conveyance is "made or given" when it is delivered and not when it is recorded; consequently a trustee in bankruptcy cannot avoid a conveyance executed and delivered by the bankrupt more than four months prior to the filing of the petition, though such conveyance is filed for record within the four months period. Underleak v. Scott, (1912) 117 Minn. 136, 134 N. W. 731.

An assignment of a life insurance policy to the insured's wife, without consideration, and while he is insolvent, constitutes a voidable transfer. Kirkpatrick v. Johnson, (S. E. D. Pa. 1912) 197 Fed. 235.

Property sold under execution on judgment by confession.—For facts showing a voidable transfer under this section, where property was sold under execution on a judgment by confession and purchased by the judg-

ment creditor at about one fourth of its value, with knowledge of the debtor's insolvency, see *Grant v. National Bank of Auburn*, (N. D. N. Y. 1912) 197 Fed. 581.

An engagement ring, given by a person who three months later goes into voluntary bankruptcy, may be recovered from the woman to whom it was given. *Pollock v. Simon*, (E. D. Pa. 1913) 205 Fed. 1005.

**Payment to bank holding note of bankrupt.**—This section is not relevant on the question whether a payment on a note held by a bank against a depositor, on a threat of the bank to set off the note against the depositor's account, is a voidable preference. In *re Starkweather*, (W. D. Mo. 1913) 206 Fed. 797.

## 1912 Supp., p. 797, sec. 67f.

### I. ANNULMENT OF LIENS GENERALLY.

This section prevails over section 67c in so far as the provisions of the two sections are repugnant. *Cook v. Robinson*, (C. C. A. 9th Cir. 1912) 194 Fed. 785; *Folger v. Putnam*, (C. C. A. 9th Cir. 1912) 194 Fed. 793.

**Annulment of liens obtained through legal proceedings.**—To the same effect as the original note, see *In re Huxoll*, (C. C. A. 6th Cir. 1912) 193 Fed. 851; *In re Martin*, (C. C. A. 6th Cir. 1912) 193 Fed. 841; *Blick v. Nimmo*, (1913) 121 Md. 139, 88 Atl. 116; *Pope v. Title Guaranty & Surety Co.*, (1913) 152 Wis. 811, 140 N. W. 348.

**Admiralty lien.**—The lien acquired by filing a libel against a ship in admiralty is not affected by bankruptcy proceedings instituted within four months thereafter. *The Philomena*, (D. C. Mass. 1911) 200 Fed. 859. See also *The Bethulia*, (D. C. Mass. 1911) 200 Fed. 862; *The Geisha*, (D. C. Mass. 1911) 200 Fed. 864.

**Laborer's, mechanic's, and contractor's liens.**—The provisions of the Bankruptcy Act, preventing an insolvent from giving or the creditor from securing preferences for pre-existing debts, apply not only to mortgages and transfers voluntarily made by the debtor, but also to those preferences which are obtained through legal proceedings, whether the lien dates from the entry of the judgment, from the attachment before judgment, or, as in some states, from the levy of execution after judgment. But the statute was not intended to lessen rights which already existed, nor to defeat those inchoate liens given by statute, of which all creditors were bound to take notice and subject to which they are presumed to have contracted when they dealt with the insolvent. Liens in favor of laborers, mechanics and contractors are of this character; and although they may be perfected by record or foreclosure within four months of the bankruptcy, they are not created by judgments, nor are they treated as having been "obtained through legal proceedings," even when it is necessary to enforce them by some form of legal proceeding.

**Jurisdiction.**—An action to recover money paid by a bankrupt, in contemplation of insolvency, must be brought in the district where the person receiving the money resides, and not in the district of adjudication, if that is different from the district of such person's residence. *Kirkpatrick v. Gallup*, (W. D. Mich. 1912) 200 Fed. 108.

**No judgment required.**—In order that a creditor may be able to set aside a transaction claimed to be unlawful he need not have a judgment, attachment, or lien. *Union Trust Co. v. Amery*, (1911) 67 Wash. 1, 120 Pac. 539.

This section is cited in *Baker v. Robertson*, (Tex. 1913) 163 S. W. 326.

The statutes of the various states differ as to the time when such liens attach, and also as to the property they cover. They may bind only what the plaintiff has improved or contracted; or they may extend to all the chattels of the debtor, or "all the property involved in the business." In some cases the lien dates from commencement of the work, or from the completion of the contract. In others, prior to levy they are referred to as being dormant or inchoate liens, or as "a right to a lien." But the courts, dealing specially with bankruptcy matters, have almost uniformly held that these statutory preferences are not obtained through legal proceedings, and, therefore, are not defeated by this section, even where the registration, foreclosure or levy necessary to their completion or enforcement was within four months of the filing of the petition in bankruptcy. *Henderson v. Mayer*, (1912) 225 U. S. 631, 32 S. Ct. 699, 56 U. S. (L. ed.) 1233.

**Equitable liens.**—The provision of the section expressly exempting from its operation and preserving all liens created by the bankrupt in good faith and for a valuable consideration more than four months before the filing of the petition in bankruptcy, includes an equitable lien such as one arising from an assignment by the bankrupt of an expectant interest in the estate of his mother. *Bridge v. Kedon*, (1912) 163 Cal. 493, 126 Pac. 149.

**Notes indorsed by bankrupt.**—Where a trustee purchases notes on which the bankrupt is liable as an indorser he becomes subrogated to the rights of the sellers, and has an interest in a special fund securing the notes. *Merchants' Nat. Bank of New York v. Sexton*, (1913) 228 U. S. 634, 33 S. Ct. 725, 57 U. S. (L. ed.) 998.

**Construction of section in connection with section 60b.**—See under this title, 1912 Supp. p. 739, sec. 60b.

### II. TIME OF ACQUIRING LIEN.

**Pleading.**—This section affects only the lien thereby acquired, and not the judgment itself; and hence in a petition drawn under

said section seeking to recover a voidable preference it is necessary to allege that at the time of filing the bankruptcy petition the lien acquired through the legal proceedings was in effect. *Rodolf v. First Nat. Bank of Tulsa*, (1912) 30 Okla. 631, 121 Pac. 629, 41 L.R.A.(N.S.) 204.

### III. JUDGMENT LIENS.

**Judgment liens.**—To the same effect as the original note, see *In re Harrington*, (N. D. N. Y. 1912) 200 Fed. 1010.

Under this section, two things are required in order to render a lien void: First. It must have been entered within four months prior to the filing of the petition in bankruptcy. Second. The judgment must have been entered against a person who was insolvent at the date of its entry. *Keystone Brewing Co. v. Schermer*, (1913) 241 Pa. St. 361, 88 Atl. 657.

**Payment made to execution creditor.**—Bankruptcy proceedings cannot affect a judgment and execution if payment has been made to the execution creditor. *In re Weitzel*, (E. D. N. Y. 1911) 191 Fed. 463.

**Discharge of surety.**—It is the lien created by a judgment that is destroyed by an adjudication in bankruptcy within four months after the recovery of the judgment against the bankrupt, and as a result a surety is not discharged by such adjudication. *Pope v. Title Guaranty & Surety Co.*, (1913) 152 Wis. 611, 140 N. W. 348.

**Proof of insolvency.**—The burden of proving the insolvency of the judgment debtor at the date of the entry of the judgment rests upon the party alleging it. *Keystone Brewing Co. v. Schermer*, (1913) 241 Pa. St. 361, 88 Atl. 657.

### IV. ATTACHMENT AND GARNISHMENT LIENS.

**Attachment and garnishment liens.**—To the same effect as the original note, see *In re Ransford*, (C. C. A. 6th Cir. 1912) 194 Fed. 658; *Cook v. Robinson*, (C. C. A. 9th Cir. 1912) 194 Fed. 785.

In any case wherein it is desired to preserve an attachment or execution lien upon the property for the benefit of the estate under this section steps must be taken to that end before the lien is discharged. The subrogation of the trustee as plaintiff in the attachment suit after the lien has been discharged does not revive the lien. *In re Walsh Bros.*, (N. D. Ia. 1912) 195 Fed. 576.

Section 67f makes two distinct provisions for the disposition of the property of an insolvent attached. —To the same effect as the original note, see *Nisbet v. Siegel-Campion Live Stock Co.*, (1912) 21 Colo. App. 494, 123 Pac. 110; *Corey v. Blackwell Lumber Co.*, (1913) 24 Idaho 642, 135 Pac. 742.

The phrase "legal proceedings" occurring in this subdivision applies to proceedings in garnishment and includes any proceeding in a court of justice by which a party pursues a remedy which the law affords him, and the charge or incumbrance created by garnishment proceedings is one of the "other liens"

mentioned in such subdivision. *In re Ransford*, (C. C. A. 6th Cir. 1912) 194 Fed. 658.

**Exempt property.**—Where money is garnished in an action in a justice court, and a claim for exemption is disallowed in such court, a subsequent adjudication in bankruptcy in the federal courts in which such property is claimed and set aside to the debtor as and for his exemptions will not release or avoid the lien of such prior garnishment, even though such garnishment proceedings may have been instituted within four months of such adjudication in bankruptcy, and in spite of the provisions of this section which only avoids liens upon property which passes to the trustee in bankruptcy, and over which the bankruptcy court could and has assumed jurisdiction. By setting aside the property as exempt, such court will be held to have disclaimed any intention of assuming or of having ever assumed jurisdiction over it, and it cannot be said to have passed at any time to the trustee in bankruptcy. Nor will the fact that on account of such adjudication in bankruptcy a personal judgment cannot be rendered against the defendant in the district court alter the case or preclude the foreclosure of the lien, as the jurisdiction of the district court is in rem and not in personam. *Burcell v. Goldstein*, (1912) 23 N. D. 257, 136 N. W. 243.

**Powers of state court.**—Under this section, after an adjudication in bankruptcy, a state court has no jurisdiction to hold property under an attachment for any purpose. A proceeding which becomes null and void can no longer produce any legal effect. A state court cannot retain the possession of property which the federal statute declares shall be wholly discharged and released from a levy, attachment, or judgment. *Lehman, Stern & Co. v. E. Martin & Co.*, (1913) 132 La. 231, 61 So. 212.

**Insolvent at time lien is acquired.**—To render a lien acquired by the levy of an attachment writ within four months void, the bankrupt must be insolvent at the time the lien is acquired. *D. C. Wise Coal Co. v. Columbia Zinc & Lead Co.*, (1911) 157 Mo. App. 315, 138 S. W. 67.

### IV. ATTACHMENT AND GARNISHMENT LIENS.

**Rights on attachment bond.**—"Where there has been an adjudication in bankruptcy of a defendant, in proceedings begun more than four months after attachments made, the creditor has by his attachment acquired as security for his claim sued upon a lien upon the property attached, which neither the adjudication nor any of the proceedings in bankruptcy disturb. The defendant's discharge does not disturb it. It does, however, by precluding a general judgment against the debtor, prevent the creditor from pursuing the usual course to avail himself of this security. The creditor finds himself in the position where, having obtained security by his diligence, the door to reach it is closed to him, unless some form of judgment not forbidden can be rendered. His

predicament furnishes to those courts which can render a qualified judgment the moving reason for doing so, in order that injustice may thus be avoided, and the creditor be enabled to avail himself of the security which is rightfully and legally his, and of the benefit of which he would otherwise be deprived. Where a bond has been given in substitution for either the property attached or the attachment in such a case, the same appeal for a special judgment is made in order that the creditor may obtain the benefit of that to which he has become rightfully entitled, or to preserve his plain equity. Where the bankruptcy proceedings are begun within four months after the attachment, and there is substituted for the attachment a bond which, as in the present case, does not become ineffective by the mere operation of the provision of section 67f of the bankrupt act, the situation is a very different one. The plaintiff has nothing for the security or satisfaction of his claim, except the bond and such legal obligation as its terms embody. This obligation gives no present legal right. The event whose happening would bring one into existence has not occurred. He stands before the court as one without security to appropriate, or legal right to enforce. What he asks is its assistance in bringing into existence such right, to be later enforced. This assistance the court will not render, unless the plaintiff can show some sufficient reason therefor which is founded in right and equity." *Prentiss, J., in Schunack v. Art Metal Novelty Co., (1911) 84 Conn. 331, 80 Atl. 290.*

#### V. LIENS ON EXEMPT PROPERTY.

**Liens against exempt property.**—On the question whether this section has the effect of annulling liens against exempt property the United States Supreme Court in *Chicago, B. & Q. R. Co. v. Hall, (1913) 229 U. S. 511, 33 S. Ct. 885, 57 U. S. (L. ed.) 1306*, speaking through Mr. Justice Lamar, said: "On this question there is a difference of opinion, some state and federal courts holding that the Bankruptcy Act was intended to protect the creditors' trust fund and not the bankrupt's own property and that, therefore, liens against the exempt property were not annulled even though obtained by legal proceedings within four months of filing petition. In *re Driggs, (S. D. N. Y. 1909) 171 Fed. 897*; In *re Durham, (E. D. Ark. 1900) 104 Fed. 231*. On the other hand, In *re Tune, (E. D. Pa. 1902) 115 Fed. 906* and In *re Forbes, (C. C. A. 9th Cir. 1911) 186 Fed. 79*, held that § 67f annuls all such liens, both as against the property which the trustee takes and that which may be set aside to the bankrupt as exempt. . . . This view, we think, is supported both by the language of the section and the general policy of the act, which was intended not only to secure equality among creditors, but for the benefit of the debtor in discharging

him from his liabilities and enabling him to start afresh with the property set apart to him as exempt.

"Barring exceptional cases, which are specially provided for, the policy of the act is to fix a four months period in which a creditor cannot obtain an advantage over other creditors nor a lien against the debtor's property. 'All liens obtained by legal proceedings' within that period are declared to be null and void. That universal language is not restricted by the later provision that 'the property affected by the . . . lien shall be released from the same and pass to the trustee as a part of the estate of the bankrupt.' It is true that title to exempt property does not vest in the trustee and cannot be administered by him for the benefit of the creditors. But it can 'pass to the trustee as a part of the estate of the bankrupt' for the purposes named elsewhere in the statute, included in which is the duty to segregate, identify and appraise what is claimed to be exempt. He must make a report 'of the articles set off to the bankrupt, with the estimated value of each article,' and creditors have 20 days in which to except to the trustee's report. Section 47 (11) and General Orders in Bankruptcy, 17. In other words, the property is not automatically exempted but must 'pass to the Trustee as a part of the estate'—not to be administered for the benefit of creditors, but to enable him to perform the duties incident to setting apart to the bankrupt what, after a hearing, may be found to be exempt. Custody and possession may be necessary to carry out these duties, and all levies, seizures and liens obtained by legal proceedings within the four months that may or do interfere with that possession are annulled, not only for the purpose of preventing the property passing to the trustee as a part of the estate, but for all purposes, including that of preventing their subsequent use against property that may ultimately be set aside to the bankrupt. This property is withdrawn from the possession of the trustee not for the purpose of being subjected to such liens, but on the supposition that it needed no protection inasmuch as they had been nullified."

Compare *First International Bank of Portal v. Lee, (1913) 25 N. D. 197, 141 N. W. 716*, wherein it is held that where property is seized upon a writ of attachment, and thereafter bankruptcy proceedings are instituted and said property is scheduled, but in said proceedings is set apart as and for the exemptions of the debtor, the lien of the attachment writ will not be considered to have been avoided.

**Rights in exempt property acquired by contract or waiver of exemption.**—The liens rendered void by this section are those obtained by legal proceedings within four months. The section does not, however, defeat rights in the exempt property acquired by contract or by waiver of the exemption. These may be enforced or foreclosed by judg-

ments obtained even after the petition in bankruptcy was filed, under the principle declared in *Lockwood v. Exchange Bank*, (1903) 190 U. S. 294, 23 S. Ct. 751, 47 U. S. (L. ed.) 1061; *Chicago, B. & Q. R. Co. v. Hall*, (1913) 229 U. S. 511, 33 S. Ct. 885, 57 U. S. (L. ed.) 1306.

#### VI. ENFORCEMENT OF PRE-EXISTING LIENS.

**Enforcement of pre-existing lien.**—To the same effect as the second paragraph of the original note, see *Colston v. Austin Run Mining Co.*, (C. C. A. 3d Cir. 1912) 194 Fed. 929.

### 1912 Supp., p. 805, sec. 67f. [*Bona fide purchasers.*]

**Bona fide purchasers protected.**—To the same effect as the original note, see *Jones v. Springer*, (1912) 226 U. S. 148, 33 S. Ct. 64, 57 U. S. (L. ed.) 161.

### 1912 Supp., p. 805, sec. 68a.

It is the main purpose of this statute, as its terms show, to prevent debtors of the bankrupt from acquiring claims against the bankrupt for use by way of set-off and reduction of their indebtedness to the estate. *Continental & Commercial Trust & Savings Bank v. Chicago Title & Trust Co.*, (1913) 229 U. S. 435, 33 S. Ct. 829, 57 U. S. (L. ed.) 1208.

**Set-off between bank and depositor.**—To same effect as original note, see *Chicago Title & Trust Co. v. Federal Trust & Savings Bank*, (N. D. Ill. 1911) 192 Fed. 967; *In re Percy Ford Co.*, (D. C. Mass. 1911) 199 Fed. 334; *Walsh v. First Nat. Bank*, (C. C. A. 6th Cir. 1913) 201 Fed. 522.

*In Studley v. Boylston Bank of Boston*, (1913) 229 U. S. 527, 33 S. Ct. 806, 57 U. S. (L. ed.) 1313, 1316, the court said: "We find nothing in the record to indicate that the deposits were made for the purpose of enabling the bank to secure a preference by the exercise of the right of set-off. The case, therefore, comes directly within the decision in *New York County Nat. Bank v. Massey*, (1904) 192 U. S. 138, where \$3,884 deposited by an insolvent customer, in good faith, four days before the filing of the petition against him, was allowed to the bank by way of set-off on notes of the bankrupt held by it. An effort is made to distinguish that case from this, by calling attention to the fact that here, by checks drawn on the account or notes charged to the account, the parties themselves voluntarily made the set-off before the petition was filed, while in the *Massey* case the trustee, under the supervision of the referee, stated an account and allowed the set-off as permitted by § 68a, which provides 'that in all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.' That section did not create the right of set-off but recognized its existence and provided a method by which it could be enforced even after bankruptcy. What the old books called a right of stoppage—what business men call set-off, is a right given or recognized by the commercial law of each of the states and is protected by the Bankruptcy Act if the petition is filed before the parties have themselves given checks, charged notes, made book en-

tries, or stated an account whereby the smaller obligation is applied on the larger. The bankers' lien on deposits, the right of retention and set-off of mutual debts are frequently spoken of as though they were synonymous, while in strictness a set-off is a counterclaim which the defendant may interpose by way of cross-action against the plaintiff. But, broadly speaking, it represents the right which one party has against another to use his claim in full or partial satisfaction of what he owes to the other. That right is constantly exercised by business men in making book entries whereby one mutual debt is applied against another. If the parties have not voluntarily made the entries and suit is brought by one against the other, the defendant, to avoid a circuitry of action, may interpose his mutual claim by way of defense and if it exceeds that of the plaintiff may recover for the difference. Such counterclaims can be asserted as a defense or by the voluntary act of the parties, because it is grounded on the absurdity of making A pay B when B owes A. If this set-off of mutual debts has been lawfully made by the parties before the petition is filed, there is no necessity of the trustee doing so. If it has not been done by the parties, then, under command of the statute, it must be done by the trustee. But there is nothing in § 68a which prevents the parties from voluntarily doing before the petition is filed what the law itself requires to be done after proceedings in bankruptcy are instituted."

**Deposits may be made and accepted for specified purposes**, not within the general rule, whereby "the bank becomes bailee of the depositor" or trustee of the fund, with title thereto remaining in the depositor until the purpose of deposit is discharged; and the relation thereby established is not that of debtor and creditor, although it was not intended that the identical money so deposited was to be held for the payment. *Continental & C. T. & S. Bank v. Chicago T. & Trust Co.*, (C. C. A. 7th Cir. 1912) 199 Fed. 704. See also *Bank of Brodhead v. Smith*, (C. C. A. 7th Cir. 1912) 199 Fed. 703.

**Deposit to meet post-dated check.**—Where a deposit is not made for general purposes, but for the purpose of meeting an outstanding post-dated check of the bank, it is tanta-

mount to a payment direct to the bank, and possesses none of the elements of an allowable set-off. In *re Starkweather*, (W. D. Mo. 1913) 206 Fed. 797.

**Payment to bank on overdue note.**—A payment to a bank of part of the amount of an overdue note, upon the threat of the bank to set off the note against the account of the maker of the note at the bank, does not constitute an allowable set-off within this section. In *re Starkweather*, (W. D. Mo. 1913) 206 Fed. 797.

**Unpaid stock subscriptions due an insolvent corporation are not subjects of set-off against ordinary claims held by the subscribers against the corporation.** In *re Howe Mfg. Co.*, (W. D. Ky. 1912) 193 Fed. 524; *Kiskadden v. Steinle*, (C. C. A. 6th Cir. 1913) 203 Fed. 375. In the latter case the court said: "After the corporation becomes insolvent, any sum due upon a stock subscription is impressed with the character of a trust in favor of all the creditors alike, except only such as may have given credit to the company with knowledge of the scheme of stock issue. Hence to apply such an unpaid subscription as a set-off to an ordinary claim held by the subscriber against the corporation would be to appropriate the rights of the other creditors in the subscription debt to the exclusive benefit of the person owing it; or, on the other hand, it might, as respects his stockholders, subject him to the payment of more than his ratable share of the bankrupt's debts."

**Secured and unsecured debts.**—Where it appeared that a creditor holding a secured

note against a bankrupt and also an unsecured note, sold the collateral for the secured note, realizing on the sale more than enough to satisfy such note, it was held that he could set off the balance against the unsecured note, although in the proof of claim no mention was made of any security available for any part of the debt represented by the secured note. In *re Searles*, (E. D. N. Y. 1912) 200 Fed. 893.

**Time account stated and liquidated.**—In the case of *In re Michaelis & Lindeman*, (S. D. N. Y. 1912) 196 Fed. 718 the court said: "Admittedly there must come a time as of which claims against a bankrupt's estate are to be liquidated and stated. This is just as true when there is a set-off or counterclaim concerned as when there is none, and this time has been fixed as the date of filing petition. *Sexton v. Dreyfus*, 219 U. S. 330, 31 Sup. Ct. 256, 55 L. Ed. 244, 25 Am. Bankr. Rep. 363, and *Steinhardt v. National Park Bank*, 18 Am. Bankr. Rep. 86, 62 Misc. Rep. 464, 102 N. Y. Supp. 546. Section 68 requires that, in all cases of mutual debts or credits between the estate of a bankrupt and a creditor, the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid." The statutory direction that the account shall be stated implies that there must be a time when the statement is to be made, and when a final statement of an account is made the account is closed and all mutuality ceases, for the account becomes a statement of balance."

## 1912 Supp., p. 808, sec. 69a.

The words "wrongfully obtained" in this section include the securing of an order of seizure of property when thereafter the pe-

tition shall be dismissed. *T. E. Hill Co. v. United States Fidelity & Guaranty Co.*, (1911) 250 Ill. 242, 95 N. E. 150.

## 1912 Supp., p. 811, sec. 70a.

### I. NATURE OF TRUSTEE'S TITLE.

**Trustee takes bankrupt's title.**—To the same effect as the original note see *Crowe v. Baumann*, (N. D. N. Y. 1911) 190 Fed. 399; *Lovell v. Newman*, (C. C. A. 5th Cir. 1912) 192 Fed. 753; In *re Interstate Paving Co.*, (N. D. N. Y. 1912) 197 Fed. 371; In *re McConnell*, (N. D. N. Y. 1912) 197 Fed. 438; In *re National Boat & Engine Co.*, (D. C. Me. 1912) 198 Fed. 407; In *re T. C. Burnett & Co.*, (E. D. Tenn. 1912) 201 Fed. 162; In *re Snelling*, (D. C. Mass. 1912) 202 Fed. 259; In *re Thompson*, (D. C. N. J. 1913) 205 Fed. 556; *Chicago Title & Trust Co. v. National Storage Co.*, (1913) 260 Ill. 485, 103 N. E. 227.

In *Everett v. Judson*, (1913) 228 U. S. 474, 33 S. Ct. 568, 57 U. S. (L. ed.) 927, 46 L.R.A.(N.S.) 154, the court said: "While it is true that § 70a provides that the trustee, upon his appointment and qualification, becomes vested by operation of law with the title of the bankrupt as of the date he

was adjudged a bankrupt, there are other provisions of the statute which, we think, evidence the intention to vest in the trustee the title to such property as it was at the time of the filing of the petition. This subject was considered in *Acme Harvester Co. v. Beekman Lumber Co.*, (1911) 222 U. S. 300, wherein it was held that, pending the bankrupt proceedings and after the filing of the petition, no creditor could obtain by attachment a lien upon the property which would defeat the general purpose of the law to dedicate the property to all creditors alike. Section 70a vests all the property in the trustee, which, prior to the filing of the petition, the bankrupt could by any means have transferred or which might have been levied upon and sold under judicial process against him. The bankrupt's discharge is from all provable debts and claims which existed on the day on which the petition for adjudication was filed. *Zavelo v. Reeves*, (1913) 227 U. S. 625, 630, 631. The

schedule that the bankrupt is required to file, showing the location and value of his property, must be filed with his petition. We think that the purpose of the law was to fix the line of cleavage with reference to the condition of the bankrupt estate as of the time at which the petition was filed and that the property which vests in the trustee at the time of adjudication is that which the bankrupt owned at the time of the filing of the petition."

In *Acme Harvester Co. v. Beekman Lumber Co.*, (1911) 222 U. S. 300, 32 S. Ct. 96, 56 U. S. (L. ed.) 208, commented on in the above quotation, the court said: "Whatever may be the limitations of the doctrine declared by this court, speaking by the late Chief Justice Fuller in *Mueller v. Nugent*, (1902) 184 U. S. 1, 14, where it is said: 'It is as true of the present law (1898) as it was of that of 1867, that the filing of the petition is a caveat to all the world, and in effect an attachment and injunction, *International Bank v. Sherman*, (1879) 101 U. S. 403; and on adjudication, title to the bankrupt's property became vested in the trustee, §§ 70, 21e, with actual or constructive possession, and placed in the custody of the bankruptcy court,' it is none the less certain that an attachment of the bankrupt's property after the filing of the petition and before adjudication cannot operate to remove the bankrupt's estate from the jurisdiction of the bankruptcy court for the purpose of administration under the act of Congress. It is the purpose of the Bankruptcy Law, passed in pursuance of the power of Congress to establish a uniform system of bankruptcy throughout the United States, to place the property of the bankrupt under the control of the court, wherever it is found, with a view to its equal distribution among the creditors. The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the bankruptcy court is so far in rem that the estate is regarded as in custodia legis from the filing of the petition. It is true that under § 70a of the act of 1898 the trustee of the estate, on his appointment and qualification, is vested by operation of law with the title of the bankrupt as of the date he was adjudicated a bankrupt, but there are many provisions of the law which show its purpose to hold the property of the bankrupt intact from the time of the filing of the petition, in order that it may be administered under the law if an adjudication in bankruptcy shall follow the beginning of the proceedings."

In *Palmer v. Welch*, (1913) 171 Mo. App. 580, 154 S. W. 433, the court said: "The trustee is vested 'by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt.' He takes the title that the bankrupt had at the date of adjudication, not as an innocent purchaser, but subject to all valid claims, liens, and equities. The trustee's rights in the prop-

erties rise no higher than those of the bankrupt, and, if the bankrupt by reason of any conduct on his part should in equity be estopped from asserting any claim, such estoppel may be invoked against his trustee in bankruptcy in like manner as it might have been invoked against the bankrupt himself."

**Title subject to existing equities.**—To the same effect as the original note, see *In re McConnell*, (N. D. N. Y. 1912) 197 Fed. 438.

**Valid liens and incumbrances.**—To the same effect as the original note, see *Title Guaranty & Surety Co. v. Witmire*, (C. C. A. 6th Cir. 1912) 195 Fed. 41; *Rode & Horn v. Phipps*, (C. C. A. 6th Cir. 1912) 195 Fed. 414.

**Liens invalid as to creditors.**—To the same effect as the original note, see *Swager v. Smith*, (C. C. A. 4th Cir. 1912) 194 Fed. 762.

**After-acquired property.**—The property which is subject to the control of the bankruptcy court is that owned by the debtor at the time he is adjudicated to be insolvent. After-acquired property may not be taken for the payment of bankrupt debts. Therefore crops planted by a bankrupt after the adjudication cannot be subjected to his debts. *Jackson v. Jetter*, (Ia. 1913) 142 N. W. 431.

**Estate by entireties.**—The trustee takes no title to an estate by the entireties standing in the name of the bankrupt and his wife. In *re Beihl*, (E. D. Pa. 1912) 197 Fed. 870.

This section is cited in *John V. Farwell Co. v. Jackson Stores*, (1911) 137 Ga. 174, 73 S. E. 13; *Baker v. Robertson*, (Tex. 1913) 163 S. W. 326.

#### IV. EXEMPT PROPERTY.

**Title remains in bankrupt.**—To the same effect as the original note, see *In re Carlon*, (S. D. S. D. 1911) 189 Fed. 815; *In re Orear*, (C. C. A. 8th Cir. 1911) 189 Fed. 888; *In re Cale*, (C. C. A. 8th Cir. 1911) 191 Fed. 31; *Bank of Nez Perce v. Pindel*, (C. C. A. 9th Cir. 1912) 193 Fed. 917; *In re Zimmerman*, (E. D. Wis. 1913) 202 Fed. 812.

*The exemptions allowed a bankrupt are fixed and prescribed by the statutes of the state of his domicile; but the provisions of the Bankruptcy Act are controlling as to the time and manner of claiming, awarding, selecting, and setting apart such exemptions, and the law is well settled that these provisions of the Bankruptcy Act should receive a liberal and not a narrow or technical interpretation. The laws securing exemptions are not to be frittered away by construction so as to destroy their value. In re Andrews*, (W. D. Mich. 1911) 193 Fed. 776.

**Proceeds of sale of exempt property.**—"It has been held in numerous cases that it is not improper to permit the bankrupt to claim the proceeds of the sale of exempt property if such property has been sold by order of the court before the time for filing schedules has expired. *Lipman v. Stein*, (C.



C. A. 3d Cir. 1905) 134 Fed. 235, 14 Am. Bankr. Rep. 30; In re Sloan, (E. D. Pa. 1905) 135 Fed. 873, 14 Am. Bankr. Rep. 435; In re Renda, (D. C. Pa. 1906) 149 Fed. 614, 17 Am. Bankr. Rep. 521; In re LeVay, (M. D. Pa. 1903) 125 Fed. 990, 11 Am. Bankr. Rep. 114. The same reasoning and the same rule ought to apply to a case like the present where, prior to his adjudication, the bankrupt was deprived of the possession of his property by an officer of a court acting under an order of court, and where the trustee in bankruptcy sold the property without notice to him and without giving him an opportunity to make his selection before the sale." In re Andrews, (W. D. Mich. 1911) 193 Fed. 776.

**Homesteads — Law governing.**—The Bankruptcy Act making no provision, there is no question but that the state law will control, as to the extent of, and requisites of, a homestead exemption; but the time

within which exemptions are to be claimed and the manner of claiming the same are fixed by the Bankruptcy Act itself, and its provisions in that respect are controlling. And this applies where the claim to exemptions is made by the wife of the bankrupt. In re Burnham, (W. D. Wash. 1913) 202 Fed. 762.

**Exemptions accruing after adjudication in bankruptcy** do not affect the trustee's title to the property. In re Rainwater, (S. D. Miss. 1911) 191 Fed. 738.

**Life insurance policies.**—To the same effect as the original note, see In re Churchill, (E. D. Wis. 1912) 198 Fed. 711.

#### V. RECLAMATION PROCEEDINGS.

**Right to reclaim.**—To the same effect as the original note, see In re Kay-Tee Film Exch., (S. D. Cal. 1911) 193 Fed. 140; In re Wall, (E. D. Okla. 1910) 207 Fed. 994,

### 1912 Supp., p. 820, sec. 70a (1).

**Books containing incriminating evidence.**—Books can be lawfully required to be transferred to a trustee though containing incriminating evidence. Johnson v. United States, (1913) 228 U. S. 457, 33 S. Ct. 572, 57 U. S. (L. ed.) 919, 47 L.R.A.(N.S.) 263.

### 1912 Supp., p. 821, sec. 70a (2).

The trustee of a bankrupt mortgagor is an assignee of the statutory right to redeem within the contemplation of an Alabama statute authorizing the exercise of the right of redemption by the assignee of the statu-

tory right. Johnson v. Davis, (Ala. 1912) 60 So. 799.

This section is cited in In re Myers-Wolf Mfg. Co., (C. C. A. 3d Cir. 1913) 205 Fed. 289.

### 1912 Supp., p. 821, sec. 70a (4).

**Property fraudulently transferred vests in trustee.**—To the same effect as the original note, see Ridgeway v. Kendrick, (C. C. A. 3d Cir. 1913) 208 Fed. 849.

The trustee is clothed with the rights of creditors to reach as assets of the estate property fraudulently conveyed at common law. Bailey v. Wood, (1912) 211 Mass. 37, 97 N. E. 902, Ann. Cas. 1913A 950.

The trustee has a transferable interest in real estate owned by the bankrupt and transferred by him in fraud of his creditors, even though made more than four months prior to the proceedings in bankruptcy, and may

sell this interest, together with the right vested in him by statute to maintain an action to set aside such fraudulent transfer. The sale is to be made without warranty or representation of any kind and the purchaser takes simply the trustee's interest in the real property and his right to bring an action. The right may be valuable and it may be worthless; whoever buys does so with a full understanding of the character of the claim. In re Downing, (C. C. A. 2d Cir. 1912) 201 Fed. 93, affirming (N. D. N. Y. 1912) 192 Fed. 683.

### 1912 Supp., p. 823, sec. 70a (5).

#### I. IN GENERAL.

**Transferable and leviable property passes to trustee.**—To the same effect as the original note, see In re Matschke, (E. D. N. Y. 1912) 193 Fed. 284; Clark v. Snelling, (C. C. A. 1st Cir. 1913) 205 Fed. 240.

**Local law governs.**—To the same effect as the original note, see In re Waite-Robbins Motor Co., (D. C. Mass. 1911) 192 Fed. 47; Rosenbluth v. De Forest & Hotchkiss Co., (1911) 85 Conn. 40, 81 Atl. 955.

**A paid-up life insurance policy vests in the trustee to the extent of the bankrupt's interest therein.** In re Schaeffer, (N. D. Ohio 1910) 189 Fed. 187.

**Interest of beneficiary in life insurance policy.**—In the case of In re Hogan, (C. C. A. 7th Cir. 1912) 194 Fed. 846, it appeared that at the time of the adjudication the bankrupt was a beneficiary in a policy of insurance on the life of his mother. The policy provided, however, that "the insured

may, with the consent of the company, change the beneficiary at any time, provided it has not been assigned, by filing with the company a written request duly acknowledged and accompanied by this policy, such change to take effect upon its indorsement hereon by the company." Shortly after the adjudication the mother died and the question arose whether the bankrupt should pay over to the trustee the money received under the policy. The court, in holding that the bankrupt was not bound so to do, said: "Whatever may be the rule, therefore, in reference to the interest and rights of one named unqualifiedly as the beneficiary under a life insurance policy, we are of opinion that such rule is not applicable to the express terms of the present policy, providing that the insured may 'change the beneficiary at any time,' and that interpretation thereof must rest on the principles of contract law unaffected by special rules in respect of insurance policies which may appear in various jurisdictions, other than the place of the present contract. In the absence of restraint imposed by rule or statute governing the contract, the above stated terms of insurance were plainly open to arrangement between the contracting parties, and are conclusive of rights thereunder. So if the question presented is one of general law, we are advised of no rule thereof which would establish in the bankrupt, through the fact alone that he had been named, for the time being, as an intended beneficiary, a property right in the contract during the life and volition of the insured (mother), within the meaning of section 70a of the Bankruptcy Act. The mother was at the date of the bankruptcy adjudication vested with complete property rights in the policy, having possession and control of the policy, together with the unqualified right to dispose of the entire benefits of such insurance, with no obligation in evidence, legal or equitable, to vest any share otherwise, either in the bankrupt or in his estate in bankruptcy. Thus the utmost effect of the existing indorsement naming the bankrupt as one beneficiary, under the general rule applicable to contracts, would be an inchoate benefit, a mere expectancy in his favor, without vested interest or property right during the life of the insured. Resting entirely on the will of the insured during her lifetime, the expectancy of possible benefits under the policy has neither substantial present value, nor other element of property, which the bankrupt could then 'by any means have transferred, or which might have been levied upon and sold under judicial process against him,' defined in section 70a as property vesting in the trustee of the estate of a bankrupt by operation of law. In the case of an analogous expectancy—In re Wetmore, 108 Fed. 520, 523, 47 C. C. A. 477—the Circuit Court of Appeals of the Third Circuit so ruled, and the opinion is pertinent and instructive. It arose in bankruptcy, under a claim of expectancy in the bankrupt at the date of adjudication, through a provision standing in his favor, in a will

made by his mother who was then living. The provision in question purported to exercise a power of appointment vested in the mother, under will of the deceased father, over the residue of a fund created for use of the mother, with power to appoint or dispose thereof by will or otherwise. As well remarked in the opinion, the test of property right in the bankrupt under the statute is not whether he 'might for a valuable consideration' prior to bankruptcy 'by executory contract have barred or precluded' himself from enjoying, or have become bound to permit others to have the exclusive benefit of the fund,' but whether 'the bankrupt had some title to it at the date of the adjudication,' and that no such title arose during the lifetime of the mother.

"In reference to another contention advanced by counsel in support of the order—that 'a possibility coupled with an interest passes to the trustee' in bankruptcy—for which *Williams v. Heard*, 140 U. S. 529, 535, 11 Sup. Ct. 885, 35 L. ed. 550, is cited as decisive, we do not understand the citation to militate in any sense against the foregoing definition of property right which must appear in the bankrupt to vest in the trustee. The case arose in bankruptcy, under the Act of March 2, 1867, c. 176, 14 Stat. 517, and involved the question whether claims for war premiums awarded in favor of the bankrupts long after the bankruptcy adjudication out of the Geneva arbitration award, pursuant to subsequent act of Congress, constituted property of the bankrupts amenable to the bankruptcy proceedings. As there ruled: The claims for indemnity arose when the losses were incurred during the war, and thus became property in the sense of the law prior to bankruptcy; so the claims were not created by the subsequent act of Congress, although thereby provided with means for their prosecution and collection. The distinctions there pointed out are in line with our understanding of the general rule. . . . It is deemed sufficient that throughout the Wisconsin cases no authority appears—apart from statutory restrictions, not applicable to the present case—to disturb the absolute property right vested in the insured, under the terms of the instant policy, to dispose of its benefits. . . . So, with the interest of the beneficiary thus settled, as dependent on the option of the insured during his lifetime, these mentions thereof as 'a vested interest subject to be divested' at the will of the insured, are without force, in either view of their bearing in the adjudication, to confer or impose property right in such expectancy, within the purview of the Bankruptcy Act."

A cause of action for personal injuries is not covered by this section. *Beechwood v. Joplin-Pittsburg R. Co.*, (1913) 173 Mo. App. 371, 158 S. W. 868.

## II. INTERESTS IN REAL PROPERTY, ETC.

**Tenant's interest in leasehold.**—A lease will pass from the bankrupt to his trustee by operation of this section although it is

by its express terms not assignable. In re Gutman, (S. D. Ga. 1912) 197 Fed. 472.

An unrecorded deed in which the bankrupt is the grantor does not pass title to the property as against attaching or executing creditors, and under the express terms of the section the title to the property passes to the bankrupt's trustee subject only to the equities or claims of record against it. Davis v. Pursel, (Colo. 1913) 134 Pac. 107.

#### IV. CONDITIONAL SALES.

**Validity of conditional sales.**—To the same effect as the original note, see In re Walsh Bros. (N. D. Ia. 1912) 195 Fed. 576; In re Lutz, (E. D. Ark. 1912) 197 Fed. 492; In re Marx Tailoring Co., (N. D. Ala. 1912) 196 Fed. 243; L. C. Smith & Bros. Type-writer Co. v. Alleman, (C. C. A. 3d Cir. 1912) 199 Fed. 1; In re Marengo County Mercantile Co., (S. D. Ala. 1912) 199 Fed. 474; Southern Hardware & Supply Co. v. Clark, (C. C. A. 5th Cir. 1912) 201 Fed. 1; In re Raney, (N. D. Tex. 1912) 202 Fed. 1002; In re Zephyr Mercantile Co., (N. D. Tex. 1913) 203 Fed. 576; In re Connelly, (E. D. N. Y. 1913) 204 Fed. 479; In re Wall, (E. D. Okla. 1910) 207 Fed. 994.

An unrecorded contract of conditional sale, unaffected with fraud and good as between the parties, does not pass to the trustee under section 70a (5). Nauman Co. v. Bradshaw, (C. C. A. 8th Cir. 1912) 193 Fed. 350. See also Hart v. Emmerson-Brantingham Co., (E. D. Mo. 1913) 203 Fed. 60, wherein it was held that an unrecorded conditional sale made to one subsequently becoming a bankrupt was valid as between the parties, entitling the seller to recover the goods sold on a breach of the condition as against the trustee in bankruptcy.

The validity of a conditional sale contract, by which title was reserved in the seller as against the trustee in bankruptcy of the purchaser, depends upon the law of the state in which delivery of possession thereunder was made. In re Nelson, (D. C. S. D. 1911) 191 Fed. 233.

**Sale in form of lease.**—Where possession of machinery was given under an instrument in the form of a lease which provided for a certain cash payment and certain monthly payments, and further provided that if the specified number of monthly payments were paid the lessee should have the option of purchasing the property by the payment of an amount equal to the rental for one month, and it appeared that the cash payment was made on the delivery of the machinery and negotiable notes were also at the same time signed and delivered by the person named as lessee, not only for the respective amounts provided as monthly rentals, but for the amount provided to be paid in the event of the exercise of the option of purchase, it was held that the transaction constituted a sale and not a bailment, and therefore that after the bankruptcy of the person named as lessee the title to the machinery passed to his trustee in bankruptcy as part of his estate.

F. S. A. Supp.—35.

In re Gaglione & Son, (M. D. Pa. 1912) 200 Fed. 81.

#### V. TRUST FUNDS AND DEPOSITS.

Where bankrupt is trustee.—To the same effect as the original note, see In re Emerson, Marlow & Co., (C. C. A. 7th Cir. 1912) 199 Fed. 95.

#### VI. PROPERTY FRAUDULENTLY OBTAINED.

**Recovery by vendor.**—To the same effect as the original note, see In re Johnson, (N. D. Ohio 1913) 208 Fed. 164.

**Evidence.**—Petitioners for an order rescinding and setting aside a sale to a bankrupt must establish three propositions to entitle them to rescind the sale in question: (1) That the bankrupt was insolvent at the time of the purchase of the goods. (2) That the bankrupt concealed its insolvency from the petitioners. (3) That the bankrupt intended not to pay for the goods. In re Sol. Aarons & Co., (C. C. A. 2d Cir. 1912) 193 Fed. 646.

**The burden of proof** rests on the party claiming the right to rescind the sale and recover the property. In re American Nat. Beverage Co., (N. D. Ga. 1912) 193 Fed. 772.

#### VII. SUBSCRIPTIONS FOR STOCK.

**Trustee may recover stock subscriptions.**—To the same effect as the original note, see In re Newfoundland Syndicate, (D. C. N. J. 1912) 197 Fed. 443.

**Jurisdiction.**—To the same effect as the original note, see In re Monarch Corporation, (D. C. Conn. 1912) 196 Fed. 252.

#### X. LICENSES.

**The right to renew a liquor license** does not pass to a trustee as assets of the estate. In re Doyle, (E. D. Pa. 1913) 205 Fed. 543, wherein the court said: "The question is whether, the petition for renewal of the license having been filed after the adjudication in bankruptcy, the license granted upon that petition is after-acquired property, which does not pass as part of the bankrupt estate. Judge Holland decided in the case of Wiesel & Knaup, (E. D. Pa. 1909) 23 Am. Bankr. Rep. 59, 173 Fed. 718, that the right of a bankrupt to apply for renewal of his license is an asset which passes to his trustee, and that, where the application was filed prior to adjudication, the rights under such application passed to the trustee in bankruptcy. I think the case at bar may be readily distinguished from that case. At the time of adjudication no application for renewal of the license had been filed. Applications of the receiver, the purchaser, and the bankrupt were subsequently filed, and a license for the year beginning June 1, 1913, was, upon consideration of petitions of all parties, granted by the court of quarter sessions to the bankrupt. If the right to apply for a license had matured by the filing of an application prior to adjudication, the case

would come within the rule in the case of Wiesel & Knaup, *supra*.

"In *Buck's Estate*, 185 Pa. St. 57, 39 Atl. 821, 64 Am. St. Rep. 816, it was held by Mr. Chief Justice Fell that a license to sell liquor is a personal privilege, which at the death of the licensee does not go to his representatives, and is not an asset of his estate. And in *Whitlock's License*, 30 Pa. Super. Ct. 34, distinguished by Judge Holland from the *Wiesel Case*, it was held that a liquor license granted to a person after he has been adjudicated a bankrupt belongs to him personally, and not to his receiver in bankruptcy, and that the receiver has no right to sell such license as an asset of the bankrupt's estate.

"In the present case the receiver, after adjudication, applied for a renewal of the license, which application was refused by the quarter sessions court. Whatever inchoate rights existed prior to the adjudication and passed out of the bankrupt at the time of his adjudication were in the nature of a personal privilege. If the license court had seen fit to confer this privilege upon the receiver of the bankrupt estate, it would have been

within its discretion to do so. The action of the court of quarter sessions in granting the license to the bankrupt vested the personal privilege arising under the license in the bankrupt as of the time the license was granted.

"Questions affecting title to property which is created under a state statute must be construed in accordance with the rules of property established by the decisions of the state courts. *Smith Typewriter Co. v. Alleman*, 199 Fed. 1, 117 C. C. A. 577; *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. ed. 359. The conclusion is inevitable to my mind that, under the rule of property established by the decisions of the state courts, the property in the license vested in the bankrupt, and it was, therefore, after-acquired property, and belongs to the licensee, and is no part of the bankrupt estate."

#### XI. EFFECT OF COMMINGLING PROPERTY.

When identity is lost. — To the same effect as the original note, see *In re Larkin*, (D. C. S. D. 1912) 202 Fed. 572.

### 1912 Supp., p. 835, sec. 70a (5). [*Policy of insurance.*]

**Policies having surrender or other value.** — To the same effect as the original note, see *In re Phillips*, (E. D. N. Y. 1912) 192 Fed. 1020.

Mr. Justice Day construing this proviso in *Burlingham v. Crouse*, (1913) 228 U. S. 459, 33 S. Ct. 504, 57 U. S. (L. ed.) 920, 46 L.R.A.(N.S.) 148, said: "This proviso deals with explicitness with the subject of life insurance held by the bankrupt which has a surrender value. Originally life insurance policies were contracts in consideration of annual sums paid as premiums for the payment of a fixed sum on the death of the insured. It is true that such contracts have been much varied in form since, and policies payable in a period of years so as to become investments and means of money saving are in common use. But most of these policies will be found to have either a stipulated surrender value or an established value, the amount of which the companies are willing to pay and which brings the policy within the terms of the proviso and makes its present value available to the bankrupt estate. While life insurance is property, it is peculiar property. Legislatures of some of the states have provided that policies of insurance shall be exempt from liability for debt, and in many states provision is made for the protection from such liability of policies in favor of those dependent upon the insured. Congress undoubtedly had the nature of insurance contracts in mind in passing § 70a with its proviso. Ordinarily the keeping up of insurance of either class would require the payment of premiums perhaps for a number of years. For this purpose the estate might or might not have funds, or the payments might be so deferred as to unduly em-

barrass the settlement of the estate. Congress recognized also that many policies at the time of bankruptcy might have a very considerable present value which a bankrupt could realize by surrendering his policy to the company. We think it was this latter sum that the act intended to secure to creditors by requiring its payment to the trustee as a condition of keeping the policy alive. In passing this statute Congress intended, while exacting this much, that when that sum was realized to the estate the bankrupt should be permitted to retain the insurance which, because of advancing years or declining health, it might be impossible for him to replace. It is the twofold purpose of the Bankruptcy Act to convert the estate of the bankrupt into cash and distribute it among creditors and then to give the bankrupt a fresh start with such exemptions and rights as the statute left untouched. In the light of this policy the act must be construed. We think it was the purpose of Congress to pass to the trustee that sum which was available to the bankrupt at the time of bankruptcy as a cash asset, otherwise to leave to the insured the benefit of his life insurance." See to the same effect *Everett v. Judson*, (1913) 228 U. S. 474, 33 S. Ct. 568, 57 U. S. (L. ed.) 927, 46 L.R.A.(N.S.) 154; *Andrews v. Partridge*, (1913) 228 U. S. 479, 33 S. Ct. 570, 57 U. S. (L. ed.) 929.

The proviso in section 70a, when analyzed, shows, first, that the said section had in contemplation policies that had some cash surrender value at the time the insured was adjudged a bankrupt; second, that when such value has been ascertained and stated to the trustee, by the company issuing the policy, the bankrupt may pay or secure to

the trustee the sum so ascertained; third, that the payment must be made or security given to the trustee within 30 days after said value has been ascertained; fourth, that upon complying with these requirements the bankrupt shall continue to hold and own such policy, free from claims of creditors; and, fifth, that if the bankrupt complies with said requirements the policy shall not pass to the trustee as assets. *Sanders v. Aetna Life Ins. Co.*, (S. C. 1913) 78 S. E. 532, wherein the court said: "It will be observed that policies of insurance are placed upon different footing from all other property vested in the trustee, and that it was not intended that the policies, but only their cash surrender value, should become assets, unless the insured failed or refused to comply with certain prescribed conditions. It is true the proviso contemplates a benefit to the bankrupt estate, and, when the policies have a cash surrender value, they are vested in the trustee by operation of law in order that said value may be added to the assets. But the main object was to enable the bankrupt to hold and own the policy free from the claims of his existing creditors; and the only effect of holding that the title to the policies was vested in the trustee, even when they were without cash surrender value, would be to defeat the principal aim of the statute without increasing the assets. The law never intends that an act should be done, when its effect would be wholly nugatory."

**Exempt policies do not pass.**—To the same effect as the original note, see *In re Morse*, (D. C. Kan. 1912) 208 Fed. 350; *Young v. Thomason*, (Ala. 1912) 60 So. 272.

**Policies included.**—In the case of *In re Young*, (N. D. Ohio 1912) 208 Fed. 373, the court said: "Since the decision of *Holden v. Stratton*, (1905) 198 U. S. 202, 25 S. Ct. 656, 49 U. S. (L. ed.) 1018, there is no longer a question that the paragraph quoted from section 70a qualifies or limits the terms of section 6 of the Bankruptcy Act. It is the holding of the court, in substance, that section 70a deals only with policies of insurance which are not exempt under the state law."

**Death of insured as extinguishing surrender value.**—There is some confusion as to the inference to be drawn from certain dicta of

the courts, to the effect that it is the surrender value existing at the time of the filing of the petition, that passes to the trustee. But in a line of well-considered cases, it is held, or assumed, that it is the policy on the life of the bankrupt, payable to his estate, whether having a surrender value or not, that passes to the trustee, as of the date of the adjudication, under section 70a, as property which the bankrupt could have transferred prior to the filing of the petition, and not merely the surrender value thereof. It is a personal privilege that is conferred upon the bankrupt by the proviso in this section of the act. Unless it is exercised, by the express language of the proviso, the policy, with all rights appertaining thereto, passes to the trustee as assets of the bankrupt's estate. As said by the court in the case of *In re Welling*, (C. C. A. 7th Cir. 1912) 113 Fed. 189: "The term 'surrender value' has a defined and legal meaning, viz., the cash value—ascertainable by known rules—of a contract of assurance abandoned and given up for cancellation to the insurer by the owner having a contract right to do so." This right, in substance and in terms, as thus defined, would seem necessarily to imply that it can only exist during the lifetime of the insured. By the death of the insured, the policy matures, and such surrender value is extinguished. *Partridge v. Andrews*, (C. C. A. 3d Cir. 1911) 191 Fed. 325, 41 L.R.A. (N.S.) 123.

The surrender value of insurance policies should be ascertained as of the time of the filing of the petition for adjudication. *Everett v. Judson*, (1913) 228 U. S. 474, 33 S. Ct. 568, 57 U. S. (L. ed.) 927, 46 L.R.A. (N.S.) 154.

**Policy in possession of wife of bankrupt.**—When it appeared that the wife of a bankrupt had paid out of her own earnings several premiums of a life insurance policy on her husband's life, and had possession of the policy, it was held that the court would not, on the application of the trustee in bankruptcy, issue a summary order requiring the bankrupt to surrender the policy to the trustee, but, at most, would only require the bankrupt to assign in writing all of his rights under the policy. *In re Loveland*, (C. C. A. 1st Cir. 1912) 200 Fed. 136.

## 1912 Supp., p. 838, sec. 70a (6).

A cause of action for personal injuries is not covered by this section. *Beechwood v. Joplin-Pittsburg R. Co.*, (1913) 173 Mo. App. 371, 158 S. W. 868.

## 1912 Supp., p. 839, sec. 70b.

### I. APPRAISAL OF PROPERTY.

**Disregarding appraisement.**—Any appraisement of the property made in the usual course of bankruptcy proceedings may be disregarded in selling it and the sale approved by the court, if the price is considered adequate. *In re Zehner*, (E. D. La. 1912) 193 Fed. 787.

### II. SALES.

**What may be sold.**—An article which infringes a patent may not be sold. *United Wireless Telegraph Co. v. National Electric Signaling Co.*, (C. C. A. 1st Cir. 1912) 198 Fed. 386.

**The practice and good will of a physician** which are of course attributable to his per-

sonality, reputation, or skill, cannot be sold by his trustee in bankruptcy. In re Myers, (C. C. A. 7th Cir. 1913) 208 Fed. 407.

A trustee in bankruptcy may convey real estate located in a jurisdiction other than that in which he is appointed. Robertson v. Howard, (1913) 229 U. S. 255, 33 S. Ct. 854, 57 U. S. (L. ed.) 1174, 1175 (*reversing* (1910) 83 Kan. 453, 112 Pac. 162), wherein the court said: "This provision makes it manifest that it was the purpose of Congress to give bankruptcy courts full and complete equitable power in matters of the administration and sale of the bankrupt estate, wholly irrespective of the mere situs of the property, the controlling factor being, not where the property is situated, but did it pass to the trustee and is it a part of the estate subject to administration under the direction of the court. In view of the fact that the Bankruptcy Act was enacted long after the passage of the statute of 1893 (3 Fed. Stat. Annot. 54), and of the complete right of administration which the Bankruptcy Act confers over the property, real and personal, of the bankrupt estate, we think it follows that the authority to realize, by way of sale, on the property of the bankrupt estate, cannot be held to be limited by the provisions of the act of 1893. Indeed, this conclusion is additionally demonstrated by the fact that as recognized by No. 18 of the General Orders in Bankruptcy, in disposing by sale of the property of the bankrupt, a bankruptcy court, as to both real and personal property, may, if reason for doing so exists, direct a private sale to be made." See to the same effect T. F. Wells & Co. v. Sharp, (C. C. A. 8th Cir. 1913) 208 Fed. 393.

**Sale of assets free of incumbrances.**—The present bankruptcy law makes no express provision for sale by the trustee free of incumbrance, but it is uniformly held that he may be authorized so to sell if there are reasonable grounds for believing that more could be realized than the amount of the incumbrance. In re Roger Brown & Co., (C. C. A. 8th Cir. 1912) 196 Fed. 758.

**When sale free from incumbrances will be ordered—Generally.**—To the same effect as the original note, see In re Fayetteville Wagon-Wood & Lumber Co., (W. D. Ark. 1912) 197 Fed. 180.

**Manner of selling assets—General rules of procedure govern.**—A sale by a trustee in bankruptcy, except where otherwise controlled by statute, is subject to the general rules and principles of procedure obtaining in other judicial proceedings. In re Williams, (C. C. A. 4th Cir. 1912) 197 Fed. 1.

**Public sale.**—The provisions of the Act of March 3, 1893, ch. 225, § 1, 3 Fed. Stat. Annot. 54, requiring the sale of real property under decree of any United States court to be by public sale at the court house of the county, parish or city in which the land, or the greater part thereof, is located or on the premises, applies to a sale of real property of a bankrupt. In re Britannia Mining Co., (W. D. Wis. 1912) 197 Fed. 459.

Though the trustee reduces the estate to money "under the direction of the court," this no more necessitates an order of the court to sell realty at public auction than to collect a chose in action. Therein the court may, but need not, give special directions, in the nature of orders. The creditors are entitled to notice of proposed sales, but this may be given by the trustee by order of the judge. In re La France Copper Co., (D. C. Mont. 1913) 205 Fed. 207.

**Sale subject to incumbrances.**—*The doctrine of caveat emptor applies* in the case of a purchaser who is expressly informed that the trustee is selling only such title as he possessed, and knows that the title is in litigation. In re Frasin, (C. C. A. 2d Cir. 1912) 201 Fed. 343.

**Quitclaim deed.**—In Hinchman v. Consolidated Arizona Smelting Co., (D. C. Me. 1912) 198 Fed. 907, wherein the purchaser of land got only a quitclaim deed, it was held that he took only the property which the bankrupt had.

**Effect of sale of assets on good will and trademarks.**—In the case of In re Jaysee Corset Co., (S. D. N. Y. 1911) 201 Fed. 779, a trustee sold the goods and chattels of the bankrupt but made no attempt to sell the good will of his business, nor her trademark, nor did he sell the business as a going concern. The court said: "The effect of these proceedings by the trustee was to kill the good will and destroy the trademark; for it is admitted that this particular kind of trademark cannot pass except in conjunction with the good will of a business. What has become of the bankrupt's business? It stopped by bankruptcy, was killed by the trustee's sale, and the present intended action on the part of the trustee is an attempt to galvanize it into life again, something which cannot be done."

**Setting sale aside—Inadequacy of price.**—Mere inadequacy of price is not enough to warrant setting aside the sale. It must be admitted that no hard and fast line can be drawn between mere inadequacy and gross inadequacy; but there is a difference, although it is impossible to state it with precision. Every case must necessarily be judged upon its own facts. In re Metallic Specialty Mfg. Co., (E. D. Pa. 1912) 193 Fed. 300.

**Trustee's misconduct.**—To the same effect as the original note, see In re Williams, (C. C. A. 4th Cir. 1912) 197 Fed. 1.

**For circumstances held to be insufficient** to require the setting aside of a sale, see In re Charles Knosher & Co., (C. C. A. 9th Cir. 1912) 197 Fed. 136.

**Confirmation of sale.**—Notice need not be given the creditors of an application to confirm the sale. In re Nevada-Utah Mines & Smelters Corporation, (S. D. N. Y. 1912) 198 Fed. 497.

**An order confirming a sale of the interest of the bankrupt in property left to him under a will** was reviewed in the case of In re Crouse, (N. D. N. Y. 1912) 196 Fed. 907 and the order of confirmation affirmed.

## 1912 Supp., p. 844, sec. 70e.

**Power conferred on trustee.**—To the same effect as the original note, see *Peterson v. Mettler*, (W. D. Wash. 1912) 198 Fed. 938; *National Bank of Athens v. Shackelford*, (C. C. A. 5th Cir. 1913) 208 Fed. 677.

**Not limited to transfers within four months period.**—*Corey v. Blackwell Lumber Co.*, (1913) 24 Idaho 642, 135 Pac. 742; *Underleak v. Scott*, (1912) 117 Minn. 136, 134 N. W. 731.

**Trustee vested with rights of creditor.**—This subdivision does not authorize the trustee to avoid a transfer, unless some creditor, by proper proceeding, might have avoided it in his own favor. *Mayhew v. Todisman*, (1912) 246 Mo. 288, 151 S. W. 436.

The trustee in bankruptcy, under the United States bankrupt law, holds a position analogous to that formerly held by the assignee in insolvency under the state law. Such assignee had the right to sue for and recover everything due to the estate for the benefit of the creditors. Where a pretended transfer from the assignor was void as to creditors, the title passed to the assignee in insolvency for the benefit of the creditors, and he was authorized to maintain an action on their behalf to reduce the property to possession. As between the creditors and the debtor, who fraudulently conveyed property to defeat them, he was regarded as holding the title to, or an interest in, the property conveyed, and it therefore passed to the assignee. The same principle holds now as to the trustee in bankruptcy. *Meyer v. Perkins*, (1912) 20 Cal. App. 661, 130 Pac. 206, 208.

The estate and subject-matter being in custodia legis, the law takes care of the creditor, and the trustee in bankruptcy, as the arm of the court, acts for and on behalf of the creditor in that particular, so that whatever the creditor might do in avoiding the deed of his debtor for fraud the trustee in bankruptcy may do under the present Bankrupt Act as a sort of alter ego. Such trustee takes title to the bankrupt's property, including that conveyed in fraud of creditors, contrary to the terms of the Bankrupt Act, but he takes it subject to outstanding equities, to which the title was subject in the hands of the bankrupt. *Coleman v. Hagey*, (1913) 252 Mo. 102, 158 S. W. 829.

**Fraudulent conveyances.**—This section includes fraudulent conveyances which are so by common law, by statute law, and by any recognized rule of law other than the special provisions of the bankrupt statute. To give the trustee the title to property trans-

ferred by the bankrupt, and a right to recover such property, the conveyance must be fraudulent as to creditors under the common law or statute law. There must be fraud in fact, as distinguished from the constructive fraud that is sufficient where it is so provided in the bankruptcy act. *Underleak v. Scott*, (1912) 117 Minn. 136, 134 N. W. 731.

**Consent of defendant.**—Actions may be brought by a trustee in the courts of bankruptcy in cases coming within the terms of section 70, subd. "e," without the consent of the defendant, since the amendment of section 23b by the act of Congress of June 25, 1910. *Newcomb v. Biwer*, (D. C. S. D. 1912) 199 Fed. 529, wherein the court said: "Prior to the amendment of section 23b in 1903, suits by a trustee under subdivision 'b' of section 60, subdivision 'e' of section 67, or subdivision 'e' of section 70 could not be brought in the United States District Courts, unless by consent of the proposed defendant. And in 1903 the words 'except suits for the recovery of property under section sixty, subdivision 'b,' and section sixty-seven, subdivision 'e,' were added. By the act of Congress of June 25, 1910, subdivision 'b' of section 23 was amended by adding to the exception named in the amendment of 1903, above set forth, the words 'and section seventy, subdivision 'e.'"

"If this is a case that comes within the provisions of subdivision 'e' of section 70 of the Bankruptcy Act, it is within the exception provided by the amendment of June 25, 1910, to section 23, subd. 'b,' of the bankruptcy law. It seems that the only purpose of these amendments was to make exceptions to the limitation on the jurisdiction of the District Courts, and thereby extend their jurisdiction to such cases as were brought under the authority provided by subdivision 'b' of section 60, 'e' of 67, and 'e' of 70."

**Amount of recovery.**—Where a summary action is brought by a trustee to recover the value of property transferred after the petition in bankruptcy was filed and it appears that the transferee had mingled the property with his own and sold part of it, the amount required to be restored for the property sold should represent the actual value of the goods when transferred, and not the amount paid by the transferee for them. *In re Denson*, (N. D. Ala. 1912) 195 Fed. 854.

This section is cited in *Grinstead v. Union Savings & Trust Co.*, (C. C. A. 9th Cir. 1911) 190 Fed. 546.

## 1912 Supp., p. 846, sec. 70e. [Jurisdiction.]

**In general.**—This amendment seems to have no limitation except that the transfer must be one which any creditor could avoid, and is reconcilable with sec. 23, subdivisions a and b (1912 Supp. 594.) *Wood v. A. Wilbert's Sons Shingle & Lumber Co.*, (1912)

226 U. S. 384, 33 S. Ct. 125, 57 U. S. (L. ed.) 251, wherein the court said: "The amendment was a part of the same act and passed at the same time that the amendment to subdivision b of section 23 was, and we must assume that they were in-

tended not to conflict but to be in accord as provisions for different situations. In other words, that it was the intention that each should have its proper application distinct from and harmonious with that of the other. Such application is observed by distinguishing between jurisdiction over the subject-matter and jurisdiction over the person, as pointed out by the Circuit Court of Appeals for the Fifth Circuit in *Hull v. Burr*, (1907) 163 Fed. 945, approving and following *Gregory v. Atkinson*, (E. D. Mo. 1904) 127 Fed. 183. In other words, the respective sections and their subdivisions confer jurisdiction on the designated courts so far as it is dependent upon the character of the suits, but when the condition expressed in subdivision b of section 23 exists the consent of the defendant determines the court, except when the suit is 'for the recovery of property under section 60, subdivision b, and section 67, subdivision e.' These special exceptions exclude any other."

**Jurisdiction of state courts.**—To the same effect as the original note, see *Hull v. Hudson*, (1911) 9 Del. Ch. 205, 80 Atl. 674; *Hobbs v. Frazier*, (1911) 61 Fla. 611, 55 So. 848.

Section 70e expressly authorizes the trustee in bankruptcy to proceed in the bankrupt court or a state court to recover property fraudulently disposed of by the bankrupt, and there is no reason why he may not prosecute in a state court a suit instituted by a creditor before the debtor is adjudged a bankrupt. If he neglects to do so, a creditor may apply to the bankrupt court to require him to prosecute the suit, or, upon his refusal to do so, the creditor may, after making him a party, proceed with the suit to a final decree. *Blick v. Nimmo*, (1913) 121 Md. 139, 88 Atl. 116.

**Effect of subsequent proceedings in bankruptcy court.**—A trustee in bankruptcy may institute proceedings in a court of bankruptcy or in a state court for the recovery of property fraudulently disposed of by the bankrupt. And where a judgment creditor, more than four months prior to the filing of a petition in bankruptcy against his debtor, files a bill in a state court to set aside a fraudulent transfer of his property, and the state court acquires jurisdiction of the parties and the subject-matter of the suit, its jurisdiction

is not divested by subsequent proceedings in bankruptcy against the debtor. This rule is now well recognized, and is firmly established by the decisions of the Supreme Court of the United States. *Blick v. Nimmo*, (1913) 121 Md. 139, 88 Atl. 116.

**Rules governing pleading and proof.**—A trustee in bankruptcy suing under the provisions of section 70e of the Bankrupt Act must, if suit is brought in a state court, bring himself within the limits of the pleading and proof prescribed by the statutes and decisions of the state where the suit is brought. *Coleman v. Hagey*, (1913) 252 Mo. 102, 158 S. W. 829.

**Bill in equity—Alleging fraud.**—A bill by a trustee to set aside a fraudulent transfer of the bankrupt must state facts showing that the transfer was made for the purpose of defrauding creditors, a general allegation to that effect being insufficient. *McKey v. Smith*, (1912) 255 Ill. 465, 99 N. E. 695.

**Alleging reduction of claim to judgment and insufficient assets.**—In ordinary bills to set aside a transfer of property in fraud of creditors it is essential to the maintenance of the suit that the complainant shall have reduced his claim to judgment. No such requirement exists where a trustee in bankruptcy brings such a suit under the Bankruptcy Act, but it is essential that he show by his bill that the assets are insufficient to satisfy the claims of creditors. The trustee can only apply the assets upon allowed claims. If the assets in his hands are sufficient to pay such claims, there is no reason for the exercise of the equitable jurisdiction to set aside, as fraudulent, conveyances of property to third persons. Conveyances which may be set aside because they are constructively fraudulent as to creditors are valid between the parties, and under the Bankruptcy Act are valid against all persons except those entitled to share in the proceeds of such property—that is, creditors whose claims have been allowed under the act. Unless it appears from the allegations and proof that the property so conveyed is needed to pay such claims, the trustee, whose rights are not superior to those of the creditors he represents, has no right to have such conveyances set aside. *McKey v. Smith*, (1912) 255 Ill. 465, 99 N. E. 695.

## 1912 Supp., p. 848, sec. 72.

The purpose of the section limiting trustee's fees was to prevent the using up of the estate or exorbitant charges to be paid out

of the estate. In *re Margolies*, (E. D. N. Y. 1911) 191 Fed. 369.



## BIGAMY, POLYGAMY, AND UNLAWFUL INTERCOURSE.

Vol. I, p. 704, sec. 5352.

**Applicability to Creek Nation.**—This section was never in force in the Creek Nation in the Indian Territory, among the members of said tribe, who intermarried according to the tribal usages and customs, and while the

tribal relations were maintained and recognized by the United States government. *Oklahoma Land Co. v. Thomas*, (1912) 34 Okla. 681, 127 Pac. 8.

Vol. I, p. 708, sec. 1.

This act was never in force in the Creek Nation in the Indian Territory under the same circumstances shown in the preceding note. *Oklahoma Land Co. v. Thomas*, (1912) 34 Okla. 681, 127 Pac. 8.

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## BRIBERY.

Vol. I, p. 713, sec. 5451.

An immigration inspector is an "officer," and a person who gives him a bribe to induce him to make a recommendation based on false testimony for a rehearing in the case of an alien then under order of deportation by the Secretary of Commerce and Labor, is liable to the penalties of this section. *Becharias v. United States*, (C. C. A. 7th Cir. 1913) 208 Fed. 143, wherein it appeared that one Becharias was convicted of offering a bribe to an immigration inspector and that the judgment of conviction was affirmed on writ of error. The facts as stated by the court were as follows: "Plaintiff in error was indicted, convicted, and sentenced to the penitentiary for offering and giving \$150 as a bribe to one Plumly, an immigration inspector, to induce him to make a recommendation based on false tes-

timony for a rehearing in the case of one Kosmos, then under order of deportation by the Secretary of Commerce and Labor; said order being addressed to the Commissioner of Immigration.

"Under the law and the regulations of the department, which have the force of law, Plumly was an officer of the United States, and to make recommendation for or against a rehearing for an alien under order of deportation was in the line of his official duty. Until the man was actually deported, and while it was in the power of the department to grant a rehearing, the proceeding was 'pending' within the meaning of the law.

"We find no error in the rulings of the trial court either on the sufficiency of the indictment or in the admission or rejection of evidence."

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## CHARITIES.

1912 Supp., p. 32, sec. 1.

**Red cross as trademark.**—In *Loonen v. Deitsch*, (S. D. N. Y. 1911) 189 Fed. 487, the court answering an argument that it was against public policy to allow the Red Cross to become a trademark said: "This needs no answer after the Acts of 1905 and 1910. Whatever may have been the policy

before, Congress has now definitely declared in the proviso of the latter act that it would permit such marks if they antedated 1905. Congress had power so to legalize the use of it; the question of public policy was for it and for it alone, and it is now finally closed."

## CHINESE EXCLUSION.

### Vol. I, p. 759, sec. 1.

This Act seems to restrict the activities of the United States attorneys and the authority of the United States commissioners in the enforcement of the deportation laws to their respective districts. *United States*

*v. Chin Tong*, (C. C. A. 5th Cir. 1911) 192 Fed. 485.

Arrest made on warrant procured by sworn complaint.—*United States v. Chin Tong*, (C. C. A. 5th Cir. 1911) 192 Fed. 485.

### Vol. I, p. 760, sec. 2. [*Deportation, how executed.*]

Bail.—The provision that "such Chinese person" shall not be admitted to bail relates to a final order of deportation. *United States v. Yee Yet*, (D. C. N. J. 1911) 192 Fed. 577, wherein the court said: "The fourth cause of demurrer refers to a provision of the statute which manifestly relates

to a final order of deportation, otherwise the marshal would be required to execute, with all convenient dispatch, an order of deportation made by a commissioner, notwithstanding the act gives an appeal from such order to the District Court."

### Vol. I, p. 763, sec. 2.

Evidence.—In proceedings before a United States commissioner for the deportation of Chinese persons, statements made by such persons under oath to the immigration inspector after they had been advised by the inspector that the intention was to ask them questions touching their right to remain in

the United States and that they need not answer the questions unless they wished to, and, further, that the answer might be used against them, are admissible. *Bak Kun v. United States*, (C. C. A. 6th Cir. 1912) 195 Fed. 53.

### Vol. I, p. 763, sec. 3.

The provisions of this section are constitutional. To the same effect as the original note, see *Bak Kun v. United States*, (C. C. A. 6th Cir. 1912) 195 Fed. 53.

Burden of proof.—In Chinese cases the burden is upon the one asserting his right to remain in the United States to establish such right by affirmative proof. *Lum Bing Wey v. United States*, (W. D. Tex. 1912) 201 Fed. 379.

In *Yee Ging v. United States*, 190 Fed. 270, the facts were as follows: The appellant was arrested in a laundry at Fort Bliss, Tex., near El Paso, for being unlawfully in the United States. In the order of deportation it is recited by the commissioner that he is a Chinese person and a laborer by occupation, and that he failed, upon the hearing, to establish by affirmative proof his lawful right to remain in the country. The appellant bases his claim of exemption from arrest on the ground that he is a citizen of the United States, having been born, it is asserted, in San Francisco, Cal. At the hearing before the commissioner the appellant introduced the depositions of two Chinese witnesses for the purpose of proving his birth as claimed. When the cause was before the court on appeal the testimony of

several other witnesses was heard, including that of the appellant, the Chinese interpreter, and three or four others. Several photographs of the appellant were also admitted in evidence. On these facts the court said: "The first, and it may be said the serious, question which confronts the court in the consideration of this case is the following: The appellant having been arrested in the state of Texas for being unlawfully here and claiming to be a citizen of the United States, is he required to establish by proof the fact of his birth in the country? or is the burden of proof upon the government to show that he was not born in the United States? Counsel for the appellant insist that the Circuit Court of Appeals for this circuit, in the case of *Gee Cue Beng v. United States*, 184 Fed. 383, 106 C. C. A. 493, has answered the second question in the affirmative. And it appears from an examination of that case that the view advanced by counsel is correct. The decision in *Gee Cue Beng's* case seems to have been placed upon two grounds: (1) That the appellant established by sworn witnesses 'a strong affirmative case' that he was a citizen of the United States; and (2) that the burden was on the government to establish his non-citizenship. In reference

to the second ground, the only one that it is necessary to consider, the court, without advancing any independent reasons of its own, noted its concurrence with the views and reasoning of the Circuit Court of Appeals for the Seventh circuit, as expressed in the opinion of Judge Grosscup in *Moy Suey v. United States*, 147 Fed. 697, 78 C. C. A. 85. The question presented is one of far-reaching importance, and if the doctrine in *Moy Suey's* case should be ultimately sustained by the Supreme Court the effect would be to seriously impair, in the judgment of the writer, the efficiency of the Chinese exclusion laws enacted by the Congress. What ruling the Supreme Court may finally make is a matter which that eminent tribunal will determine for itself. But the question, it is thought, has heretofore been decided precisely to the contrary by the Supreme Court in the case of *Chin Bak Kan v. United States*, 186 U. S. 193, 22 Sup. Ct. 891, 46 L. ed. 1121. And it is worthy of remark that no reference is made to that case by Judge Grosscup in his opinion delivered in the case of *Moy Suey*. But he appears to proceed upon the assumption that a different rule of evidence should be applied to a Chinese person 'physically and politically' in the country from that applicable to such a person who is stopped at the border line and refused admission. In the latter case he admits, in consonance with the holding in *United States v. Ju Toy*, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. ed. 1040, that the burden of proving citizenship is upon the Chinese person seeking admission. But in the former he seems to insist that where the Chinese person claims to be a citizen the government must prove that he is not native born. The statute makes no such distinction, nor is it to be found, so far as the court is advised, in any case decided by the Supreme Court."

**Nature of proof.**—By the law the Chinese person must be adjudged unlawfully within the United States unless he "shall establish by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States." As applied to aliens there is no question of the validity of that provision, and the treaty, the legislation, and the circumstances considered, compliance with its requirements cannot be avoided by a mere assertion of citizenship. The facts on which such a claim is rested must be made to appear. And the inestimable heritage of citizenship is not to be conceded to those who seek to avail themselves of it under pressure of a particular exigency, without being able to show that it was ever possessed. *Yee Ging v. United States*, (W. D. Tex. 1911) 190 Fed. 270, following *Chin Bak Kan v. United States*, (1902) 186 U. S. 193, 22 Sup. Ct. 891, 46 U. S. (L. ed.) 1121.

**Amount of proof.**—Deportation cases are civil and not criminal in their nature and to be decided by the preponderance of evidence even if the burden of proof is on the person charged with alienage, but asserting

citizenship, to prove his citizenship. *Woo Jew Dip v. United States*, (C. C. A. 5th Cir. 1911) 192 Fed. 471.

**Right of appeal.**—The right of appeal from the District Court to the Circuit Court of Appeals is unquestioned. *Woo Jew Dip v. United States*, (C. C. A. 5th Cir. 1911) 192 Fed. 471.

**Bail pending appeal.**—While there is no specific authority for admitting to bail a Chinese person who has taken an appeal from an order of the District judge for his deportation, the court may in its sound discretion admit to bail. *United States v. Yee Yet*, (D. C. N. J. 1911) 192 Fed. 577, wherein the court said: "An examination of the Chinese exclusion act and its amendments shows that there is no specific authority for admitting to bail a Chinese person who has taken an appeal from an order of the District Judge for his deportation, and yet such appeals have been taken to and heard and determined by different courts of appeals, for instance, by the Third Circuit Court of Appeals, in the case of *Toy Tong et al. v. United States*, 146 Fed. 343, 76 C. C. A. 621, by the Second Circuit Court of Appeals in *Re Yee King et al. v. United States*, 179 Fed. 368, 102 C. C. A. 646, and by the Circuit Court of Appeals for the Fifth Circuit in *Re Gee Cue Beng v. United States*, 184 Fed. 383, 106 C. C. A. 493. See also *In re United States*, 194 U. S. 194, 24 Sup. Ct. 629, 48 L. ed. 931. Furthermore, it has been the practice in this circuit pending such an appeal to admit the appellant to bail, and from the opinions in *Re Ah Tai*, (D. C.) 125 Fed. 795, and in *Re Lum Poy et al*, (C. C.) 128 Fed. 974, a like practice appears to have been followed upon appeals taken from the order of a commissioner to the District Court in the states of New York, Massachusetts, Vermont, California, Idaho, Oregon, and Montana. While it is true, as stated, that the above cases relate to the allowance of bail upon an appeal from an order of deportation made by a United States commissioner to the District Court, and not from an order of that court to the Circuit Court of Appeals, still in principle they are the same. There is no express statutory authority for the allowance of bail in either case. Hence, if it is allowable in the one, it would seem to be in the other. Under the authority of *United States v. Fah Chung*, (D. C.) 132 Fed. 109, in *re Ah Tai*, (D. C.) 125 Fed. 795, in *re Lum Poy et al.*, (C. C.) 128 Fed. 974, in *re Chin Wah*, (D. C.) 182 Fed. 256, and, further, in view of the practice which has so generally obtained in like cases, I feel constrained to uphold these bonds and overrule the demurrers. It is not to be inferred, however, from that remark, that I do not agree with those decisions. I think they are right, and that the question of admitting to bail a Chinese person ordered deported pending an appeal from the order of deportation rests in the sound discretion of the court."

**Conclusiveness of findings by commissioner on questions of facts.**—It is the settled general rule that the finding of a commissioner

who sees and hears Chinese witnesses sworn in behalf of Chinese persons of the prohibited class seeking entry to the United States, and who reaches the deliberate conclusion that they are not entitled to credit, will not be reversed by an appellate court. *Chin Ken v. United States*, (C. C. A. 2d Cir. 1911) 191 Fed. 817; *Chu King Foon v. United States*, (C. C. A. 2d Cir. 1911) 191 Fed. 822; *Gong Nom Wood v. United States*, (C. C. A. 2d Cir. 1911) 191 Fed. 830. See also *United States v. Lee Chung*, (D. C. N. J. 1913) 206 Fed. 367, wherein the court said: "Where the reviewing court has nothing before it except the transcribed testimony, and the commissioner declares that the witnesses were not entitled to belief, his finding will not be disturbed, unless it is manifest that he acted arbitrarily."

Finding should not be disturbed on review, unless the record clearly shows that an obvious mistake was made by the trial court in the consideration of the evidence. *Fong Gum Tong v. United States*, (C. C. A. 7th Cir. 1911) 192 Fed. 320, wherein the court said: "An order that appellant be deported as a Chinese laborer found in the United States in violation of the Chinese exclusion act, rendered by a United States commissioner and affirmed by the District Court

on a hearing de novo, is presented for review. Appellant's defense was that he was a native-born citizen, and his contention here is that the finding against him is not sustained by the evidence. He was entitled to a judicial determination of his claim that he was a native-born citizen. *Moy Suey v. United States*, 147 Fed. 697, 78 C. C. A. 85; *Pang Sho Yin v. United States*, 154 Fed. 660, 83 C. C. A. 484; *United States v. Jhu Why*, (D. C.) 175 Fed. 630. In the *Moy Suey* Case, as in the others cited, the finding on review was that the evidence as a whole placed beyond substantial contradiction the fact that the person in question was a native-born citizen. But here there is a clear and sharp conflict. If the government's evidence conveyed the truth, appellant was born in China, and his contrary statement, in denial of his admission to the inspector, was a fabrication. True, his testimony in the District Court that he was born in San Francisco was corroborated by the testimony of two Chinese residents of Chicago. But nevertheless the question was one of the weight and credibility of the evidence. All the witnesses were heard orally in the District Court, and their appearance and manner of testifying were matters of observation there that are not in the record here."

## Vol. I, p. 772, sec. 13.

**Jurisdiction of commissioner.**—In *United States v. Chin Tong*, (C. C. A. 5th Cir. 1911) 192 Fed. 485, the court commenting on this section said: "It does not seem to us that this section would authorize a commissioner to issue a writ to arrest a Chinese person

outside of the commissioner's district, or that it would authorize a Chinese inspector to arrest such person without a warrant in one district and carry him into another district for trial before a commissioner of the latter district."

## Vol. I, p. 778, sec. 6.

**The certificate is prima facie evidence of the Chinese person's right to enter and remain in the country and of the facts stated in it.** *United States v. Chin Chong Pong*, (S. D. N. Y. 1911) 192 Fed. 722.

The United States may controvert the evidence of a merchant certificate, and hence may offer proof collaterally to contradict the determination by the immigration authorities that the Chinaman was entitled to land when admitted into the country. *United States v. Fong Sen*, (E. D. N. Y. 1913) 205 Fed. 398.

**Wives and minor children.**—To the same effect as the original note, see *United States v. Yee Quong Yuen*, (C. C. A. 8th Cir. 1911) 191 Fed. 28, wherein the court said: "But it is contended that the son abandoned his father as soon as he reached Salt Lake City, and entered at once upon the prohibited occupation of a laborer, and that for this reason he lost the status of his father and his right to remain in this country. The case of *United States v. Yong Yew*, (D. C.) 83 Fed. 832, and *United States v. Joe Dick*, (D. C.) 134 Fed. 988, are relied on to sustain this contention. The first-mentioned case dis-

cussed the evidence adduced with a view of determining the good faith of an entry as a merchant, and it was held that the prima facie value of the certificate of identification, there under consideration, was overcome by other facts of the case. Certainly that case affords no warrant for the contention that entry made lawfully and in good faith can by subsequent conduct of the immigrant be held invalid and of no effect.

"The other case presents this state of facts: Joe Kin came to this country in 1874 and began trading as a merchant in San Francisco. A few years later he caused his minor son, eight years old, to be brought over from China to him. The son lived in his father's family 3 or 4 years, when the father left the country permanently and returned to China, where he remained. The boy, then 11 or 12 years old, was thrown upon his own resources and began at once the career of a laborer. He never registered as required by the acts of 1892 and 1893, and was afterwards arrested for deportation as a laborer unlawfully within the United States. The concession was made that he came into the country lawfully as the minor son of a

resident merchant, but the case turned on this question: Whether his status as minor son of such a merchant continued during the rest of his minority, although his father had ceased to be a merchant, broken up his household, renounced the support of his son, and left the United States without the intention of returning. It was held that he had lost his father's status, and that his own status was determined by his subsequent occupation. Without intending to approve or disapprove the conclusion reached in that case, it is clear that it has little, if any, similarity to the one before us. The appellee's status and right of residence in this country were fixed by his lawful entry while a minor son of his father, who then resided here as a Chinese merchant. Presumptively this status and this right remained with him thereafter. His father was a merchant in Salt Lake City when the boy came. He has continued to be such a merchant from that day to this. He has never left the country with the intention of abandoning his business here, and has never returned to China with the intention of remaining there. His boy, although a

minor when he landed on our shores, was old enough to begin his life's work, and the father, for reasons of his own, deemed Denver a more promising place for him than Salt Lake City, and established him in the business of a merchant at that place. He was unsuccessful. He did not abandon his father, nor did his father abandon or abdicate his duty of care and protection of him. While they were waiting after their first unsuccessful venture for an opportunity to engage in another business, the father supplied him with expense money. The worst of his offending was that he worked for his board at a laundry for a few months prior to his arrest, and while he and his father were attempting to find a new business for him. This state of facts, in our opinion, discloses no abandonment of the father's status, or no voluntary adoption of any new status by the son. Neither does it disclose any attempt at circumventing the laws of the United States respecting the exclusion of Chinese laborers. So far as this record shows, the boy was lawfully in the United States at the time of his arrest, and the judgment of the District Court to that effect is affirmed."

## Vol. I, p. 782, sec. 12.

**Merchant becoming a laborer.**—If a merchant is unfortunate in business and is obliged to become a laborer that is no reason for deporting him because he has no laborer's certificate, where he had had a merchant's certificate which was destroyed by fire. *United States v. Lee You Wing*, (S. D. N. Y. 1913) 208 Fed. 166, wherein the court said: "This is an appeal from an order of deportation. The charge is that the defendant is a Chinese laborer without a certificate. The defense is that he was a merchant, and as such not required to have a laborer's certificate. The evidence, as usual in Chinese cases, is incomplete and unsatisfactory. The evidence, upon the whole, shows, in my opinion, that the defendant was a merchant at Hong Kong; that he came to San Francisco with a merchant's certificate, and was a merchant there; that his certificate was burned in the fire following the San Francisco earthquake; that he came East after the earthquake with \$1,500; that in 1908 he bought an interest for \$1,000 in the firm of Wah Chong Lung & Co. in Newark, N. J.; that in 1910 he applied for a certificate that he was a merchant, which would entitle him to return to this country after a contemplated visit to China; that such certificate was refused; that he then bought a laundry, where he has worked since. He was arrested in this proceeding in 1912 on the ground that he was a laborer in this country without a certificate. His own evidence is in some respects contradictory, but in my opinion it is natural that in testifying about dates of long past events such a witness should make errors. No members of the firm of Wah Chong Lung & Co. were called in his behalf, but

they may be hostile to him. He left the firm several years ago. In the examination in 1910, on the defendant's application for a certificate on the eve of his contemplated departure for China, Mr. Wiley's questions show that the defendant claimed that the firm owed him \$350, and the manager claimed that the firm owed him nothing. The manager, Yee Lo, had apparently said to Mr. Wiley that the defendant had been a member of the firm; that he joined before Li Lip. Mr. Wiley did not examine Yee Lo, or Mr. Tirrell, or Mr. Smith, white witnesses, who, the defendant said, would prove his membership in the firm. Mr. Wiley refused to give the defendant a merchant's certificate, but he took no steps to have him deported as a laborer until two years after.

"I think the fact that the defendant applied for such a certificate is entitled to considerable weight. He would probably not have dared to apply for such a certificate if he was a common laborer. The fact, too that Mr. Wiley, although refusing to give it, took no action against the defendant for two years later, is of still greater significance. The government's counsel in his brief states as an explanation of this delay that Chinese persons employed in mercantile pursuits and ostensibly having an interest in the firm in which they are working, even if they have no certificates, are not usually molested, unless found actually engaged in laboring pursuits. But a man is either a merchant or not a merchant. If a merchant is unfortunate in business, and is obliged to become a laborer, that is no reason for deporting him because he has no certificate. He was not obliged to have a laborer's certificate if he was a mer-

chant. Upon this record, I think that, if the defendant had continued to occupy the same relation to the firm of Wah Chong Lung & Co. that he occupied in 1910, he would not have been proceeded against; and, if that is

so, the fact that he has since become a laborer does not warrant his deportation.

"On the whole case, I think the order of deportation should be reversed, and the defendant discharged."

## CITIZENSHIP.

### Vol. I, p. 786, sec. 1994.

"This section is said to originate in the Act of Congress of February 10, 1855 (10 Stat. 604, c. 71), which in its second section provided that 'any woman, who might lawfully be naturalized under the existing laws, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen.' This section was construed in *Kelly v. Owen*, (1868) 7 Wall. 496, 19 U. S. (L. ed.) 283, and was held to confer the privileges of citizenship upon women married to citizens of the United States, if they were of the class of persons for whose naturalization the acts of Congress provide. So under the present statute,

when a woman who could be naturalized marries a citizen of the United States, she becomes by that act a citizen herself." *Low Wah Suey v. Backus*, (1912) 225 U. S. 460, 32 S. Ct. 734, 56 U. S. (L. ed.) 1165. See also *Mackenzie v. Hare*, (1913) 165 Cal. 766, 134 Pac. 713, wherein the court said: "In the Revised Statutes the words 'and taken' are omitted. The effect of this statute is that every alien woman who marries a citizen of the United States becomes perforce a citizen herself, without the formality of naturalization, and regardless of her wish in that respect."

### Vol. I, p. 788, sec. 1999.

The right to renounce citizenship is solemnly declared by this act of Congress. *Mackenzie v. Hare*, (1913) 165 Cal. 776, 134 Pac. 713, wherein the court said: "The preamble declares that the right of expatriation is a natural and inherent right of all people. The body of the act declares further that any decision of any officer of the government denying, restricting, or impairing the right of expatriation is 'inconsistent with the fundamental principles of this government.'"

This language seems to be but little more than a legislative declaration of national policy. But it clearly is operative in this, that it gives the consent of the national government to the expatriation of any citizen by his or her voluntary act. If such consent of the nation is essential to a valid expatriation, this law is evidence thereof. The absolute right of expatriation is now recognized as the settled doctrine of this country."

### 1909 Supp., p. 69, sec. 3.

A female citizen who marries an alien becomes herself an alien, whether she intends that result as the consequence of her marriage or not. She must bow to the will of the nation, as expressed by the act of Congress. Owing to the possibility of international complications, the rule has generally prevailed from considerations of policy, that the wife should not have a citizenship, nor an allegiance, different from that of her husband. The section was intended to put this general doctrine into statutory form. *Mackenzie v. Hare*, (1913) 165 Cal. 776, 134 Pac. 713, wherein the court said: "It is suggested that the object of the act, as expressed in its title, was to legislate solely for the protection of citizens abroad, and therefore that it should not be construed to apply to women who marry here and continue to re-

side in this country, or who marry an alien permanently residing in this country. As has been stated in reciting the origin of the act, such persons frequently remove to the country of which the husband is a subject, or to other foreign countries. It was the obvious purpose to provide a rule which should govern in cases of that kind. Furthermore, the language of the section shows that it contemplates that an American woman included within its terms will in some cases reside in the United States after contracting the marriage with the alien, and that it intends that she shall continue to have the nationality of her husband during such residence here, so long as the marriage relation continues. The interpretation contended for would be contrary to this provision, and therefore it is not permissible."

## CIVIL RIGHTS.

### Vol. I, p. 796, sec. 1980.

**Statute of limitations.**—The action under this section is for damages and not for a penalty, and the statute of limitations of five years against suits for penalties or forfeitures (Rev. Stat. sec. 1047, 3 Fed. Stat.

Ann. 1047) is therefore not applicable. There being no federal statute of limitations applicable to the case, state statutes of limitations are applicable. *O'Sullivan v. Felix*, (C. C. A. 5th Cir. 1912) 194 Fed. 88.

### Vol. I, p. 801, sec. 1990.

**State statute held not in conflict with section.**—In *Wilson v. State*, (1912) 128 Ga. 489, 75 S. E. 619, it is held that a state statute did not offend against this section which provided as follows: "If any person shall contract with another to perform for him services of any kind, with intent to procure money or other thing of value thereby, and not to perform the service contracted for, to

the loss and damage of the hirer, or, after having so contracted, shall procure from the hirer money, or other thing of value, with intent not to perform such service, to the loss and damage of the hirer, he shall be deemed a common cheat and swindler, and upon conviction shall be punished as for a misdemeanor."

### Vol. I, p. 805, sec. 1.

**Constitutionality.**—This and the following section, which were declared unconstitutional and void in their application to the states, in *Civil Rights Cases*, (1883) 109 U. S. 3, 3 S. Ct. 18, 27 U. S. (L. ed.) 835, have thirty years later been declared unconstitutional and void in their entirety in *Butts v. Merchants' & Miners' Transp. Co.*, (1913) 230 U. S. 126, 33 S. Ct. 964, 57 U. S. (L. ed.) 1422. The facts of the case involved the constitutionality of sections 1 and 2 as applied to vessels of the United States engaged in the coastwise trade. The court said: "Counsel for the plaintiff cites *El Paso & N. R. Co. v. Gutierrez*, (1909) 215 U. S. 87, as an authority for holding the sections in question valid as applied to American vessels upon the high seas and to the District of Columbia and the Territories, notwithstanding their invalidity as applied to the States. The matter involved in that case was whether the provision in the *Employers' Liability Act of 1906*, 34 Stat. 232, c. 3073, relating to the District of Columbia and the Territories could be sustained, considering that the provision relating to interstate commerce had been adjudged invalid in *Employers' Liability Cases*, (1908) 207 U. S. 463. That act was quite unlike the sections now before us in two important particulars: 1. It was not a penal or criminal statute, to be strictly construed, but was a civil and purely remedial one, to be construed liberally. 2. Its applicability to the District of Columbia and the Territories did not depend upon the same words which made it applicable to interstate commerce. On the contrary, it dealt expressly, first, with common carriers 'in the

District of Columbia, or in any Territory of the United States.' and, second, with common carriers 'between the several States.' The latter provision had been adjudged invalid because too broad in some of its features, and the *Gutierrez* case involved the other provision. In that case the court, considering the terms of the statute, held that the provision relating to interstate commerce was 'entirely separable from' the one relating to the District of Columbia and the Territories, and that Congress manifestly had proceeded 'with the intention to regulate the matter in the District and the Territories, irrespective of the interstate commerce feature of the act.' With the invalid and separable provision eliminated there still remained a complete and operative statute in terms applying to the District of Columbia and the Territories. The differences between that act and the sections now before us are so pronounced and so obvious that the *Gutierrez* case is not an authority for the plaintiff. On the contrary, it is in entire harmony with the other cases before cited, as is shown throughout the opinion and by the following excerpt (p. 97): 'It remains to inquire whether it is plain that Congress would have enacted the legislation had the act been limited to the regulation of the liability to employees engaged in commerce within the District of Columbia and the Territories. If we are satisfied that it would not, or that the matter is in such doubt that we are unable to say what Congress would have done omitting the unconstitutional feature, then the statute must fall.' . . . Here it is not possible to separate that which is constitutional from that which is

not. Both are dependent upon the same general words, 'within the jurisdiction of the United States,' which alone can indicate where the sections are to be operative. Those words, as the context and the preamble show, were purposely used. They express the legis-

lative will and cannot be limited in the manner suggested without altering the purpose with which the two sections were enacted. They must therefore be adjudged altogether invalid."

## CLAIMS.

### Vol. II, p. 6, sec. 190.

**Construction.**—In *Van Metre v. Nunn*, (1912) 116 Minn. 444, 133 N. W. 1012, the court construing this section said: "The plaintiff's construction of this statute is this: 'The statute was enacted for the purpose of prohibiting the persons occupying the positions therein mentioned from prosecuting by means of a lawsuit, and in any manner and by any means to aid in the prosecution of any such claim by means of a lawsuit, before a court or tribunal having jurisdiction

to hear, determine, and to make a final disposition of the claim.' It is obvious that this is a technical view of the statute, not justified by its language, and that it prohibits during the time limited the persons therein named from acting as counsel, attorney, or agent in the collection of any claim against the United States which was pending in any of its departments while he was such officer, clerk, or employee."

### Vol. II, p. 7, sec. 3477.

**In general.**—Under this section claims against the United States government cannot be transferred or assigned unless such assignment is made in accordance with the provisions of such statute, and all pretended transfers or assignments of such claims, or any part thereof, unless made in accordance with the provisions of the statute, are declared null and void. *Porter v. Title Guaranty & Surety Co.*, (1912) 21 Idaho 312, 121 Pac. 548.

**Voluntary assignment of naked claims.**—"The Supreme Court has frequently had occasion to consider this section, and the holding is that the intent of Congress as expressed therein was that a voluntary assign-

ment of naked claims against the government for the purpose of suit or in view of litigation or otherwise, should not be countenanced, and that the statute embraces every claim or right to demand money from the United States, however arising, of whatever nature, and whenever and wherever prosecuted." *Emmons v. United States*, (C. C. Ore. 1911) 189 Fed. 414.

**Equitable assignment.**—Any attempt to work out an equitable lien or assignment of an interest in a government contract is impossible in view of this section. In *re Waters-Colver Co.*, (E. D. N. Y. 1913) 206 Fed. 845.

### Vol. II, p. 41, sec. 951.

**Counterclaim for taxes paid.**—This section forbids the allowance of a counterclaim for corporation taxes paid in excess of the amount due in an action by the government to recover a corporation tax. *United States v. Nipissing Mines Co.*, (C. C. A. 2d Cir. 1913) 206 Fed. 431.

**"Claim for a credit."** A "claim for a credit" is shown where an army officer in the settlement of his account with the government for supplies furnished him, turns over to his successor appointed to receive it, some of the supplies. *United States v. Du Row*, (N. D. Ohio 1913) 208 Fed. 895.

### Vol. II, p. 55, sec. 1059.

**Cases sounding in tort.**—To the same effect as the original note see *United States v. Buffalo Pitts Co.*, (C. C. A. 2d Cir. 1912) 193 Fed. 905.

**"Contracts express or implied."**—To the same effect as the original note see *United States v. Buffalo Pitts Co.*, (C. C. A. 2d Cir. 1912) 193 Fed. 905.



## Vol. II, p. 64, sec. 1066.

This section is incorporated in the Judicial Code § 153 (see Fed. Stat. Annot. Supp. 1912, p. 203). *Eastern Extension, A. & C. Telegraph Co. v. United States*, (1913) 231 U. S. 326, 34 S. Ct. 57.

The words "treaty stipulation" should not be so narrowly interpreted as to permit the exercise of jurisdiction where the claim arises solely out of the treaty cession. Whether the liability asserted is said to result from an express provision of assumption contained

in a treaty, or is sought to be enforced as a necessary consequence of the cession made by a treaty, it is equally within the policy and spirit of the statute; and the letter of the statute should not be otherwise construed. It is its evident purpose that the obligations of the United States directly resulting from a treaty should not be determined by the Court of Claims. *Eastern Extension, A. & C. Telegraph Co. v. United States*, (1913) 231 U. S. 326, 34 S. Ct. 57.

## Vol. II, p. 64, sec. 1068.

This section is cited in *New York & O. Steamship Co. v. United States*, (S. D. N. Y. 1912) 202 Fed. 311.

## Vol. II, p. 73, sec. 1091.

This statute expressly restricts the allowance of interest in suits in the Court of Claims against the Government. *National Home for Disabled Volunteer Soldiers v. Parrish*, (1913) 229 U. S. 494, 33 S. Ct. 944, 57 U. S. (L. ed.) 1296.

## Vol. II, p. 80, sec. 1.

This section is incorporated in the Judicial Code, sec. 145 (see Fed. Stat. Annot. 1912 Supp. p. 200.) *Eastern Extension, A. & C. Telegraph Co. v. United States*, (1913) 231 U. S. 326, 34 S. Ct. 57.

Consent of United States to be sued.—The United States by successive acts of Congress have consented to be sued upon their contracts either in the Court of Claims or in a Circuit or District Court of the United States. *Buckley v. United States*, (E. D. Wash. 1912) 196 Fed. 429.

*Rev. Stat. sec. 1066* (2 Fed. Stat. Annot. 64), is not repealed by this section. *Eastern Extension, A. & C. Telegraph Co. v. United States*, (1913) 231 U. S. 326, 34 S. Ct. 57, wherein the court said: "It is argued that the act of 1887 was intended to provide a complete scheme for the bestowal of jurisdiction over all claims against the Government, save those therein expressly excepted, and that, hence, it must be regarded as a substitute for the provisions of the Revised Statutes including § 1066 which should therefore be deemed to be repealed. We cannot accede to this view. The question is one of legislative intent. The section dealt with a special class of cases. There is no essential repugnancy between the broadening of the general provisions as to jurisdiction and the maintenance of the limitation as to claims based upon treaties, and, in considering the scope and manifest purpose of the latter act in relation to claims arising out of transactions between the Government, or its officers, and claimants, we find no warrant for concluding that in enlarging the jurisdiction previously conferred by § 1059 it was the intention of Congress to effect such a complete substitution as would destroy the established exception set forth in § 1066. So

far, then, as the petition may be viewed as one seeking to assert a claim growing out of the treaty with Spain, we are of the opinion that it was not within the jurisdiction of the Court of Claims."

This section is not applicable to claims for property seized by United States officers during the war with Spain for military purposes, in violation of the President's proclamation, in violation of the laws of war and the conditions arising from the capitulation of Santiago. *Herrera v. United States*, (1912) 222 U. S. 558, 32 S. Ct. 179, 56 U. S. (L. ed.) 316; *Diaz v. United States*, (1912) 222 U. S. 574, 32 S. Ct. 184, 56 U. S. (L. ed.) 321.

Recovery of money paid as an internal revenue tax under an unlawful assessment may be had in the District Court under this section. *United States v. Finch*, (C. C. A. 7th Cir. 1912) 201 Fed. 95, wherein the court said: "The only assignment of error which calls for discussion is one challenging the jurisdiction of the District Court to entertain the cause."

"The suit was instituted and proceeded to judgment as authorized under the provisions of the Act of March 3, 1887, c. 369, 24 Stat. 515, known as the Tucker Act [2 Fed. Stat. Annot. 80]. This statute expressly provides (section 1) that the Court of Claims shall have jurisdiction to hear and determine claims against the United States, founded upon the Constitution, laws of Congress, or "regulations of an Executive Department," and (section 2) that District and Circuit Courts shall have concurrent jurisdiction therein for amounts named. Certain classes of claims are excepted therefrom, not applicable in terms to the case at bar; and the claim in suit is

plainly enforceable thereunder, unless the statute under which it arises provides other inconsistent remedy.

"The contention is that such inconsistency appears in the provisions of the several sections of the Internal Revenue statute, in reference to recovery for unlawful assessments made and collected, namely, sections 3220, 3226, 3227, and 3228, Rev. Stat. [3 Fed. Stat. Annot. 597 et seq.] and that an exclusive remedy is thereby intended for recovery against the collector. The sections cited expressly authorize the Commissioner (section 3220), on appeal to him, to remit or refund taxes and penalties erroneously assessed or collected, and provide (section 3226) that "no suit shall be maintained in any court for recovery" thereof, until appeal shall be made to the Commissioner and his decision "has been had therein." Such appeal and adverse decision are averred and found as conditions precedent to the present suit. We are advised of no further provision thereof for recovery, whether by suit against the collector (as contended) or otherwise. For the proposition that an exclusive remedy against the collector was intended, counsel relies upon remarks appearing in the course of the opinion, in *United States v. Savings*

*Bank*, 104 U. S. 728, 734 (26 L. ed. 908), that 'an action lies against the collector' when the Commissioner rejects a claim under section 3226. But we do not understand that such inquiry was involved in the case, nor that the decision rested thereon in any measure; moreover, the remark was made long prior to the above-mentioned *Tucker Act*, although subsequent to the original act (section 1059, R. S. [2 Fed. Stat. Annot. 55]), conferring rights of action upon claims in the Court of Claims.

"The question here presented, however, does not require solution of the inquiry whether recovery may be authorized against the collector, as the jurisdictional test must be whether the several provisions for recovery of internal taxes prescribe a remedy which is inconsistent with the general provision of the *Tucker Act*, and may thus operate to exclude other remedies. Vide *Nichols v. United States*, 7 Wall. 122, 130, 19 L. ed. 125. We believe no such inconsistent provision appears in the sections referred to, and that the rule upheld in *Dooley v. United States*, 182 U. S. 222, 21 Sup. Ct. 762, 45 L. ed. 1074, and authorities cited in the opinion, furnishes ample support for jurisdiction over the claim in suit."

## Vol. II, p. 82, sec. 2.

The evident purpose and intent of this law was to give to persons having claims against the United States for comparatively small amounts the right to bring suits in the courts of the United States in districts where they and their witnesses reside, without subjecting them to the expense and annoyance of litigating in a court located at Washington. *New York & O. Steamship Co. v. United States*, (S. D. N. Y. 1912) 202 Fed. 311.

"By the term 'official services,' as used in the statute, we are to understand only those services which are peculiar to the office of an 'officer of the United States,' and which such officers are by law authorized or required to perform. It is obvious that only cases brought to recover for 'official services' of 'officers of the United States,' a restricted class, are withdrawn from the jurisdiction of the federal courts." *Scully v. United States*, (C. C. Nev. 1910) 193 Fed. 185.

An officer of the United States does not include a United States deputy surveyor not appointed by the President alone, nor by the President by and with the consent of the Senate, nor by a court of law, but by a surveyor general. *Scully v. United States*, (C. C. Nev. 1910) 193 Fed. 185, wherein the court said: "There can be no offices of the United States, strictly speaking, except those which are created by the Constitution itself, or by an act of Congress, and, when Con-

gress does so establish an inferior office, it may authorize the President alone, or the courts of law, or the heads of departments to appoint the incumbent, but no appointee named by the head of a department can be considered an officer of the United States, unless the official making the appointment is authorized by law so to do."

Counterclaims.—This section is not broad enough to permit the recovery in the District Courts of demands upon counterclaims. *United States v. Nipissing Mines Co.*, (C. C. A. 2d Cir. 1913) 206 Fed. 431, wherein the court said: "The affirmative judgment against the United States upon the counter claim cannot, however, be permitted to stand. Section 951 of the Revised Statutes (see 2 Fed. Stat. Annot. 41) allows set-offs when claims have been presented to accounting officers, but this statute does not authorize a judgment for an excess against the government. *United States v. Eckford*, 6 Wall. 484, 18 L. ed. 920. Moreover, in our opinion, the *Tucker Act* of 1887 which gives the District Courts jurisdiction over certain suits against the United States, is not broad enough to permit the recovery of demands upon counter claims. We think that that statute refers to original suits and prescribes procedure inconsistent with its use as the basis of a counter claim."

## Vol. II, p. 84, sec. 5.

Filing petition in district of residence of plaintiff.—The provision of the act that the petition be filed in the district of the residence of the plaintiff would seem to be intended for his benefit, but in any event his

failure to file it there does not go to the jurisdiction of the court and may be waived by the District Attorney. *New York & O. Steamship Co. v. United States*, (S. D. N. Y. 1912) 202 Fed. 311.

## COLLISIONS.

### Vol. II, p. 158, art. 15, cl. (e).

Use of fog horn by steam vessels. — The only occasion on which a steam vessel can properly use a fog horn is stated in this clause, that is, when she is towing, or is a vessel employed in laying or picking up a telegraph cable, or is unable to get out of

the way of an approaching vessel through being not under command or unable to maneuver as required by the rules. A fog horn is ordinarily used exclusively by sailing vessels. *The Minnesota*, (S. D. N. Y. 1911) 189 Fed. 706.

### Vol. II, p. 160, art. 16.

Duty to stop. — In the case of *The Beaver*, (N. D. Cal. 1912) 197 Fed. 866, it was held that one of the vessels was in fault for violation of the second part of this rule. In this case the court said: "The respondent claims that rule 16 should be so interpreted that the requirement to stop the engine is not obligatory if the position of the approaching vessel is ascertained 'with reference to danger of collision by an approximate of accuracy;' but this would leave the law substantially the same as it was prior to the adoption of the rule, and would not accomplish the purpose intended by its enactment. It was designed to take away from a vessel the right to proceed at all, after hearing the first signal, without first stopping the engines to enable those in charge to ascertain the position of the signaling ves-

sel. It recognizes the difficulty of ascertaining from the sound of a whistle the exact position, and especially the course and distance of a vessel in a fog. It therefore does not leave the navigation of a vessel, when a whistle is heard apparently forward of her beam, the position of which is not ascertained, to the master's judgment, but assumes that the zone of danger of collision is reached when the whistle is heard, and forbids the ship to enter such zone except after stopping its engines to ascertain the position of the oncoming ship. It defines in positive terms the master's duty in such cases."

Excessive speed. — In the case of *The Beaver*, (N. D. Cal. 1912) 197 Fed. 866, the vessel was held to be in fault for navigating at excessive speed in a fog in violation of the first part of this rule.

### Vol. II, p. 162, art. 19.

Rule applied. — This rule was applied in *The Wm. E. Gladwish*, (C. C. A. 2d Cir. 1913) 206 Fed. 901.

### Vol. II, p. 162, art. twenty-one.

Rule applied. — This rule was applied in *The Wm. E. Gladwish*, (C. C. A. 2d Cir. 1913) 206 Fed. 901.

### Vol. II, p. 172, rule 22.

This rule is cited in *Nicholas Transit Co. v. Pittsburgh S. S. Co.*, (W. D. N. Y. 1912) 196 Fed. 65; *The Henry W. Oliver*, (N. D. Ohio 1912) 202 Fed. 306.

### Vol. II, p. 172, rule 24.

This rule is cited in *The Fayette Brown*, (N. D. Ohio 1912) 198 Fed. 684.

### Vol. II, p. 176, art. 11.

A vessel made fast to another vessel must maintain her proper anchor lights. *The Prudence*, (E. D. Va. 1912) 197 Fed. 479.  
F. S. A. Supp.—36.

The term "hull," as used in this article, includes the forecandle deck. *The Europe*, (C. C. A. 9th Cir. 1911) 190 Fed. 475.

## Vol. II, p. 178, art. 16.

**Moderate speed.**—In the following cases vessels have been found guilty of fault in navigating at excessive speed in a fog. The *Cascades*, (C. C. A. 9th Cir. 1911) 190 Fed. 729; The *S. V. Luckenbach*, (C. C. A. 2d Cir. 1912) 197 Fed. 888; The *George F. Randolph*, (S. D. N. Y. 1912) 200 Fed. 96.

**Failure to reduce speed on hearing fog signal.**—See *The Texas*, (D. C. Del. 1913) 207 Fed. 669.

**Necessity of stopping on hearing signal.**—See *Gillen v. City of New York*, (S. D. N. Y. 1912) 198 Fed. 585.

The word "navigate" as used in this rule is not to be construed as requiring that vessels in a fog shall keep moving. The *Plainfield*, (C. C. A. 2d Cir. 1913) 205 Fed. 730.

## Vol. II, p. 178, art. 18, rule I.

**Fog.**—This rule cannot be invoked in a fog, unless it can be shown that the vessel is seen dead ahead. A literal compliance with the rule, when vessels are uncertain as to the location of each other, might well lead

to grave disaster. The *George F. Randolph*, (S. D. N. Y. 1912) 200 Fed. 96.

**Duty of vessels to pass starboard to starboard.**—See *The Wrestler*, (S. D. N. Y. 1912) 198 Fed. 583.

## Vol. II, p. 179, rule VIII.

**Rule applied.**—In the following cases vessels were held to be in fault for violation of this rule. The *Menominee*, (C. C. A. 3d Cir. 1912) 197 Fed. 736; The *George W. Elder*, (D. C. Ore. 1913) 203 Fed. 523.

## Vol. II, p. 179, rule IX.

This rule is cited in *The North Point*, (E. D. Va. 1913) 205 Fed. 958.

## Vol. II, p. 180, art. 19.

**Pilot rules invalid.**—The pilot rule which provides that "whenever the danger signal is given, the engines of both steamers should be stopped and backed until the headway of the steamers has been fully checked," is invalid so far as it applies to steam vessels crossing, as if acted upon it violates this section of the statute. The *James A. Walsh*, (S. D. N. Y. 1912) 194 Fed. 549.

This article, which gives the privilege to the vessel having the other on her port hand, and article 21 which requires her to keep her course and speed, do not admit of the imposition upon that privilege by the pilot rules of a condition that she answer a signal. A fortiori, it does not admit the imposition of the condition that she take the initiative of giving a single blast to indicate her intent to hold her course and speed, even though the pilot rules so provide. The *Haida*, (S. D. N. Y. 1911) 191 Fed. 623.

**When violation of rule justified.**—The only circumstances under the statute which justify a violation of the rule that the privileged vessel shall keep her course and

speed are when there are special circumstances which render departure from the rule necessary in order to avoid immediate danger. The *James A. Walsh*, (S. D. N. Y. 1912) 194 Fed. 549.

**Emergency caused by privileged vessel.**—A privileged vessel will not be excused on the ground of emergency where the emergency is caused by her failure to navigate in accordance with this rule. The *Elizabeth*, (C. C. A. 2d Cir. 1912) 197 Fed. 160.

**Rule applies to both vessels.**—The starboard-hand rule operates on both vessels. The one is to get out of the way by change of course, or stopping or reversing. The other is to keep her course and speed. The *Elizabeth*, (C. C. A. 2d Cir. 1912) 197 Fed. 160.

For a violation of this rule, see *The James A. Walsh*, (S. D. N. Y. 1912) 194 Fed. 549; *L. Boyers Sons Co. v. United States*, (C. C. A. 2d Cir. 1912) 195 Fed. 490; *The Transfer*, (C. C. A. 2d Cir. 1912) 195 Fed. 497; *The Aurora*, (C. C. A. 2d Cir. 1912) 198 Fed. 383.

## Vol. II, p. 180, art. 20.

**Duty of sailing vessel.**—A sailing vessel, as the privileged vessel, is not only entitled, but bound, to maintain her course as long as it is possible for the burdened vessel to

avoid her, at least in the absence of some distinct indication that the burdened vessel is about to fail in her duty. To require the privileged vessel to act before such time

would be to nullify the general rule. *The M. E. Luckenbach*, (E. D. N. Y. 1912) 200 Fed. 630.

The expression "risk of collision" has a different meaning from the expression "immediate danger," as used in the twenty-seventh article. "Risk of collision" means "chance," "peril," "hazard," or "danger of collision" merely, and not immediate danger. "Risk of collision" means, not merely cer-

tainty of collision, if no efforts be made to avert it, but danger of collision; and there is danger or risk of collision whenever it is not clearly safe to go on. *The Philadelphia*, (E. D. Pa. 1912) 199 Fed. 299.

**Tow and sailing vessel crossing.**—The rule of this article is applicable to a tug with a tow, the same as to a single steam vessel. *The M. E. Luckenbach*, (E. D. N. Y. 1912) 200 Fed. 630.

## Vol. II, p. 180, art. 21.

The privileged vessel is entitled to assume that, although the burdened vessel may at first propose to exchange rights of way, it will, if such proposal be rejected, conform to

the rules of navigation. *L. Boyers Sons Co. v. United States*, (C. C. A. 2d Cir. 1912) 195 Fed. 490.

## Vol. II, p. 180, art. 22.

For a violation of this rule, see *The Transfer*, (C. C. A. 2d Cir. 1912) 195 Fed. 497.

## Vol. II, p. 180, art. 24.

This article is cited in *The George W. Elder*, (D. C. Ore. 1913) 203 Fed. 523.

## Vol. II, p. 180, art. 25.

**When safe and practicable.**—This article does not imply that on receiving a passing signal each vessel has the right to assume that the other is on a particular side of the channel, or will make room for the approaching vessel on the other side. *The Howard Reeder*, (C. C. A. 4th Cir. 1913) 207 Fed. 929, wherein the court said: "That it would be best to have vessels so navigate—that is, each proceed to the right—is very clear, if it could in all cases be done, and would largely obviate the necessity of passing signals at all in channels of the character in question. But the rule is when it 'is safe and practicable so to do,' leaving it largely a matter of discretion to the navigator, made necessary by many considerations which arise en route, among them the necessity for crossing from side to side of the channel, the existence of shoal waters, the sinuosities of

the channel, leaving or approaching a channel, and the following of buoys or other aids to navigation on dark nights."

**Upper New York Bay.**—The narrow channel rule applies to the main ship channel between Governor's Island on the east and Bedloe's and Ellis Islands, on the west. The channel does not include the entire navigable channel but only the space between the anchorage grounds. *The George F. Randolph*, (S. D. N. Y. 1912) 200 Fed. 96. See also *The Manuel Calvo*, (S. D. N. Y. 1912) 198 Fed. 568.

A tug with a tow is governed by this article. *The Texas*, (D. C. Del. 1913) 207 Fed. 669.

This article was relied on in *The Cascades*, (C. C. A. 9th Cir. 1911) 190 Fed. 729, and *The S. V. Luckenbach*, (C. C. A. 2d Cir. 1912) 197 Fed. 888.

## Vol. II, p. 181, art. 27.

This article is cited in *The George W. Elder*, (D. C. Ore. 1913) 203 Fed. 523.

## Vol. II, p. 181, art. 28.

This section is cited in *The Atkins Hughes*, (S. D. N. Y. 1912) 199 Fed. 938.

## Vol. II, p. 181, art. 29.

**Duty to have lookout.**—In the following cases vessels were held to be in fault for collision because of failure to maintain a proper and efficient lookout. *The Luzerne*, (C. C. A. 2d Cir. 1912) 197 Fed. 162; *The Jacob Luckenbach*, (D. C. Md. 1913) 206 Fed. 226.

## Vol. II, p. 182, sec. 4.

A vessel is liable for the fault of its master under this section. The Confidence, (C. C. A. 2d Cir. 1912) 201 Fed. 340, wherein the court said: "The contention of the appellant is that the act should be so construed as to impose a penalty on the master for the master's fault and on the vessel only for the owner's fault. As he states it in brief: 'Where the owner employs a competent master, and in all respects equips his vessel in compliance with the statute, the vessel has complied with the act; and if the vessel is later navigated, while so equipped, the act imposes no penalty on the vessel for the master's failure to observe the statutory provisions in his handling of the boat.' In other words, it is contended that the act should be construed as if it read:

"Every vessel which shall engage in navigation, without having complied with this act shall be liable,' etc. But in the opinion of a majority of this court such a construction strains the plain language of the statute, which certainly is not obscure. It provides specifically (in sections 1 and 2) that a vessel, when navigating, shall move thus and so, shall show such and such lights, and shall give such and such signals. Certainly a vessel, which, when navigating, fails to move, or show lights, or give signals as required, may most truthfully and accurately be described as being 'navigated without complying with the provisions of the act.' Taking the words in their ordinary and natural meaning, without any refinement or distortion, they make the vessel as well as the master responsible in penalty for failure to obey such rules of navigation as the statute enumerates. The burden is on the person contending for a restricted meaning to

show some good ground for the conclusion that Congress did not mean precisely what it said. We do not find anything persuasive in the arguments advanced to sustain the narrow construction. We see no distinction between the two phrases 'observe the provisions' and 'comply with the provisions.' Nor do we attach any weight to the circumstance that the master is penalized (while the vessel is not) for failure to observe the pilot rules, other than those enumerated in the statute. Nor do we see why it should be assumed that Congress did not intend to make the owner liable for the fault of his employé. He is already liable in damages for such faults when there is a disastrous collision. The object of this statute was to prevent collisions, by punishing disobedience of the requirements of the act whenever it occurred and was discovered, without waiting for disaster to follow. A master may be competent, and may hold a certificate, and yet be repeatedly reckless and disregardful of prescribed rules. Our experience has shown how frequent this is. Congress may well have believed that the best way to make masters comply with the rules of navigation, which they are too prone to modify, would be to punish the owner when the master violated them. To do so would tend to make the owner vigilant and watchful of his employé; not content with general competence and a certificate, but constantly seeking to advise himself, perhaps through others of the crew, as to how the master handled the vessel, and prompt to discharge a master whose habitual conduct was such as to expose the vessel to repeated penalties."

## COMMERCE AND LABOR.

## Vol. X, p. 62, sec. 7.

The decision of the appropriate immigration officer is final unless reversed on appeal to the Secretary of Commerce and Labor. And if it does not affirmatively appear that the executive officers have acted in some unlawful or improper way and abused their

discretion, their finding upon the question of citizenship must be deemed to be conclusive and is not subject to review by the court. *Tang Tun v. Edsell*, (1912) 223 U. S. 673, 32 S. Ct. 359, 56 U. S. (L. ed.) 606.

## CONGRESS.

## Vol. II, p. 239, sec. 102.

A writ of habeas corpus, issued to compel the release of a witness who had been imprisoned for refusing to give testimony be-

fore a committee of the House of Representatives, was quashed in *Henry v. Henkel*, (S. D. N. Y. 1913) 207 Fed. 805.

## CONSPIRACY.

### Vol. II, p. 247, sec. 5440.

**Venue.**—To the same effect as the second paragraph of the original note, see *Hyde v. United States*, (1912) 225 U. S. 347, 32 S. Ct. 793, 56 U. S. (L. ed.) 1114.

**Limitation.**—Where, during the existence of the conspiracy, there are successive overt acts, the period of limitation must be computed from the date of the last of them of which there is appropriate allegation and proof, and this although some of the earlier acts may have occurred more than three years before the indictment was found. *Brown v. Elliott*, (1912) 225 U. S. 392, 32 S. Ct. 812, 56 U. S. (L. ed.) 1136.

**Conspiracy to commit offense against United States—To violate bankruptcy law.**—The words "any defense against the United States" in section 5440 have been construed to include any offense made a crime by the laws of the United States, and applies to a conspiracy formed in contemplation of bankruptcy. *Radin v. United States*, (C. C. A. 2d Cir. 1911) 189 Fed. 568.

**Persons may be indicted under this section for a conspiracy to conceal the assets of a bankrupt corporation although at the time of the conspiracy the corporation had not become a bankrupt.** *Roukous v. United States*, (C. C. A. 1st Cir. 1912) 195 Fed. 353.

**Persons may be indicted for conspiracy in reference to the concealment of assets of a corporation although the corporation could not be punished under the Bankruptcy Act, (section 29b (1) Fed. Stat. Annot. 1912 Supp. vol. 1, p. 646) for concealment of assets.** *Roukous v. United States*, (C. C. A. 1st Cir. 1912) 195 Fed. 353.

**Overt act.**—Doing an "act," within the meaning of this section, must involve positive conduct upon the part of the doer and not mere passive inaction—that is to say, to bring a case within the statute, the conspirator must himself "do" the "act" or give authority to another to do that particular thing for him. A mere failure on the part of the conspirator to prevent another from doing the act of his own volition cannot be sufficient. *United States v. McClarty*, (W. D. Ky. 1911) 191 Fed. 518.

It is true that the conspiracy, the unlawful combination, has been said to be the crime, and that at common law it was not necessary to aver or prove an overt act; but sec. 5440 has gone beyond such rigid abstraction and prescribes, as necessary to the offense, not only the unlawful conspiracy, but that one or more of the parties must do an "act to effect" its object, and provides

that when such act is done "all the parties to such conspiracy" become liable. *Hyde v. United States*, (1912) 225 U. S. 347, 32 S. Ct. 793, 56 U. S. (L. ed.) 1114, wherein the court said: "It seems like a contradiction to say a thing is necessary to complete another thing and yet that other thing is complete without it. It seems like a paradox to say that anything, to quote the Solicitor General, 'can be a crime of which no court can take cognizance.' The conspiracy, therefore, cannot alone constitute the offense. It needs the addition of the overt act. Such act is something more, therefore, than evidence of a conspiracy. It constitutes the execution or part execution of the conspiracy and all incur guilt by it, or rather complete their guilt by it, consummating a crime by it cognizable then by the judicial tribunals, such tribunals only then acquiring jurisdiction."

**Indictment—Generally.**—It is essential in an indictment for conspiracy to commit a crime against the United States to charge acts sufficient to show that the design of the conspiracy was to commit an offense against the United States. *Stanley v. United States*, (C. C. A. 8th Cir. 1912) 195 Fed. 896.

When the criminality of a conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment; while if the criminality of the offense consists in the agreement to accomplish a purpose not in itself criminal or unlawful, by criminal or unlawful means, the means must be set out. *Hedderly v. United States*, (C. C. A. 9th Cir. 1912) 193 Fed. 561.

**Allegation of place of conspiracy.**—The place of trial can be any state and district where an overt act is performed, and as the place of the overt act may be the place of jurisdiction it follows that the exact place where the conspiracy was formed need not be alleged. *Brown v. Elliott*, (1912) 225 U. S. 392, 32 S. Ct. 812, 56 U. S. (L. ed.) 1136.

**Averment of overt act.**—The conspiracy is a continuing one so long as overt acts are committed in furtherance thereof. It therefore follows that the charging in a single count of the indictment for conspiracy of more than one separate and distinct overt act is not charging separate and distinct offenses. *Stanley v. United States*, (C. C. A. 8th Cir. 1912) 195 Fed. 896.

**Duplicity.**—An indictment which charges a conspiracy to commit two distinct offenses is not duplicitous. *John Gund Brewing Co.*

*v. United States*, (C. C. A. 8th Cir. 1913) 206 Fed. 386.

*To violate postal laws.*—An indictment under this section for a conspiracy to use the mails to defraud, which alleged that the defendants conspired to violate section 215 of the Criminal Code of the United States, was held to be good, although at the time the conspiracy was formed the Criminal Code had not gone into effect, as the charge of violating the section named could have been left out of the indictment and the acts alleged would still have shown a conspiracy to commit an offense against the United States, viz. to violate sec. 5480 of the Revised Statutes, (5 Fed. Stat. Ann. 973), which was in effect at the time and prohibited the use of the mails to defraud. *Ex parte King*, (N. D. Ga. 1912) 200 Fed. 622.

An indictment under this section for conspiracy to use the mails to defraud, need not necessarily charge that the defendants conspired and did commit the offense of attempting to defraud, if the facts set out show that they actually tried to carry out a scheme to defraud by the use of mails. *United States v. Maxey*, (E. D. Ark. 1912) 200 Fed. 997.

The fact that an indictment for conspiracy to use the mails to defraud shows, in charging overt acts, that a completed offense was

committed under the statute making it a crime to use the mails to defraud, does not render the indictment duplicitous. *Stanley v. United States*, (C. C. A. 8th Cir. 1912) 195 Fed. 896.

In an indictment for conspiracy to use the mails to defraud the intention to perpetrate the fraud need not be alleged in the part of the indictment which charges the commission of the offense. It is sufficient if it is charged in any part of the indictment. *United States v. Maxey*, (E. D. Ark. 1912) 200 Fed. 997.

*To violate public land laws.*—An indictment charging that the accused conspired together to obtain from the United States, under the forest reserve act, patents to lands belonging to the United States, in exchange for and in lieu of school lands lying within the limits of such forest reserve, the title to which the accused had obtained, or were to obtain, fraudulently, from the state by means of applications for the purchase of the same in the names of fictitious persons, sufficiently charges an offense under the laws of the United States. *Ex parte Hyde*, (N. D. Cal. 1904) 194 Fed. 207.

This section is cited in *Breese v. United States*, (C. C. A. 4th Cir. 1913) 203 Fed. 824.

## COPYRIGHT.

### Vol. II, p. 256, sec. 4952.

This section gives to each author or proprietor of a painting, upon complying with the provisions of the chapter of the Revised Statutes concerning copyright, the sole liberty of copying and vending the same. *Louis*

*Dejonge & Co. v. Breuker & Kessler Co.*, (C. C. A. 3d Cir. 1911) 191 Fed. 35.

*Rights of owners of uncopyrighted play.*—See *Ferris v. Frohman*, (1912) 223 U. S. 424, 32 S. Ct. 263, 56 U. S. (L. ed.) 492.

### Vol. II, p. 268, sec. 4965.

The action is a civil one for penalties. *Journal Pub. Co. v. Drake*, (C. C. A. 9th Cir. 1912) 199 Fed. 572.

*Unlawful intent.*—“The penalty provided by the statute is for the act of copying, printing, and publishing a copyright article, or for selling or exposing for sale such a copy, and the forfeiture or penalty is fixed for every sheet of such copy found in the possession of the person who has committed any one of the acts prohibited. The general rule in such a case is that, where the defendant has been shown to have committed an unlawful act, an unlawful intent is presumed. ‘If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally

breaks the law in the only sense in which the law ever considers intent.’ *Ellis v. United States*, 206 U. S. 246, 257, 27 Sup. Ct. 600, 602 (51 L. ed. 1047, 11 Ann. Cas. 589). But there is a prohibition in this statute against the copying, printing, and publishing of a copyrighted article ‘by varying the main design with intent to evade the law.’ . . . It is obvious that the intent to evade the law is only required to appear or be inferred where the copyrighted article has not been reproduced in the substantial form and character of the original, but where in the reproduction there has been a varying of the main design. In such a case it should appear as a fact, or be inferable from facts proven, that the reproduction was with an intent to evade the law, and this would be a question



of fact for the jury." *Journal Pub. Co. v. Drake*, (C. C. A. 9th Cir. 1912) 199 Fed. 572.

Sheet.—In *Journal Pub. Co. v. Drake*, (C. C. A. 9th Cir. 1912) 199 Fed. 572, the court said: "It is further objected that the verdict and judgment is in excess of that provided by the statute; that the penalty of \$1 is for every sheet of the infringed copyright

found, without regard to the number of infringements printed on each sheet. We do not so understand the law. The penalty imposed is for every sheet upon which an infringement is printed. In this case, as there were two separate and distinct infringements printed upon 400 sheets, there were 800 infringements printed in all."

## Vol. II, p. 272, sec. 1.

Statutory notice on each reproduction or copy of painting.—In the case of a painting each reproduction or copy must be accompanied with the statutory notice. *Louis Dejonge & Co. v. Breuker & Kessler Co.*, (C. C. A. 3d Cir. 1911) 191 Fed. 35.

Sufficiency of copyright notice on map.—See *Lydiard-Peterson Co. v. Woodman*, (C. C. A. 8th Cir. 1913) 204 Fed. 921.

## 1909 Supp., p. 81, sec. 1 (b).

Meaning of words "make any other version thereof." In *G. Ricordi & Co. v. Mason*, (S. D. N. Y. 1912) 201 Fed. 184, the action was to enjoin the defendant from publishing and selling nondramatic versions of the copyrighted operas "Germania" and "Iris," owned by the complainant, and to recover damages and obtain an accounting of the profits realized by the defendant from the sale of said versions in a publication entitled "Opera Stories." There was no dispute of fact, and the question involved was one solely of statutory construction. The court said: "Although section 1 of the Copyright Act, which went into effect July 1, 1909, in broad terms gives complainant the exclusive right 'to translate the copyrighted work into other languages or dialects, or make any other version thereof,' etc., still the summing up of a libretto by merely outlining the plot or theme, detailing the incidents in such a way as to give in the fewest words possible the so-called story, as was done by the defendant with the operas 'Germania' and 'Iris,' does not constitute the making of such a version thereof as was in the contemplation of Congress when the copyright statute was enacted. A literal definition of the words 'make any other version thereof'

would not only include the defendant's publication, but also the newspaper publications, after performance, of any reviews or criticisms, even when written by reporters invited by the owner of the play to witness the production. The publication of abridgments or versions of the play or opera being permitted to the newspapers, it makes no difference that another, without dialogue or stage directions, embodies practically the same information in a salable booklet. Indeed, the proofs show that the information as to the theme or plot of the operas in question was not taken by defendant from complainant's copyrighted librettos, but that the version of 'Germania' was derived from a newspaper, and that of 'Iris' from a German publication. Of course, if the defendant's stories consisted of mere modifications of the copyrighted works or abridgments thereof, reproducing portions of the dialogue, words, or phrases, the scenes, and characters, a different question would be presented. As the proofs stand, however, I am convinced, that the defendant's 'Opera Stories' is not an invasion of the copyright secured to the complainant by statute or an interference therewith." See also the same case repeated in (S. D. N. Y. 1911) 201 Fed. 182.

## 1909 Supp., p. 81, sec. 1 (e).

Right to copy perforated rolls or records.—In *Aeolian Co. v. Royal Music Roll Co.*, (W. D. N. Y. 1912) 196 Fed. 926, the question raised involved the right of the complainant, the Aeolian Company, under the copyright act of March 4, 1909, to restrain the defendant, the Royal Music Roll Company, from copying and duplicating perforated music rolls or records manufactured by the former. On a motion for a preliminary injunction the court granted the motion for the reason stated by it as follows: "While, under the provisions of the copyright law, such music rolls or records are not strictly matters of copyright, Congress in passing the enact-

ment evidently intended to protect copyright proprietors in their right to their productions, and to give them an exclusive right to print, publish, and vend the same. If the copyrighted work be a musical composition, the owner, under the provisions of the statute, after complying therewith, has the exclusive right to perform it publicly for profit, and may, if he chooses so to do, make 'an arrangement or setting' of the musical composition, published or copyrighted after the passage of the act, for mechanical reproduction. In this manner the copyright owner retains control of the right to manufacture music rolls, and the mechanical re-

production of such music or composition is optional with him. If he elects to mechanically reproduce it, or knowingly acquiesces in such use of reproduction by another, 'any other person,' the act says, 'may make similar use of the copyrighted work' upon payment of a royalty. The bill avers that, prior to making the music rolls or records in question, complainant was given permission and license to mechanically reproduce the copyrighted composition and to make perforated rolls therefrom. By such permission or license the owners of the copyright transferred to the licensees their right to manufacture perforated rolls, or parts, or instruments to mechanically reproduce the copyrighted music. The provision of the statute (section 1 e) that 'any other person may make similar use of the copyrighted work' becomes automatically operative by the grant of the license; but the subsequent user does not thereby secure the right to copy the perforated rolls or records. He cannot avail himself of the skill and labor of the original manufacturer of the perforated roll or record by copying or duplicating the same, but must resort to the copyrighted composition or sheet music, and not pirate the work of a competitor who has made an original perforated roll. The defendant contends there is no provision in

the copyright act for an action of this kind by the manufacturer of perforated rolls or records—a licensee of the copyright proprietor—and that the license herein granted conveyed nothing beyond the right to use the copyrighted music. This court, however, is of a different opinion and thinks that Congress gave to the owner of the copyrighted work and to his licensee the right to maintain an action such as this. By section 36 of the copyright act it is provided that any party aggrieved may file a bill in equity and a Circuit (now District) Court of the United States may grant an injunction to prevent and restrain the violation of any rights secured by such act. To effect the purpose intended by Congress, this provision must be given reasonable construction, and to give it such construction requires holding that the phrase 'any party aggrieved' includes a licensee who has obtained a right to manufacture and sell perforated rolls. The phrase is not limited merely to owners of the copyright, but is broad enough to include licensees or others having permission from the owner of the copyright to mechanically reproduce the musical composition. The allegation charging copying of the rolls by the defendant is not denied. The motion for temporary injunction is granted.'

### 1909 Supp., p. 82, sec. 3.

"Component parts."—In *Mail & Express Co. v. Life Pub. Co.*, (C. C. A. 2d Cir. 1912) 192 Fed. 899, the court answering the contention of the defendant that the plaintiff's copyright of a periodical did not protect pictures therein as "component parts," said: "But section 3 of the copyright act says in so many words that a copyright *does* protect 'all copyrightable component parts of the work copyrighted' and that in the case of a periodical the copyright 'gives the proprietor thereof all the rights in respect thereto which he would have if each part were individually

copyrighted under this act.' The language of the statute is so exactly contrary to the defendant's claim that there seems to be no reason for interpretation nor ground for discussion."

If a trade catalogue containing pictures and cuts of various statuary and articles is copyrighted the owner is entitled to the protection of the copyright law as to each cut contained therein. *Da Prato Statuary Co. v. Giuliani Statuary Co.*, (C. C. Minn. 1911) 189 Fed. 90.

### 1909 Supp., p. 83, sec. 5 (k).

"Pictorial illustrations" within the meaning of this section include pictures of ladies attired in the latest or up-to-date styles, depicting the fashions in dress, supplemented by information concerning the materials which the complainant offers to make up in accordance therewith, and the price at which

it will do so. *National Cloak & Suit Co. v. Kaufman*, (M. D. Pa. 1911) 189 Fed. 215, wherein the court said: "The protection of the law is not confined to pictorial illustrations known as works of fine arts. This was not so even under the preceding act."

### 1909 Supp., p. 83, sec. 8.

Copyright by employer.—In *National Cloak & Suit Co. v. Kaufman*, (M. D. Pa. 1911) 189 Fed. 215, the question arose whether the complainant who sued for infringement of copyright was the sort of person who

could procure a copyright. On this question the court said: "The complainant is a corporation created by the laws of New York, which, according to the bill, 'wrote, designed and compiled and caused to be writ-

ten, designed and compiled by those employed by it for the purpose, all of them citizens and residents of the United States, or aliens domiciled within the United States at the time of the first publication,' the book of which it was the proprietor. The present act of Congress confers copyright on 'the author or proprietor' (section 8), and provides that 'the word "author" shall include

an employer in the case of works made for hire' (section 62). Under the old law which did not recognize or contemplate in its provisions our modern conditions, as the present law, corporations were even regarded as proper persons to secure copyright; . . . and then, as well as now, the employer had the right to the copyright in the literary product of a salaried employee."

## 1909 Supp., p. 84, sec. 9.

**In general.**—To secure a copyright the formality required under earlier statutes has been dispensed with. Copyright now vests upon the publication of the book or publication with the notice of copyright. *National Cloak & Suit Co. v. Kaufman*, (M. D. Pa. 1911) 189 Fed. 215.

**Contents of notice.**—The initials of the person copyrighting need not appear in the notice. *Woodman v. Lydiard-Peterson Co.*, (C. C. Minn. 1912) 192 Fed. 67, wherein the

court said: "I do not see any reason for a very strict construction of the law. My recollection is that the strictness required by the former act has been materially modified by the present one. The object is to notify persons who is the owner of the publication, and the person by whom it is copyrighted, so that, if they make copies, they may know that they are infringing upon somebody's copyright."

## 1909 Supp., p. 84, sec. 12.

**Condition precedent to action.**—An action for an injunction and an accounting for the infringement of a copyright of a book cannot be maintained, unless it be alleged and proved that prior to the commencement of the action two complete copies of the best edition thereof were deposited in the copyright office or in the mail addressed to the registrar of copyrights at Washington, as provided by section 12. *New York Times Co. v. Sun Printing & Publishing Ass'n*, (C. C. A. 2d Cir. 1913) 204 Fed. 586, wherein the court said: "The last paragraph would seem to be a plain prohibition against the maintenance of an action or proceeding for infringement until the copies are deposited in the copyright office or in the mail. If an equity action for an injunction and an accounting be not such an action as the statute contemplates, it is difficult to perceive what the lawmakers had in mind. Manifestly the statute refers to precisely such an action as this, otherwise the language is meaningless. We are not concerned here with the wisdom or necessity of the provision. Congress was conferring a special privilege upon authors and could limit that privilege in any manner it saw fit. In order to secure a valid copyright or a valid patent, it is necessary to comply with every requirement of the law, and a discussion of the wisdom or unwisdom of such requirements is wholly irrelevant. If a change in the law be needed, recourse should be had to the legislative and not to the judicial branch of the government. It is unnecessary to consider the status of the complainant's alleged copyright for other purposes than those

involved in this action. The question here is, Can an equity suit for an injunction and an accounting be maintained thereon? It is contended that as soon as the copyright was secured and before the copies were mailed, as required by law, the complainant acquired a right which was entitled to the protection of a court of equity. Such a construction wholly ignores the provision for mailing. It may never be complied with, and still, if the complainant's contention be correct, an equity suit may be commenced, an injunction issued and an accounting had. How can a court of equity protect an inchoate or incomplete right by a suit which the law says cannot be maintained? We are unable to assent to the proposition that this is not an action for infringement of a copyright, but rather, as complainant contends, 'a suit in equity by a party aggrieved, for an injunction to prevent and restrain the violation of the complainant's copyright secured by the copyright law.' But this statement of the action is merely a change in nomenclature. There can be no doubt as to the character of the action. As before stated, not one of the criteria which determine an action for infringement is omitted. A distinction is also sought to be drawn between 'maintained' and 'began'; the contention being that a suit may be begun before the copies are deposited in the mail. In other words, an action may be commenced which cannot be maintained. Not only so, but an injunction may issue restraining the defendant from publishing alleged infringing matter, in an action which cannot be maintained. We are unable to assent to this construction."

## 1909 Supp., p. 87, sec. 25 (a).

**Sufficiency of bill.**—In *Crown Feature Film Co. v. Levy*, (S. D. N. Y. 1912) 202

Fed. 805, a bill for infringement of a photograph was held demurrable because the com-

plainant did not sufficiently show his title to the copyright; because there was nothing to show that the photograph was a copyrightable work; and because there was a failure to show compliance with the copyright statute. The court said: "First. Complainant states merely that its assignor was 'the sole and exclusive owner and proprietor of certain photographs entitled "St. George and the Dragon, Part 1," . . . and of all rights and privileges thereunder and therein and to the United States and the territories thereof.' There is no allegation that Powers was the author, or that there was any author or producer in the United States or elsewhere, or how, if Powers was not the author, he became the proprietor. I think, under the present act even more strongly than heretofore, complainant must show his title not merely by an allegation that he is the proprietor, but by setting forth facts which show how he became proprietor and why he

has the right to bring the action. While *Bosselman v. Richardson*, (C. C. A. 8th Cir. 1908) 174 Fed. 622, and *Ford v. Charles E. Blaney Amusement Co.*, (S. D. N. Y. 1906) 148 Fed. 642, arose under the previous law, yet they are in principle applicable to the case here under consideration. Second. I am inclined to think that defendants are right in their contention that the bill is demurrable because there is nothing to show that the photograph is a copyrightable work. Third. The allegation that Powers filed 'two complete copies of said photographs' does not satisfy the requirement of the statute, which, among other things, is that registration shall be made by depositing 'two complete copies of the best edition thereof then published.' The bill must show strict compliance with the requirements of the Copyright Law, and if the failure so to do appears on the face of the bill, then the bill fails to state a cause of action under the statute."

### 1909 Supp., p. 87, sec. 25 (b).

"Court."—In *Mail & Express Co. v. Life Pub. Co.*, (C. C. A. (2d Cir. 1912) 192 Fed. 899, the court in determining the meaning to be given to the word "court" said: "While the language of the provision quoted is somewhat obscure, we do not think that by the use of the word 'court' it is required that

the judge acting by himself shall assess the damages when a case is presented calling for an award under the minimum damage clause. We think it the better view that the statute permits him to direct the jury to assess the damages within the prescribed limits."

### 1909 Supp., p. 88, sec. 25 (c).

Effect of asking for increased bond.—Where an alleged infringing article is seized under this section, and the defendant afterwards asks that the complainant's bond be increased under Rule 7 of the Supreme Court, he is not in a position to complain of the

seizure, or demand a return of the alleged infringing articles, but his remedy is to defeat the complainant on a trial on the merits. *Universal Film Mfg. Co. v. Copperman*, (S. D. N. Y. 1913) 206 Fed. 69.

### 1909 Supp., p. 88, sec. 25 (d).

Order to show cause for return of articles.—An order to show cause why articles seized under this clause should not be returned will not be entertained in the absence of an affidavit that the articles seized are not infring-

ing copies, records, plates, molds, matrices, or means for making the copies alleged to infringe the copyright. *Crown Feature Film Co. v. Bettis Amusement Co.*, (N. D. Ohio 1913) 206 Fed. 362.

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## COSTS.

### Vol. II, p. 276, sec. 823.

Expenses and disbursements.—To the same effect as the original note, see *Marks v. Merrill Paper Co.*, (C. C. A. 7th Cir. 1913) 203 Fed. 16.

Attorney fees on motion.—This and the following section distinctly provide that attorneys shall be allowed certain fees, and no

others. On the subject of attorney fees this act controls. It makes no provision for attorney fees on motions. Hearing on a motion is not a final hearing of the cause, upon which the statutory docket fee may be taxed. No attorney fee can be allowed on the motion. *Michigan Aluminum Foundry Co. v.*

Aluminum Co. of America, (E. D. Mich. 1911) 190 Fed. 903.

Traveling expenses of attorney. — There is no authority in the statute for allowing for traveling expenses of an attorney. *Michigan Aluminum Foundry Co. v. Aluminum Co. of America*, (E. D. Mich. 1911) 190 Fed. 903.

Allowance of costs under state laws. — If acts of Congress make specific provision for

costs, they control. If they make no provision for certain kinds of costs, the provisions, if any, of the state statutes may be followed, at least if they do not result in injustice in a particular case. Such seems to be the prevailing doctrine at this time. *Michigan Aluminum Foundry Co. v. Aluminum Co. of America*, (E. D. Mich. 1911) 190 Fed. 903.

## Vol. II, p. 278, sec. 824.

Judgment rendered without a jury. — A docket fee of ten dollars is properly allowed on remanding a cause from the federal to a state court, it being a case at law when judgment is rendered without a jury. *Acker v. Charleston & W. C. Ry. Co.*, (C. C. S. C. 1911) 190 Fed. 238.

"For each deposition," etc. — The word "deposition," as used in this section, does not include oral testimony taken in open court. *Eriksson v. Grandfield*, (E. D. Pa. 1912) 193 Fed. 296.

## Vol. II, p. 285, sec. 968.

Suit under Interstate Commerce Act. — In *Delaware, L. & W. R. Co. v. Lyne*, (C. C. A. 3d Cir. 1912) 193 Fed. 984, it appeared that the action was brought to recover damages for subjecting the plaintiff Lyne to undue and unreasonable prejudice and disadvantage, in violation of the act of Congress entitled 'An Act to regulate commerce,' approved February 4, 1887 (24 Stat. 379, c. 104, 3 Fed. Stat. Annot. 809), and acts amendatory thereof and supplementary thereto. The damages claimed were unliquidated, but were stated in the ad damnum clause of the declaration at \$20,000. A jury trial was had, and the plaintiff recovered a verdict of \$1. Afterwards the Circuit Court allowed an attorney's fee of \$250, "to be taxed as part of the costs in this case." It was conceded by counsel for the plaintiff that, if no costs were

Number of docket fees. — On a petition for limitation of a vessel owner's liability only one proctor's docket fee is allowed to each proctor, regardless of how many clients he represents at a final hearing, as the fee is allowed the proctor as an incident to his appearance and service in the court on the hearing, and not as a fee for appearing for each client whom he represents. *Boston Marine Ins. Co. v. Metropolitan Redwood L. Co.*, (C. C. A. 9th Cir. 1912) 197 Fed. 703.

taxable, the counsel fee should not have been allowed. It was held that there should have been no allowance. The court said: "In the case before us, the Circuit Court had jurisdiction to entertain and decide the dispute; but its power extended no further. It was expressly forbidden to allow costs, since the verdict was for less than \$500. If it be asked in what tribunal a suit under the interstate commerce act that involves only a small sum should be brought, without running the risk of losing costs, the answer is—in the appropriate court of the state. Other suits involving small amounts must be brought in such courts, even if diversity of citizenship exists; and this is the rule, also, even if the suit be upon a federal statute. There is no reason why such suits may not be brought in the courts of a state."

## Vol. II, p. 289, sec. 974.

"Costs." — In *United States v. Wilson*, (S. D. N. Y. 1911) 193 Fed. 1007, Judge Ward of the second circuit said: "I think that the word 'costs,' in section 974 Rev. Stat. U. S. means taxable costs of the trial before the court and petit jury in which defendants have been convicted. This is the bill which section 983 provides is to be taxed and in-

cluded in the judgment. It has not been the practice in this district to tax the fees of trial jurors, nor the fees and mileage of persons not examined as witnesses at the trial, nor fees for service of subpoenas upon persons who did not testify at the trial, unless in the latter cases the adverse party default."

## Vol. II, p. 291, sec. 982.

Construction of section. — In *Motion Picture Patents Co. v. Steiner*, (C. C. A. 2d Cir. 1912) 201 Fed. 63, affirming (S. D. N. Y. 1912) 192 Fed. 134, the court, in construing this section, said: "The language used is so plain that there can be little doubt as to the proper construction of the section. First, it

applies only to the attorney, proctor or other persons admitted to practice in the federal courts. It does not apply to the client, no matter how reprehensible his conduct may be. It was designed to punish the pettifogger, or at least to make him pay the expenses occasioned by his misconduct. Sec-

ond, it can be invoked only when such attorney, proctor, or other person admitted to practice in the federal courts multiplies the proceedings in the cause so as to increase costs unreasonably and vexatiously. His conduct may be so contumacious as to justify proceedings for contempt; but unless he has increased the costs and done so unreasonably and vexatiously, he cannot be punished under this section. Third, the court cannot direct the offending attorney to pay all the costs, but only the excess of costs, which excess was occasioned by his unreasonable and vexatious conduct. In short, the section permits the court to order that an attorney who has unnecessarily increased the costs shall pay personally the excess of such costs over the amount which was properly

incurred. If, for instance, a witness is examined and the record clearly shows that his testimony, in so far as it relates to the issue in controversy, should have been completed in an hour and that by the unreasonable conduct of the attorney it is drawn out for days, the court may, under section 982, compel the offending attorney to pay the excess occasioned by this unnecessary prolongation of the examination. The evident purpose of the section is to punish the lawyer who vexatiously increases costs, by making him, and not his client, liable for the increase occasioned by his improper conduct. It recognizes that such costs should not have been incurred and places their payment on the person who is responsible for them."

## Vol. II, p. 294, sec. 1.

**Appellate proceedings in forma pauperis.**—This act does not apply to appellate courts. *The George Hill*, (C. C. A. 2d Cir. 1912) 192 Fed. 1022.

**Suit on contingent fee.**—The showing for leave to sue in forma pauperis must include

a showing that the attorney, who has an interest in the result of the case, as well as the plaintiff and the other beneficiaries, is unable to give security for costs. *Esquibel v. Atchison, T. & S. F. Ry. Co.*, (D. C. N. M. 1913) 206 Fed. 863.

# CRIMES AND OFFENSES.

## Vol. II, p. 321, sec. 1014.

**In general.**—The only statute of the United States relating to the arrest of a person charged with a criminal offense in a district other than that in which the indictment has been returned is found in this section. *John Gund Brewing Co. v. United States*, (C. C. A. 8th Cir. 1913) 204 Fed. 17.

This section clearly cannot apply to a corporation, for a corporation cannot be arrested, or be held to bail for its appearance, and no order for its removal to another district can be made, as such order can only be made when the defendant is imprisoned. *John Gund Brewing Co. v. United States*, (C. C. A. 8th Cir. 1913) 204 Fed. 17.

**Bail.**—In *Leary v. United States*, (1912)

224 U. S. 567, 32 S. Ct. 599, 56 U. S. (L. ed.) 889, Ann. Cas. 1913D 1029, the court said: "It is said that the bail contemplated by the Revised Statutes (§ 1014) is common-law bail and that nothing should be done to diminish the interest of the bail in producing the body of his principal. But bail no longer is the mundium, although a trace of the old relation remains in the right to arrest. Rev. Stat., § 1018; 1 Fed. Stat. Annot. 522. The distinction between bail and suretyship is pretty nearly forgotten. The interest to produce the body of the principal in court is impersonal and wholly pecuniary."

## Vol. II, p. 337, sec. 1024.

The effect of this statute is to permit separate offenses of the same class and growing out of the same transactions to be joined in one indictment in separate counts, provided they are such as may "be properly joined." It makes no change in the law as it previously existed, except to permit offenses which might have been theretofore presented in separate indictments to be presented in separate counts in the same indictment and

separately punished. *Anderson v. Moyer*, (N. D. Ga. 1912) 193 Fed. 499.

This section applies to all territorial courts as well as to the Circuit and District Courts of the United States in all cases of offenses against the laws of the United States. *Summers v. United States*, (C. C. A. 9th Cir. 1913) 202 Fed. 457.

**Election of counts.**—In *Rooney v. United States*, (C. C. A. 9th Cir. 1913) 203 Fed.

928, wherein one Rooney was convicted of feloniously introducing liquor into Indian country, it appeared that in the first count of the indictment Vincent Wontock was charged as principal, and Stewart Rooney as aiding, inciting, and abetting the said Vincent Wontock in the commission of the crime. In the third count of the indictment both Wontock and Rooney were charged as principals. To the contention of Rooney that the lower court erred in overruling a motion made by him to require the government to elect upon which count of the indictment it would rely the Circuit Court of Appeals said: "We are of opinion that the action of the court below in refusing to require the United States to elect upon which count of the indictment it would rely for conviction was without error. The charges against the plaintiff in error clearly come within the class of charges mentioned in the section above set forth. It would, indeed, be difficult to conceive of two charges more closely connected, and the joinder of which would be more proper, within the meaning of the section, than the charges against Rooney set forth in the indictment in this case. Both charges are based on the same transaction and on the same array of facts. Had the motion of the plaintiff in error to require the government to elect upon which count it relied for conviction been granted, his position before the jury would have remained unchanged. The failure of the trial judge to grant the motion did not place him at a disadvantage, nor were his rights in any way prejudiced or jeopardized. That the question was one which rested solely in the discretion of the court is well settled."

**Indictments held to have been properly consolidated.**—Two indictments for using the mails to defraud in violation of section 5480 of the Revised Statutes, 5 Fed. Stat. Annot. 973, may be consolidated under this section. *Marshall v. United States*, (C. C. A. 2d Cir. 1912) 197 Fed. 511.

Indictments against defendants charged with violating the national banking laws were consolidated in *Kettenbach v. United States*, (C. C. A. 9th Cir. 1913) 202 Fed. 377. The court said: "We find no merit in the contention that the court erred in consolidating the indictments for trial. Not only was the order made under the authority of section 1024 of the Revised Statutes, but it was made upon a motion and application of the plaintiffs in error, in which they alleged 'that each and all of the charges against these defendants or either thereof grew out of one and the same transaction, to wit, the violation of the national banking laws of the United States, and under the law can be

tried at one and the same time, and save great expense and many hardships in requiring these defendants to prepare for trial. . . . Wherefore these defendants, and each thereof, respectfully pray that a severance be had as to these two defendants, and that they be tried separately from the other defendants, that each and all the indictments involving these defendants or either thereof be consolidated and be tried at the same time.' The application was supported by the affidavit of counsel for the plaintiffs in error, in which it was stated that the motion was made in good faith, and not for the purpose of delay, and that it was well founded in law. No exception was saved to the order of consolidation, and the plaintiffs in error are now in no position to assign error to it."

In *Norton v. United States*, (C. C. A. 8th Cir. 1913) 205 Fed. 593, it was held that several indictments and all of the counts therein charged the defendant as president of a bank with acts of the same character and degree, and warranted an order of consolidation.

Several indictments were consolidated under this section in *Kharas v. United States*, (C. C. A. 8th Cir. 1911) 192 Fed. 503.

**Consolidation — several defendants.**—In *Emanuel v. United States*, (C. C. A. 2nd Cir. 1912) 196 Fed. 317, the court said: "The clause in section 1024 reads: 'When there are several charges against any person for the same act or transaction,' etc. It is contended that this applies to charges against a single defendant, not against several defendants; and, in support of the argument, it is pointed out that this provision first appeared in Act Feb. 26, 1853, c. 80, 10 Stat. p. 162, reading as follows: 'Whenever there are or shall be several charges against any person or persons for the same act or transaction,' etc. When this clause was carried into the revision which was adopted as the Revised Statutes, the words 'or persons' was omitted. The very first section of the Revised Statutes, however, provides that, in determining the meaning of said statutes, 'words importing the singular number may extend and be applied to several persons or things.' There was, therefore, no necessity for retaining the omitted words. The section would be extended to cover several persons as well as a single one, unless there were some good reason why it should not be thus extended. No such reason appears or is suggested."

This section is cited in *Emanuel v. United States*, (C. C. A. 2nd Cir. 1912) 196 Fed. 317; *United States v. Ridgeway*, (W. D. Wash. 1912) 199 Fed. 286.

## Vol. II, p. 340, sec. 1025.

"An indictment is well enough which states facts that constitute a crime in language which leaves no doubt in the mind of the defendant of what he is accused. It is true that a defendant should be informed clearly

by the indictment of the exact and full charge made against him; yet the manner in which the information is given is unimportant. The function of an indictment is performed when it announces a substantial ac-

cusation of crime, states facts sufficient in law to support a conviction, and furnishes the accused with such a description of the charge as will enable him to make his defense and avail himself of a conviction or acquittal for protection against further prosecution for the same offense." *Davey v. United States*, (C. C. A. 7th Cir. 1913) 208 Fed. 237.

Following language of statute.—To the same effect as the original note, see *United States v. Sterling Salt Co.*, (W. D. N. Y. 1912) 200 Fed. 593.

The selection of a grand jury by the officers who by law are the only ones invested with that power, is not a mere defect or imperfection in form. It is a matter of substance which cannot be disregarded without prejudice to an accused. *United States v. Lewis*, (E. D. Mo. 1911) 192 Fed. 633.

Indictment presented by foreman.—This section is applicable where an indictment is not presented to the court by the grand jury in a body, but by the foreman alone. *Breese v. United States*, (1912) 226 U. S. 1, 33 S. Ct. 1, 57 U. S. (L. ed.) 97.

An incomplete entry of the return of an indictment is to be properly classed as a defect of form. *Breese v. United States*, (C. C. A. 4th Cir. 1913) 203 Fed. 824.

Indictments held sufficient.—In *Nemcof v. United States*, (C. C. A. 3d Cir. 1913) 202 Fed. 911, an indictment for conspiracy was held sufficient after conviction which defectively alleged the conspiracy. The court said: "The unusually full and elaborate indictment that is now attacked as fatally insufficient, although in one particular only, was found a true bill on December 13, 1910. If it be carefully scrutinized, a pleader's omission may perhaps be discovered; but, if such there be, it could have been easily cured if (as they should have done) the defendants had promptly objected. The defect was as manifest then as it is now, but for almost a year they made no complaint. Apparently they had no doubt concerning the nature and 'scope of the charge and saw no need to subject its language to the exacting test that we are now urged to apply. Even when the case was called for trial in September, 1911, they neither demurred nor moved to quash, but pleaded 'not guilty,' and took an active part in the contest that followed. This lasted for eight or nine days, and resulted in a verdict of conviction. Then for the first time, after a prolonged trial upon the merits to which no error is assigned, they made known their objection to the indictment on the ground of insufficiency, and moved to arrest the judgment. Failing to convince the District Court, they renew the objection here. The controversy affords an excellent example of trial with limited liability, for it is clear that, if sentence could never be imposed on the indictment, the defendants ran no real risk in taking the chance of a favorable verdict. The narrowness of the ground upon which their contention rests is apparent from the frank concession that the indictment would be unquestionably good if the

pleader had simply added the phrase (usually inserted to comply with the customary form) that the defendants had conspired, not only with each other, but also with 'other persons to the grand inquest unknown.' Their position will appear in the following quotation from the brief; the same concession being made in several similar passages: 'We do not contend that under no circumstances could the defendants have been prosecuted for conspiracy to commit an offense under the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 545; 1 Fed. Stat. Annot. 525, 1912 Supp. 457). All that we contend is that they cannot be so prosecuted unless the bankrupt Granich is a party to the combination. If he was, the indictment should have so alleged. Had it charged that the conspiracy was between the defendants and the bankrupt Granich, or between the defendants and "divers other persons," a method recognized by law as a means of including conspirators not being prosecuted, and which would have included and been tantamount to an allegation that the conspiracy was with the bankrupt Granich, then the acts of the bankrupt as well as of the other conspirators would have been contemplated. If done, such acts would have been criminal as to one of the conspirators, to wit, Granich, and so made the conspiracy criminal as to all. On consummation of such a conspiracy section 29b (1) would have been violated because one of the conspirators, the bankrupt, would be guilty of concealment from his trustee and could be indicted under section 29b (1).'

"Summarized, the argument is this: The charge is conspiracy to commit a crime. The crime is the concealment of assets from a trustee in bankruptcy. This offense can only be committed by the bankrupt himself; but the bankrupt is neither named as a conspirator (although the indictment clearly sets forth his participation), nor is he included by a formal averment embracing 'other persons,' etc. Therefore the defendants have been improperly convicted of conspiring to commit a crime that neither one nor both of them could commit, either separately or together, unless they conspired with the bankrupt himself. And, as a conspiracy with him is not charged in direct and precise terms, the final result is said to be that the indictment fails to set out an indictable offense.

"We shall not attempt to follow the earnest and elaborate argument that was made on behalf of the defendants. In our opinion it is somewhat belated, and it certainly has not satisfied us that the smallest injustice has been done. The omission complained of seems to fall fairly within the spirit of Rev. Stat. § 1025, and to be a 'defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.'"

An indictment for perjury was held sufficient in view of this section in *Kovoloff v. United States*, (C. C. A. 7th Cir. 1912) 202 Fed. 475.

This section is cited in *Hedderly v. United States*, (C. C. A. 9th Cir. 1912) 193 Fed. 561.



**Vol. II, p. 343, sec. 1032.**

The word "arraignment" is used as comprehensively descriptive of what shall precede the plea. *Johnson v. United States*, (1912) 225 U. S. 406, 32 S. Ct. 748, 56 U. S. (L. ed.) 1142.

**Vol. II, p. 344, sec. 1033.**

Both the Constitution and the law are careful to direct that information be given to the accused of the charge against him. By § 1033 it is provided that when any person is indicted for any capital offense, if it be treason, three days before the trial, and if it be

any other capital offense, two days before the trial, a copy of the indictment and list of jurors and witnesses shall be delivered to him. And this can be insisted upon. *Johnson v. United States*, (1912) 225 U. S. 406, 32 S. Ct. 748, 56 U. S. (L. ed.) 1142.

**Vol. II, p. 347, sec. 731.**

This section was originally a part of the same section of the statute which defined conspiracy—that is, § 30 of the Act of March 2, 1867, 14 Stat. 484, c. 169. *Hyde v. United States*, (1912) 225 U. S. 347, 32 S. Ct. 793, 56 U. S. (L. ed.) 1114.

There may be a constructive presence in a state, distinct from a personal presence, by

which a crime may be consummated. And if it may be consummated it may be punished by an exercise of jurisdiction; that is, a person committing it may be brought to trial and condemnation. *Hyde v. United States*, (1912) 225 U. S. 347, 32 S. Ct. 793, 56 U. S. (L. ed.) 1114.

**Vol. II, p. 355, sec. 5391.**

This section is cited in *Farley v. Scherno*, (1913) 208 N. Y. 269, 101 N. E. 891, 47 L.R.A. (N.S.) 1031.

**Vol. II, p. 357, sec. 3.**

Proceedings in a state court are not affected by this section. *Holmes v. State*, (1911) 6 Okla. Crim. 541, 120 Pac. 300.

**Vol. II, p. 358, sec. 1044.**

**Conspiracy.**—Where the conspiracy contemplates various overt acts and the consequent continuance of the conspiracy beyond the commission of the first act, each overt act thereafter gives a new, separate, and distinct effect to the conspiracy, and constitutes another agreement, so that a prosecution is not barred by the statute of limitations until three years after the commission of the last overt act alleged and proved. *Hedderly v. United States*, (C. C. A. 9th Cir. 1912) 193 Fed. 561.

"Where a conspiracy is formed more than three years prior to indictment, but where the first overt act is committed within three years, the prosecution is not barred; and this simply because the offense has not been committed until the doing of the overt act. To say, in this connection, that the making of the corrupt agreement is the crime, is a perversion of the meaning of the Supreme Court in *U. S. v. Britton*, 108 U. S. 190, 2 Sup. Ct. 531, 27 L. ed. 698. See *Hyde v. U.*

*S.*, 225 U. S. 347, 359, 32 Sup. Ct. 793, 56 L. ed. 1114. Where, however, the conspiracy was formed more than three years prior to the indictment, and acts in pursuance thereof are done both prior to and within the three years, there has arisen a difference of opinion. *U. S. v. Owen*, (D. C.) 32 Fed. 534. *U. S. v. McCord*, (D. C.) 72 Fed. 159, *Ex parte Black*, (D. C.) 147 Fed. 832, 841, and *U. S. v. Biggs*, (D. C.) 157 Fed. 264, 273, support the theory that in such case the limitation bars the prosecution. The weight of authority, in our opinion, is to the contrary. That a conspiracy may be a continuing offense, and that prosecution for a conspiracy formed more than three years prior to the indictment is not barred, if it be alleged and proved that the conspiracy continued in force and operation within the period of limitation, is settled." *Breese v. United States*, (C. C. A. 4th Cir. 1913) 203 Fed. 824.

## CUSTOMS DUTIES.

### Vol. II, p. 429, par. 215.

"Unmanufactured tobacco" includes scrap tobacco used in the manufacture of a cheap grade of cigarettes and stogies. *Latimer v. United States*, (1912) 223 U. S. 501, 32 S. Ct. 242, 56 U. S. (L. ed.) 526, wherein the court said: "There has been some difference of opinion as to the proper classification of scrap tobacco under the various tariff acts. In *United States v. Schroeder*, (C. C. A. 2d Cir. 1899) 93 Fed. 448, a higher grade of scrap was held to be 'waste' within the meaning of the Tariff Act of 1890. In *Seeberger v. Castro*, (1894) 153 U. S. 32, it was decided that the clippings from the ends of cigars were dutiable as unmanufactured tobacco under the Tariff Act of 1883. The

plaintiff claims that this decision has no application here, because it related to clippings which were of a higher grade than scrap, 'and for the further reason that, as the importer there made no claim that it should be taxed as waste, the court did not pass on that question. But it did definitively decide that such material, by whatever name called, was 'unmanufactured tobacco.' The words having received such a construction under the act of 1883 must be given the same meaning when used in the Tariff Act of 1897, on the theory that, in using the phrase in the later statute, Congress adopted the construction already given it by this court."

### Vol. II, p. 451, par. 339.

Cotton featherstitched braids are governed by this section. *United States v. Baruch*, (1912) 223 U. S. 191, 32 S. Ct. 306, 56 U. S. (L. ed.) 399.

### Vol. II, p. 475, par. 436.

Pearls not set or strung, though assorted or matched so as to be suitable for a necklace, are dutiable under this paragraph

rather than under paragraph 434. *United States v. Citroen*, (1912) 223 U. S. 407, 32 S. Ct. 259, 56 U. S. (L. ed.) 486.

### Vol. II, p. 481, par. 463.

The word "waste," as used in this paragraph, refers to remnants and by-products of small value that have not the quality or utility either of the finished product or of the raw material, and does not include scrap

tobacco used in the manufacture of a cheap grade of cigarettes and stogies. *Latimer v. United States*, (1912) 223 U. S. 501, 32 S. Ct. 242, 56 U. S. (L. ed.) 526.

### Vol. II, p. 506, sec. 7.

**Degree of similitude.**—The requirement of the statute is not that there be similarity in all of the four particulars enumerated in § 7, but a substantial similarity in one of those particulars is adequate. *United States v. Eckstein*, (1911) 222 U. S. 130, 32 S. Ct. 65, 56 U. S. (L. ed.) 125.

**Artificial horsehair.**—There is a substantial statutory similitude between cotton yarns enumerated in paragraph 302 of the Tariff Act of 1897 and artificial or imitation horsehair. *United States v. Eckstein*, (1911) 222 U. S. 130, 32 S. Ct. 65, 56 U. S. (L. ed.) 125.

### Vol. II, p. 612, sec. 4.

This act is general in its terms and applies to all importations of merchandise of every character. *Insurance Co. of North America v. Willey*, (1912) 212 Mass. 75, 98 N. E. 677.

### Vol. II, p. 619, sec. 9.

**"Imported."**—The property upon which duties are leviable, and which is forfeitable for failure to enter at the custom house, is property "imported" into the United States.

To be "imported," it must be of foreign situs, and brought hither by the owner, or with his consent, with intent to be here held, used, consumed, or enjoyed, or to be here incorporated in the general mass of property. If brought hither by accident, great if not inevitable necessity, superior force, or by a trespasser, and timely removed hence, it is not "imported," nor dutiable, nor subject to forfeiture against the owner. *United States v. Eighty-Five Head of Cattle*, (D. C. Mont. 1913) 205 Fed. 679.

The word "wilful," as used in this section,

involves evil intent. *United States v. Eighty-Five Head of Cattle*, (D. C. Mont. 1913) 205 Fed. 679.

The word "entry," as used in this section, must be given the broader meaning of the whole process of putting the goods through the custom house. *Heike v. United States*, (C. C. A. 2d Cir. 1911) 192 Fed. 83.

Section 5445, R. S. (2 Fed. Stat. Annot. 773), was not repealed by this section. *Heike v. United States*, (C. C. A. 2d Cir. 1911) 192 Fed. 83.

## Vol. II, p. 634, sec. 24.

The Secretary of the Treasury and not a collector of a port is the person who makes payment of moneys to be refunded. *Joannidis v. Loeb*, (S. D. N. Y. 1911) 191 Fed. 93.

## Vol. II, p. 644, sec. 2799.

What constitutes baggage. — A trunk containing merchandise intended for sale need not be entered under this section, as it and its contents do not constitute baggage. *United States v. One Trunk*, (C. C. A. 2d Cir. 1912) 192 Fed. 913.

## Vol. II, p. 645, sec. 2802.

Ignorance of the presence of the article in the baggage is a good defense under this section. *United States v. Two Baskets*, (C. C. A. 2d Cir. 1913) 205 Fed. 37.

## Vol. II, p. 760, sec. 21.

Time of liquidation. — The law does not prescribe the time when the collector shall liquidate the duties. He may liquidate before or after a year from entry. The only limitation upon his action in that regard is that, after once liquidating, he may not, in

the absence of fraud or protest by the owner, importer, agent, or consignee, reliquidate after a year from the date of entry. *Pacific Creosoting Co. v. United States*, (C. C. A. 9th Cir. 1912) 196 Fed. 35.

## Vol. II, p. 761, sec. 22.

Concealment. — Where it appeared that the owner of a famous violin brought it into this country without notifying the customs authorities, and had it here for more than three years, keeping it on his library table, showing it to many guests, including well-known

violinists, at musicales, and pointing it out as a famous violin, it was held that there was no concealment within the proviso of this section. *United States v. One Stradivarius Kieserwetter Violin*, (C. C. A. 2d Cir. 1912) 197 Fed. 157.

## Vol. II, p. 773, sec. 5445.

The word "entry," as used in this section, must be given the broader meaning of the whole process of putting the goods through the customs. *Heike v. United States*, (C. C. A. 2d Cir. 1911) 192 Fed. 83.

This section has not been repealed by later legislation. *Heike v. United States*, (C. C. A. 2d Cir. 1911) 192 Fed. 83.

## 1909 Supp., p. 813, sec. 9.

Fraud of consignors. — In *United States v. Twenty-five Packages of Panama Hats*, (1913) 231 U. S. 358, 34 S. Ct. 63, reversing (C. C. A. 2d Cir. 1912) 195 Fed. 438, which on a proceeding to forfeit, for fraud of foreign consignors, goods not technically entered at the New York custom house, but unloaded

from the ship and stored in general order, the court construed section 9 to warrant the suit. Mr. Justice Lamar, writing the opinion of the court, said: "The prior Tariff Act, (26 Stat. 131) provided for the forfeiture of the goods 'if any owner, importer, consignee, agent or other person shall make or attempt

to make any entry of imported merchandise by means of any fraudulent or false invoice.' In several cases arising under that act it was held that the language used did not cover the case of fraud by the consignor, nor could the goods be forfeited for the wrongful conduct of any person if the act preceded the making of the documents or taking any of the steps necessary to enter the goods. Under the statute, as thus construed, there was no penalty for the grossest fraud on the part of the consignor, notwithstanding the fact that his invoice valuation was of great importance in determining true value, as a basis for collecting the duty. And even if the consignor was also consignee it had been held that there was a *locus penitentiae* so that he might, before entry, substitute a true for a false invoice and thus escape a forfeiture. In order to close these loopholes and to make the act more effective Congress, on August 5, 1909 (36 St. 11, 97), changed the law so as to increase the number of

persons whose fraud should be punished. It also enlarged the scope of conduct for which the goods should be forfeited. Instead of punishing only for the fraud of the 'owner, importer, consignee and other persons,' as under the act of 1890, provision was made for forfeiture for fraud of the 'consignor or seller.' Instead of punishing only for entering or attempting to enter on a fraudulent invoice, it punished an attempt by such means 'to introduce any imported merchandise into the commerce of the United States.' This latter phrase necessarily included more than an attempt to enter; otherwise the amendment was inoperative against the consignor against whom it was specially aimed, for he does not, as such, make the declaration, sign the documents, or take any steps in entering or attempting to enter the goods. When he makes the false invoice in a foreign country there is not extraterritorial operation of the statute whereby he can be criminally punished for his fraud."

## DIPLOMATIC AND CONSULAR OFFICERS.

### Vol. II, p. 817, sec. 4079.

**Purpose of section.**—The intent of section 4079 is not to provide that, where by treaty exclusive jurisdiction is given over controversies between the master and any of the crew of a foreign vessel to the consular officer of the country to which the vessel belongs, such jurisdiction can be exercised only in the manner directed in sections 4080 and

4081, and if not so exercised the court of admiralty is not deprived of jurisdiction. The purpose of those sections is to provide a method whereby consular officers exercising jurisdiction under the stipulations of the treaty can enforce such jurisdiction and their orders in pursuance thereof. *The Ester*, (E. D. S. C. 1911) 190 Fed. 216.

## EVIDENCE.

### Vol. III, p. 2, sec. 724.

**Federal, not state, legislation controls practice.**—To the same effect as the original note, see *Kaiser v. Chicago*, St. P. M. & O. Ry. Co., (D. C. Minn. 1912) 192 Fed. 1013.

**Production at and before trial.**—A party cannot be compelled to produce in advance of the trial books and papers for the inspection of the other party. *Kaiser v. Chicago*,

St. P. M. & O. Ry. Co., (D. C. Minn. 1912) 192 Fed. 1013; *Cheatham Electric Switching Device v. American Automatic Switch Co.*, (S. D. N. Y. 1912) 198 Fed. 496; *Schatz v. Winton Motor Carriage Co.*, (S. D. N. Y. 1912) 197 Fed. 777.

This section is cited in *Dickinson v. Kerner*, (N. D. Ill. 1912) 193 Fed. 204.

### Vol. III, p. 5, sec. 860.

This section has been repealed but the repeal did not have any retrospective effect.

*Cameron v. United States*, (1914) 231 U. S. 710, 34 S. Ct. 244.

**Accused voluntarily testifying.**—This section had no bearing where the accused voluntarily testified in his own behalf in the course of the same proceeding, thereby himself opening the door to legitimate cross-examination. *Powers v. United States*, (1912) 223 U. S. 303, 32 S. Ct. 281, 56 U. S. (L. ed.) 448.

**Not applicable to state courts.**—This section (since repealed by Act of May 7, 1910, c. 216, 36 Stat. 352, Fed. Stat. Annot. 1912 Supp. p. 78) by its own terms was limited to criminal proceedings "in any court of the United States," and constituted no limitation upon the procedure of the state courts. *Ensign v. Commonwealth of Pennsylvania*, (1913) 227 U. S. 592, 33 S. Ct. 321, 57 U. S. (L. ed.) 658.

**Perjury.**—This section provides, in substance, that in criminal cases the testimony of the defendant, if given in a judicial pro-

ceeding, shall not be used against him in a court of the United States. If the statute stopped at this point it is manifest that the federal courts would be powerless to punish the crime of perjury if the statute were strictly construed; hence the proviso making it inapplicable to the crime of perjury. Where perjury is charged, the alleged perjurious testimony must, from the nature of the case, be produced together with such other parts of the statement of the witness as are necessary to remove any doubt or ambiguity which might exist as to the time, the place and the individuals referred to by him. *Cameron v. United States*, (C. C. A. 2d Cir. 1911) 192 Fed. 548.

**Waiver of privilege.**—The privilege given by this section could be waived. *Buckeye Powder Co. v. Hazard Powder Co.*, (D. C. Conn. 1913) 205 Fed. 827.

## Vol. III, p. 8, sec. 863.

**Rules of court.**—It is not within the power of the District Court, or of any judge, to deprive a party of the rights accorded him by this section. *In re National Equipment Co.*, (C. C. A. 2d Cir. 1912) 195 Fed. 488.

**Mode of compelling answers.**—In an action at law the court has no authority to strike out the defendant's answer unless the defendant answers certain interrogatories propounded by the plaintiff on an examination de bene esse initiated by the plaintiff under this section. *Barnes v. Trees*, (S. D. N. Y. 1912) 194 Fed. 230.

A person who does not reside within the district where the subpoena is issued cannot be compelled, except under this section, to attend before an examiner as a witness in an equity cause. *Tomlinson v. Moore*, (S. D. N. Y. 1910) 189 Fed. 845.

A witness may be compelled by process or rule to attend before a notary and answer questions propounded. *Roschynialski v. Hale*, (D. C. Neb. 1913) 201 Fed. 1017.

This section is cited in *Buckeye Powder Co. v. Hazard Powder Co.*, (D. C. Conn. 1913) 205 Fed. 827.

## Vol. III, p. 20, sec. 866.

Depositions to be used before immigration officers are not authorized by this section. *Ex p. Wing You*, (C. C. A. 9th Cir. 1911) 190 Fed. 294.

## Vol. III, p. 23, sec. 868.

**Necessity that commission issue.**—In the case of *In re Robert Gair Co.*, (C. C. A. 1st Cir. 1912) 196 Fed. 492, which was a petition by Robert Gair Co. for mandamus, the following facts appeared. A bill in equity was brought against the petitioner in the Supreme Court of the District of Columbia for an alleged infringement of a patent for an invention, and issue thereon was duly joined. Pursuant to an agreement of counsel for the respective parties, the taking of evidence on the part of the complainant was begun before a notary public in the state of Massachusetts, proper notice thereof having been given; and a witness, one Haynes, had been under examination for the complainant. On the cross-examination he refused, on advice of counsel for the complainant, to answer certain questions put to him by counsel for the respondent; and thereupon the counsel for respondent filed a motion in the United States District Court for the District of Massachusetts to compel an answer. The

motion was heard, and dismissed for want of jurisdiction. On these facts the petition was dismissed. Putnam, Circuit Judge, said: "The doubts of Judge Lacombe in *Arnold v. Chesebrough*, (C. C.) 35 Fed. 16, as to appointing an examiner to take testimony outside of the district of the court having jurisdiction of the case have become obsolete, and are fully met by the opinion of the Circuit Court of Appeals for the Second Circuit in *White v. Toledo Company*. 79 Fed. 133, 24 C. C. A. 467. That establishes the proposition that the appointment of an examiner out of the district is fully supported by section 868 of the Revised Statutes therein referred to. This seems to require that the witness should be named. Whether the witness was named in the case in the Second Circuit is not clear. Also, *McClellan v. Carland*, 217 U. S. 268, 30 Sup. Ct. 501, 54 L. ed. 762, has so far broadened out the prior decisions as to the jurisdiction of Circuit Courts of Appeals over writs of

mandamus that apparently, as the present topic might have ripened into matters which would clearly be appealable to the Circuit Court of Appeals, mandamus might lie. The fundamental difficulty is that the petition in this case shows that the examination was being conducted by consent of the parties, and that there was no commission as required by the Revised Statutes. They require that a commission should have been issued by the court for the taking of the testimony of the witness involved, and provided that thereupon a subpoena might be issued by the clerk of the federal court of the district where the witness was to be examined. It does not appear here that any subpoena is

sued, or that there was anything more than an agreement that an order might be entered appointing a special examiner nunc pro tunc. All this might be sufficient ordinarily to enable the court where a case is pending to control a witness after he has appeared voluntarily before it; but in the present case it is clearly a condition precedent that the statute should be strictly complied with. So far as we can see, the only remedy the petitioner has is to induce the court, if it can, to refuse to allow the deposition to be used on the ground of the refusal of the witness to submit to a full cross-examination, though as to that we express no opinion."

### Vol. III, p. 24, sec. 869.

**Production of documents.**—The witness may be compelled to appear to testify, and to produce documents in his power or possession, provided the same are material and competent evidence in behalf of the party applying therefor. The statute does not say that the witness may be compelled to produce documents in another jurisdiction, or in the court where the action is pending. The production which can be compelled is the production to the notary taking the dep-

osition at the time and place mentioned in the subpoena. The statute seems to confer no authority to interfere with the witness's possession and control of documents other than such as is requisite to enable the notary, or other officer before whom the deposition is being taken, to cause to be made correct copies of such documents, or of so much thereof as may be required by either of the parties. *Smith v. National Bank of D. O. Mills & Co.*, (C. C. Nev. 1910) 193 Fed. 255.

### Vol. III, p. 25, sec. 875.

**When letters rogatory will be sent.**—This section does not restrict the inherent power of a federal court to issue letters rogatory in cases not mentioned therein when testimony of witnesses is desired to be taken in countries that refuse to compel

the attendance of witnesses under commissions; and where the witnesses are likely to be unwilling the examination should be oral and not on written interrogatories. *De Villeneuve v. Morning Journal Ass'n*, (S. D. N. Y. 1913) 206 Fed. 70.

### Vol. III, p. 26, sec. 882.

A certified copy of the certificate of tax commissioners is properly admitted in evidence by virtue of this section. *Stephens v. Long*, (1912) 92 S. C. 65, 75 S. E. 530.

### Vol. III, p. 27, sec. 886.

**Transcript prima facie evidence.**—To the same effect as the original note, see *United States v. Du Perow*, (N. D. Ohio 1913) 208 Fed. 895.

### Vol. III, p. 37, sec. 905.

**Statutes of state or territory.**—The rule is settled that where the unwritten law of a sister state is in question, resort may be had to the published reports of the decisions of the courts of such state, or to oral testimony of witnesses skilled in the subject; but where the written law of a sister state is to be proved, the methods provided for by this section must be followed. *Ridpath v. Heller*, (1913) 46 Mont. 586, 129 Pac. 1054.

**Attestation by clerk.**—In the case of a copy of the record of a court this section is satisfied where, although some parts of the record were attested by deputies of the clerk,

there is a final authentication of the whole record under the hand of the clerk himself. *Holyoke v. Holyoke's Estate*, (1913) 110 Me. 469, 87 Atl. 40.

**Certificate of judge or magistrate.**—The reason for the rule requiring the certificate of the judge as to the due form of the clerk's certificate is that the court in which the document is offered in evidence is not presumed to know or take judicial notice of the laws in force or what is "due form" in another state or foreign jurisdiction. *Ganow v. Ashton*, (S. D. 1913) 143 N. W. 383.

**United States courts must give faith and credit.**—The same faith and credit must be

given to the judgment of a state court that it would have "by law and usage" in that state. *Foster Milburn Co. v. Chinn*, (C. C. A. 2d Cir. 1913) 202 Fed. 175. In this case the following facts appeared: The plaintiff, a citizen of the state of Kentucky, brought suit in the circuit court of Mercer county, Ky., a court of general jurisdiction, against the defendant, a corporation of the state of New York, engaged in the business of manufacturing proprietary medicines. The cause of action alleged was the false and fraudulent publication of the plaintiff's photograph, together with a copy of a testimonial not signed by him. Service of the summons was made upon one Monroe, as managing agent. His duty was to inspect throughout the United States the distributors of the defendant's advertising literature, who were employed by independent contractors. The defendant appeared specially to quash the return of service, on the ground that it had no office, officer, or managing agent in the state, and that service upon Monroe did not bind it. This motion having been overruled, the defendant, under protest and still objecting to the jurisdiction, answered and took part in the trial, which resulted in a verdict and judgment for the plaintiff, which was upon defendant's appeal to the Court of Appeals reversed, and the cause sent back for a new trial. On the second trial, the same objections of the defendant being overruled, it again contested at the trial, which resulted again in a judgment for the plaintiff, and the defendant having appealed on the jurisdictional question alone, the same was affirmed by the Court of Appeals, on the ground that the defendant by appealing had waived its objection to the jurisdiction. Thereupon the plaintiff brought this action in the federal court upon the Kentucky judgment. The defendant set up in its answer the foregoing facts, alleging that the judgment was null and void, because the court had no jurisdiction of it, and that the proceedings were in violation of the Constitution of the United States, in that they sought to deprive the defendant of its property without due process of law. The action was tried by the court, a jury having been duly waived, and judgment was entered in favor of the plaintiff for the amount demanded in the complaint, with costs. On appeal the court said: "It is certainly the general rule of the federal courts that an objection once taken to the jurisdiction is not waived by the defendant's subsequently answering and taking part in the trial. *Harkness v. Hyde*, 98 U. S. 476, 25 L. Ed. 237. It is also true that the defendant may attack a judgment of the court of another state for lack of jurisdiction, either appearing on the face of the record or proved by testimony. *Thompson v. Whitman*, 18 Wall. 45, 21 L. Ed. 897. It is, however, the law of the state of Kentucky that though the defendant ap-

pear specially to object to the jurisdiction of the court, if he thereafter appeal to a higher court from any judgment recovered against him in the action, he ipso facto waives his objection and transforms his special into a general appearance. It is not necessary for us to determine whether the service of process upon Monroe, as managing agent, was good or bad. We are obliged under section 905, U. S. Rev. St., to give full faith and credit to the judgment; that is to say, the same faith and credit it would have 'by law or usage' in the state of Kentucky. So doing, we must treat the defendant as having appeared generally. The trial judge was right in holding that a usage established by the decision of the highest courts of Kentucky is to be given the same effect as if established by statute. In the latter case the Supreme Court has held that such a rule is binding in a suit upon a judgment in the courts of another state."

**Commission to take testimony.**—An instrument purporting to be a commission to take testimony, issued by a court of one state, is not entitled to recognition in a court of another state, unless certified in accordance with the above section. *New York Press Co. v. Salter*, (1911) 129 La. 51, 55 So. 706.

**Decisions of state courts founded on local laws.**—A decision of a state court founded upon a law local or peculiar to that state, is entitled, by virtue of section 1 of article 4 of the Constitution of the United States (9 Fed. Stat. Annot. 141) and this section, to full faith and credit in the courts of another state, in which such local or peculiar law is not recognized. *Roller v. Murray*, (1912) 71 W. Va. 161, 76 S. E. 172.

**Jurisdictional matters.**—Notwithstanding this statute the judgment of a foreign court when sued upon in the courts of another state is open to impeachment for want of jurisdiction of the foreign court. The recital or assertion of jurisdiction, in the record of the judgment, is in this respect immaterial. *Marshall v. R. M. Owen & Co.*, (1912) 171 Mich. 232, 137 N. W. 204.

**State regulation.**—By virtue of article 4, sec. 1 of the Constitution of the United States providing that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, and the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof," Congress has enacted this section, providing thereby a uniform method of proof and authentication, and therefore state legislatures cannot add more onerous burdens as to proof arising from other states, but they may by statute lessen such burdens. In *re Peterson's Estate*, (1912) 22 N. D. 480, 134 N. W. 751.

This section is cited in *Walker v. State*, (1911) 64 Tex. Crim. 70, 141 S. W. 243.

## Vol. III, p. 39, sec. 906.

Enforcement of transitory action in another state.—This section, which was enacted to carry into effect article 4, § 1, of the Federal Constitution, requires the courts of the several states to enforce any transitory cause of action created by a statute of a sister state, not opposed to the settled policy of the state wherein the cause of action is sought to be enforced. But neither the Constitution of the United States nor any act

of Congress passed in pursuance thereof authorizes the legislature of one state to deny to one having a transitory cause of action originating in that state under one of its statutes the right to appeal to the courts of another state for the enforcement of his cause of action. *Tennessee Coal, Iron & R. Co. v. George*, (1912) 11 Ga. App. 221, 75 S. E. 567.

## Vol. III, p. 41, sec. 2469.

Method not exclusive.—This section and the following section do not prescribe an exclusive method of proving the public documents therein mentioned. *Harmening v. Howland*, (N. D. 1913) 141 N. W. 131.

## EXECUTION.

## Vol. III, p. 45, sec. 987.

Purpose of section.—“Section 987 does not in terms relate either to appeals or writs of error or to the supersedeas of the judgment, sought to be reviewed in an appellate court. It rather relates to a method of securing a deliberate reconsideration of a judgment or decree by the court which rendered it without the embarrassment which would occur if immediate execution of the judgment were permitted, and yet on such conditions as secured the payment of the judgment if allowed to stand. It is well known by the profession that prior to the creation of the Circuit Courts of Appeals at a time when these sections were enacted by Congress few cases, comparatively speaking, ever found their way from the trial court to the Supreme Court of the United States, the then only available court of review. The fact that no appeal or writ of error could be prosecuted unless \$5,000 or more was involved, the

long distance from the places of trials to the seat of government where the Supreme Court was held, and the heavy expense attending the proceeding, were largely prohibitive of any review of the work of a trial judge. As a result his judgment in a large majority of cases was final. In view of this situation, it was quite a reasonable thing that provision should be made insuring the fullest opportunity, consistent with ample security to the judgment creditor, for the trial court to reconsider its own judgments upon petitions for a new trial. Lest the right of a suitor to invoke such reconsideration should be lost or impaired by the hasty execution of a judgment, the statute seems to have for its object and purpose the stay of such execution until such petition could be definitely and intelligently filed and considered.” *Sanborn v. Bay*, (C. C. A. 8th Cir. 1911) 194 Fed. 37.

## Vol. III, p. 54, sec. 1.

To what courts applicable.—Undoubtedly the Act of March 3, 1893, applies not only to federal courts then in existence, but also to those subsequently created, unless something in the organic act exempts them, and governs as well any possible new forms of judicial sales under decrees as foreclosure, execution, and partition sales then known. *In re Britannia Min. Co.*, (C. C. A. 7th 1913) 203 Fed. 450.

Bankruptcy sales are not governed by this section but by sec. 70b of the Bankruptcy Act (Fed. Stat. Annot. Supp. 1912, p. 839). *Robertson v. Howard*, (1913) 229 U. S. 255,

33 S. Ct. 854, 57 U. S. (L. ed.) 1174, 1175, reversing (1910) 83 Kan. 453, 112 Pac. 162. To the same effect see *In re National Min. Exploration Co.*, (D. C. Mass. 1911) 193 Fed. 232.

In the case of *In re Britannia Min. Co.*, (C. C. A. 7th Cir. 1913) 203 Fed. 450, reversing (W. D. Wis. 1912) 197 Fed. 459, the court said: “In our judgment, the act of 1893 has no application to trustee’s sales of the assets of bankrupt estates for this prime reason: In a judicial sale under order or decree, the order or decree



fixes the relative rights of the parties in the property according to the status or conduct or contract between them, and the sale itself is the thing that divests all the parties of their title and confers it upon another; while in a trustee's sale the sale itself is not the thing that divests the parties in interest of their title; there is no order or decree of the bankruptcy court that gives the creditors any adjudicated rights in specific property—the statute gives them the right to a distribution after the assets, not already in money, have been reduced to money; there is no order or decree that divests the bankrupt of his title—the only decree against him is the adjudication of bankruptcy, and after that he still has the legal title (in trust for the trustee thereafter to be elected); when the trustee is elected, *eo instanti* he is vested, not by virtue of any order or decree of court, but “by operation of law” (section 70a), with the title of the bankrupt as of the date of adjudication. In short, the statute operates as a self-executing conveyance from the bankrupt to the trustee. His quality of title is the same as if the statute, instead of operating directly, had required that the court should either cause the bankrupt to convey to the trustee or should appoint a commissioner to execute a conveyance in the bankrupt's name. So when the trustee, as grantor, conveys what he acquired as grantee, he is not making a sale within the purview of the Act of March 3, 1893. If he needs to resort to

the ancillary jurisdiction of bankruptcy courts in other districts, which jurisdiction, independently of the amendment in 1910 of section 2, subd. 20 (Act June 25, 1910, c. 412, §§ 1, 2, 36 Stat. 838 (1912 Supp. Fed. Stat. Annot. 21, 480)), was held to exist (*Babbitt v. Dutcher*, 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969), it is not for the purpose of becoming vested with title and the right and power to sell and convey, but only to aid him in acquiring or holding or delivering possession. Other sections of the Bankruptcy Act and of the General Orders, hereinabove quoted, only restrict, in the interest of the beneficiaries of the trust, the manner in which the trustee shall exercise his otherwise unlimited power of disposition; and they confirm us in the conclusion we have derived from a consideration of the nature of the trustee's title, namely, that Congress in the Bankruptcy Act has provided a comprehensive and exclusive method of administering estates of bankrupts.”

The Act of March 3, 1893, seems to relate to judicial sales pursuant to some order or decree creating or declaring a right to sell, which right could not be exercised but for the order or decree; sales necessarily authorized and ordered by the court; sales void but for such order or decree; sales divesting the title of the former owner. Sales in bankruptcy are not like these in character. In *re La France Copper Co.*, (D. C. Mont. 1913) 205 Fed. 207.

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## EXECUTIVE DEPARTMENTS.

Vol. III, p. 58, sec. 161.

Administrative and not legislative power is conferred by this section. *United States v. George* (1913) 228 U. S. 14, 33 S. Ct. 412, 57 U. S. (L. ed.) 712.

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## EXTRADITION.

Vol. III, p. 68, sec. 5270.

**Applicability of fifth amendment.**—The provision of the fifth amendment, “that no person shall be held to answer for a capital or otherwise infamous crime unless on the presentment or indictment of a grand jury,” does not apply to prisoners to be held in extradition proceedings to answer such

crimes in foreign countries. *Ex parte La Mantia*, (S. D. N. Y. 1913) 206 Fed. 330.

**Applicability of sixth amendment.**—The provision of the sixth amendment, requiring the accused in criminal prosecutions “to be confronted with the witnesses against him,” obviously applies to criminal prosecutions

tried here, and not to persons extradited for trial under treaties with foreign countries whose laws may be entirely different. *Ex parte La Mantia*, (S. D. N. Y. 1913) 206 Fed. 330.

**Authority of Congress.**—Congress has a perfect right to provide for the extradition of criminals in its own way, with or without a treaty to that effect, and to declare that foreign criminals shall be surrendered upon such proofs of criminality as it may judge sufficient. This appears to have been the object of § 5270, which is applicable to all foreign governments with which we have treaties of extradition. This section, by its very terms, applies "in all cases in which there now exists or hereafter may exist, any treaty or convention for extradition." *Charlton v. Kelly*, (1913) 229 U. S. 447, 33 S. Ct. 945, 57 U. S. (L. ed.) 1274, 46 L.R.A. (N.S.) 397.

**Effect of conflicting treaty.**—The effect of a treaty of a later date than the statute is to supersede the statute in so far as there is a necessary conflict. *Charlton v. Kelly*, (1913) 229 U. S. 447, 33 S. Ct. 945, 57 U. S. (L. ed.) 1274, 46 L.R.A. (N.S.) 397.

**Complaint — In general.**—A complaint made upon information and belief is sufficient where it sets forth that it is made by authority of and at the request of the proper officials of the requesting country, and that the information upon which it is based was communicated to the complainant by those officials. While it is advisable that certified copies of the foreign complaint and warrant be attached to and made a permanent part of the complaint, yet it is sufficient if those documents, alleging positively the respondent's guilt, are presented to the commissioner with the complaint, and if depositions showing probable cause are produced at the hearing. *Powell v. United States*, (C. C. A. 6th Cir. 1913) 206 Fed. 400.

**Crime described by different names.**—If the complaint intelligibly describes and identifies the offense, and if the offense so described is punishable by the laws of both countries, and if by any name it is included in the extradition treaty, that is enough. *Powell v. United States*, (C. C. A. 6th Cir. 1913) 206 Fed. 400.

**Foreign warrant of proceedings unnecessary.**—To the same effect as the original note, see *Ex parte Schorer*, (E. D. Wis. 1912) 197 Fed. 67.

**Sufficiency of foreign warrant.**—When the record in the case disclosed an authenticated copy of a document, signed by "The Examining Magistrate of Royal Superior Court of Munich, Meidinger, Royal Councillor," to which was attached the court seal, and which, after description of the accused, recited the charge made against him, the provisions of the German code, his flight and probable guilt, and concluded with, "The arrest of Schorer for the purpose of being placed under examination is ordered because the accused has fled," it was held to be sufficient assuming that a warrant was necessary.

*Ex parte Schorer*, (E. D. Wis. 1912) 197 Fed. 67.

**Preliminary examination—Precedent formalities.**—Unless treaty stipulations require another or a different course to be pursued, the foreign country is authorized to institute the proceedings under this section without any precedent formalities. *Ex parte Schorer*, (E. D. Wis. 1912) 197 Fed. 67.

**Nature of hearing.**—The proceeding to determine whether the accused should be extradited is not to be regarded as in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him, but rather of the character of those preliminary examinations, which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment, or other proceeding, in which he shall be finally tried upon the charge made against him. *Charlton v. Kelly*, (1913) 229 U. S. 447, 33 S. Ct. 945, 57 U. S. (L. ed.) 1274, 46 L.R.A. (N.S.) 397.

**Probable cause.**—The only question to be determined by the commissioner is that of probable cause; or, to use the language common in treaties, whether there is such evidence of criminality as will justify the apprehension and commitment. *Ex parte Schorer*, (E. D. Wis. 1912) 197 Fed. 67.

**Adjournment.**—A United States commissioner sitting in extradition proceedings has authority to adjourn the proceedings for a reasonable time on representations of counsel for the petitioning country that additional evidence will be presented against the alleged criminal, although such alleged criminal had previously been arrested and discharged in extradition proceedings in connection with the same crime. *Ex parte Schorer*, (E. D. Wis. 1912) 195 Fed. 334, wherein the court said: "It was suggested that when the present proceeding was instituted the commissioner should not have entertained it unless the alleged new evidence was then and there presented. To that it can well be replied that this would call upon him in advance to determine the very purpose for which the second proceeding is instituted. The accused has a right to be heard upon the question whether the new evidence is such as supplies the alleged defect in the former proceedings, and he has a right to have this new evidence presented on the second hearing just as it would have been presented on the first. If the second hearing should develop the same weaknesses disclosed upon the first, the accused ought to be discharged. But such weaknesses or added strength can develop only through a hearing of the proposed evidence; and unless and until it is reasonably clear that the rearrest and re-examination are in fact, or in effect, furthering a course of harshness or oppression, or a policy or purpose ulteri-

or to the honest and efficient performance of the treaty obligation, the proceedings before the commissioner should be allowed to take the course designed by the statute."

*Necessity for showing acts charged are crime in foreign country.*—The commissioner is not obliged to make extended inquiry as to the scope of the criminal jurisprudence of the demanding country, but is by the statute limited to determining whether there is sufficient evidence of criminality to justify holding the accused for the particular offense, as we understand that offense by its description in the treaty and in our laws. *Ex parte Schorer*, (E. D. Wis. 1912) 197 Fed. 67.

*Necessity for demand.*—The rule is well settled that, unless there is a provision in the treaty, a demand by one country upon another for the extradition of an alleged fugitive is not a step necessary to be taken

prior to, or to be proven in, the proceedings before the extradition commissioner. *Ex parte Schorer*, (E. D. Wis. 1912) 197 Fed. 67.

*Review of commissioner's decision.*—To the same effect as the original note, see *Ex parte Schorer*, (E. D. Wis. 1912) 197 Fed. 67.

*Habeas corpus.*—The rule is well established that if the committing magistrate has jurisdiction of the subject-matter and of the accused, and the offense charged is within the treaty, and the magistrate has before him legal evidence on which to exercise his judgment as to the sufficiency of the facts to establish the criminality of the accused for the purpose of extradition, his decision cannot be reviewed on habeas corpus. *McNamara v. Henkel*, (1913) 226 U. S. 520, 33 S. Ct. 146, 57 U. S. (L. ed.) 330.

### Vol. III, p. 76, sec. 5271.

*Partial repeal of sec. 5271.*—To the same effect as the original note see *Ex parte Schorer*, (E. D. Wis. 1912) 197 Fed. 67.

*Proof of identity.*—Evidence of identity

considered and held to be insufficient. *Ex parte La Mantia*, (S. D. N. Y. 1913) 206 Fed. 330.

### Vol. III, p. 78, sec. 5278.

Three things are necessary in order to authorize the executive of one state to order the return of a fugitive from justice to the state in which the crime was committed: First, the accused must be demanded as a fugitive from justice by the executive of the state from which he fled; second, the demand must be accompanied by a copy of the indictment, or an affidavit made before a magistrate, charging the fugitive with having committed a crime in the demanding state; and, third, a copy of the indictment or affidavit must be certified to by the executive of the demanding state. *Thorp v. Metzger*, (Wash. 1913) 137 Pac. 330.

The affidavit must be sworn to before a magistrate. *Davis v. State*, (Tex. 1914) 163 S. W. 442.

"Magistrate" as including notary public.—A notary public, who has no other power than to swear witnesses and take depositions in the state in which he is appointed, is not a "magistrate." *Ex parte Owen*, (Okla. 1913) 136 Pac. 197.

"Certified as authentic."—The requisition requires the production by the governor demanding a fugitive from justice of a copy of the indictment found or affidavit made before a magistrate of his state or territory, charging the person demanded with having committed a crime, "certified as authentic" by him, the demanding governor. What is it that is required to be certified as authentic? It is the indictment or affidavit made before the magistrate. This is really all the certificate that is required of the demanding governor, and it is not essential that he go

farther and certify to the official character of the grand jury or of the officer certifying to the copy of indictment, or the officer before whom the affidavit is subscribed and sworn to, or to the official character of the proper custodian of such a document. It is sufficient that the indictment or affidavit is certified as authentic. *Tiberg v. Warren*, (C. C. A. 9th Cir. 1911) 192 Fed. 458.

*Discretion of executive as to surrender.*—When the executive authority of the state whose laws have been thus violated makes such a demand upon the executive of the state in which the alleged fugitive is found as is indicated by the above section, producing at the time of such demand a copy of the indictment, or an affidavit certified as authentic and made before a magistrate charging the person demanded with a crime against the laws of the demanding state, it becomes, under the Constitution and laws of the United States, the duty of the executive of the state where the fugitive is found to cause him to be arrested, surrendered, and delivered to the appointed agent of the demanding state, to be taken to that state. *Ryan v. Rogers*, (Wyo. 1913) 132 Pac. 95.

To the same effect see *Ex parte Law*, (1911) 2 Ala. App. 257, 56 So. 79, wherein the court said: "When the executive authority of a state whose laws have been violated makes a demand upon the executive of another state, producing at the time of the demand a copy of the indictment or affidavit certified as authentic, and made before a magistrate, charging the person demanded with a crime against the demanding state,

and the executive upon whom the demand is made becomes satisfied, in any manner that he may deem satisfactory, that the alleged criminal has taken refuge in the state of which he is the chief executive, it becomes his duty to issue his warrant for the arrest of such alleged criminal, and authorize his extradition to the demanding state. The Governor is not required to demand proof of the demanding state that the alleged criminal is a fugitive from justice, or that he is within the borders of his state. These mat-

ters he may determine for himself, either from the papers accompanying the requisition or from the independent inquiries. A person arrested in such proceeding is entitled, before his extradition, upon petition for writ of habeas corpus, to question the lawfulness of his arrest, and may show, if he can by legal evidence, that he is not, in fact, a fugitive from justice of the demanding state, within the meaning of the Constitution and laws of the United States."

### Vol. III, p. 89, sec. 3.

**Introduction of evidence.**—The effect of this provision is not to give the accused the right to introduce any evidence which would be admissible upon a trial under an issue of not guilty. The prime purpose of the section is to afford the defendant the means for obtaining the testimony of witnesses and to

provide for their fees. In no sense does the statute make relevant, legal or competent evidence which would not have been competent before the statute upon such a hearing. *Charlton v. Kelly*, (1913) 229 U. S. 447, 33 S. Ct. 945, 57 U. S. (L. ed.) 1274, 46 L.R.A. (N.S.) 397.

### Vol. III, p. 90, sec. 5.

**Effect of section on mode of authentication.**—This act makes the consular certificate the final and controlling guide in determining the admissibility of testimony before the extradition commissioner. When the documentary evidence has been authenticated as required by the statute, it is admissible, leaving to the commissioner merely the ques-

tion of determining the sufficiency of the evidence therein contained. *Ex parte Schorer*, (E. D. Wis. 1912) 197 Fed. 67.

In international extradition proceedings documents authenticated as required by law are admissible in evidence without being sworn to. *Ex parte La Mantia*, (S. D. N. Y. 1913) 206 Fed. 330.

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## FOOD AND DRUGS.

### Vol. III, p. 119, sec. 1.

This act is a revenue law. It imposes a specific tax on oleomargarine and "special taxes" on those who engage in its manufacture or sale, and contains several administrative and penal provisions. But it does not purport to be independent of other legis-

lation or complete in itself. On the contrary, it plainly contemplates the existence of an established system of revenue laws to which resort shall be had in carrying it into effect. *United States v. Barnes*, (1912) 222 U. S. 513, 32 S. Ct. 117, 56 U. S. (L. ed.) 291.

### Vol. III, p. 120, sec. 3.

**"Wholesale dealer."**—Where a licensed retail dealer, being temporarily out of oleomargarine, borrowed an unbroken original manufacturer's package from another retailer, which, in his own place of business, he broke and sold as he was authorized to do, and subsequently, when he had received a fresh stock from the manufacturer he re-

turned an unbroken package to the dealer from whom he had borrowed some, it was held that the facts failed to show that he was a "wholesale dealer" in oleomargarine within the meaning of that term as used in this section. *Weaver v. Ewers*, (C. C. A. 8th Cir. 1912) 195 Fed. 247.

### Vol. III, p. 126, sec. 17.

**Section applicable to unlicensed manufacturer.**—In *May v. United States*, (C. C. A.

8th Cir. 1912) 199 Fed. 42, a contention by the defendants that this section applied only

to persons who had received a license to manufacture oleomargarine was answered by the court as follows: "To so construe the section would be to add thereto the word 'licensed,' so that it would read 'whenever a licensed person,' or to add other words indicating that it was limited to persons who had received such a license as has been mentioned. If it clearly appeared that it was the intention of Congress to so limit that section, possibly authorities might be found which would support such an interlineation. But a moment's reflection will show that such never could have been the intention of the Legislature. If such were the law, a person who intended to violate section 17 would purposely fail to take out a license as a manufacturer, for in such a case he could not be imprisoned in the penitentiary; he could only be punished for a violation of section 4, the penalty for which is a fine."

Section applicable to manufacturer of colored oleomargarine.—In *May v. United States*, (C. C. A. 8th Cir. 1912) 199 Fed. 42, the court said: "The evidence at the trial did not show that the defendants manufactured white oleomargarine; they therefore did not come within the definition of a manufacturer contained in the original act. It was proven that they mixed white oleomargarine with artificial coloration, so that it looked like butter. This brought them within the definition of a manufacturer found in the amendment of May 9, 1902, c. 784, 32 Stat. 194, (see *infra* p. 127). It is claimed by the defendants, inasmuch as when section 17 was enacted the only manufacturer was a person who made white oleomargarine, that that section cannot apply to these defendants who became manufacturers by an act subsequent thereto: There is nothing in this contention."

The essential elements of the offense defined in section 17 are: (1) That the defendant is engaged in carrying on the business of manufacturing oleomargarine. (2) That he has produced oleomargarine. (3) That he has attempted to defraud the United States. *May v. United States*, (C. C. A. 8th Cir. 1912) 199 Fed. 42.

Alleging manner in which attempted fraud was committed.—An indictment under this section need not advise the defendant of the manner in which he attempted to commit the fraud. *May v. United States*, (C. C. A. 8th Cir. 1912) 199 Fed. 42, wherein the court said: "It is to be noted that section 17 does not declare it an offense to commit the fraud in any particular way. If it did, then it would be necessary to allege the manner in which the act was done. But as the section stands, it is an offense if the government is defrauded by any means or method. As was

said in *United States v. Simmons*, 96 U. S. 360, on page 364, 24 L. ed. 819:

"The intent to defraud the United States is of the very essence of the offense; and its existence, in connection with the business of distilling being distinctly charged, must be established by satisfactory evidence. Such intent may, however, be manifested by so many acts upon the part of the accused, covering such a long period of time, as to render it difficult, if not wholly impracticable, to aver, with any degree of certainty, all the essential facts from which it may be fairly inferred."

"To have alleged in this indictment how the defendants attempted to defraud the United States would have required a statement of much of the evidence presented at the trial."

Proof of attempt to defraud.—When a defendant's operations have proceeded so far as to show conclusively that he has produced oleomargarine with the intent to defraud the government out of the tax thereon, there is an attempt to defraud such as is mentioned in section 17, although he has neither sold nor removed nor attempted to sell or remove any of the product. *May v. United States*, (C. C. A. 8th Cir. 1912) 199 Fed. 42, wherein the court said: "The claim of the defendants, however, is that before the offense can be committed the oleomargarine produced must have become subject to the tax. They call attention to section 8 of the act, which provides that 'upon oleomargarine which shall be manufactured and sold, or removed for consumption or use,' there shall be assessed a tax, and they say that the indictment should have alleged that the defendants had attempted either to sell it, or to remove it for consumption, or to remove it for use; and they insist that an allegation of this kind was an essential part of the indictment. Whatever may be said of this claim when the charge is that the defendant had defrauded the United States, it cannot be sustained when the charge is that the defendant has attempted to defraud the United States. Conclusive evidence might be produced to the effect that a defendant had made plans to construct and operate an illegal factory for the manufacture of oleomargarine, to manufacture it, and to sell it without payment of the tax. It might also be further shown conclusively that, in pursuance of this illegal plan, he had erected a factory and had commenced to manufacture and had actually manufactured oleomargarine with the intent of selling it without paying the tax, but that before he had sold or removed, or attempted to sell or remove, any part of it, his operations were interfered with by the authorities. Can it be said in such a case that he has not attempted to defraud the United States?"

### Vol. III, p. 128, sec. 4. [*Butter defined — adulterated butter — process or renovated butter.*]

Adulterated butter.—The intention of Congress in enacting and the true construc-

tion of the clause "any butter in the manufacture or manipulation of which any process

or material is used with intent or effect of causing the absorption of abnormal quantities of water, milk or cream," in this section, is to bring butter containing an abnormal quantity of water, milk, or cream into the class of adulterated butter and to subject it to forfeiture, and its manufacturer to the fines and penalties denounced for a violation of the regulations therein concerning adulterated butter when, and when only, some process or material is used in its manufacture or manipulation, with the intent or effect of introducing into the butter, by absorption, an abnormal quantity of water, milk, or cream. The presence in butter of an abnormal quantity of moisture does not make it "adulterated butter" under this act, and proof of the presence of an abnormal quantity of moisture in butter and of a removal of the butter without a compliance with the regulations concerning the taxing and branding of "adulterated butter" is insufficient to bring such butter within the class of adulterated butter or to sustain its forfeiture as such. *United States v. 11,550 pounds of butter*, (C. C. A. 8th Cir. 1912) 195 Fed. 657.

The true construction of the regulation of the Secretary of the Treasury, to the effect that butter having 16 per cent. or more of moisture contains an abnormal quantity and is classed as adulterated butter under the

clause of the act quoted above, is that it merely defines and fixes the measure of an abnormal quantity of moisture in the butter under this clause. The regulation so construed is void because, while the Secretary and his subordinates had authority to investigate each case and to decide, for administration purposes in the light of the facts and circumstances of the particular case, whether or not the butter involved therein was adulterated butter and taxable as such, they had neither express nor implied authority by a general regulation to give an authoritative and final definition of the terms, or such a construction of the statute, which should govern all future cases. If the correct interpretation of this regulation is, as counsel for the government claims, that it makes all butter which contains 16 per cent. or more, or an abnormal quantity, of moisture "adulterated butter," whether the abnormal quantity was introduced into the butter by the use of some process or material with intent or effect of causing it to be absorbed by the butter or not, then the rule is unauthorized and void, because it has the effect to subject classes of property to forfeiture, and classes of persons to fines and penalties, that are excluded therefrom by the plain terms of the law. *United States v. 11,550 Pounds of Butter*, (C. C. A. 8th Cir. 1912) 195 Fed. 657.

### Vol. III, p. 128, sec. 4. [*Special taxes, adulterated and renovated butter.*]

For a dealer in adulterated butter to be liable to a tax by the United States under the statute it is immaterial whether or not

the said dealer "knowingly" engaged in the business. *C. H. Lawrence & Co. v. Seyburn*, (C. C. A. 5th Cir. 1913) 202 Fed. 913.

### Vol. III, p. 138, sec. 1.

**Act constitutional.**—To the same effect as the original note see *United States v. Twenty Chests of Tea*, (N. D. N. Y. 1913) 208 Fed. 89.

The purpose of the tea act is to keep out

of the country impure and unwholesome teas. It is in the nature of a police regulation. *United States v. Twenty Chests of Tea*, (N. D. N. Y. 1913) 208 Fed. 89.

### Vol. III, p. 140, sec. 6.

**No review by courts of appraisers' decision.**—Congress has undoubtedly the power to exclude all teas, or to admit them under the most arbitrary regulations it may choose to prescribe. By the act the whole matter is

turned over to administrative officers, with no review of the facts in the court. *Macy v. Loeb*, (C. C. A. 2d Cir. 1913) 205 Fed. 727.

### Vol. III, p. 141, sec. 9.

**Intent to defraud** is not a prerequisite to forfeiture. *United States v. Twenty Chests of Tea*, (N. D. N. Y. 1913) 208 Fed. 89, wherein the court said: "Does section 9 subject tea once rejected and sent out of the country to forfeiture if offered for reimportation by any one, one ignorant of the facts? Must the government re-examine tea offered in fact for reimportation whenever the importer offers it and alleges that he had no

knowledge of its previous history, that is, its examination, rejection, etc., or go to the trouble and expense of hunting up evidence to show that the one offering it for importation had knowledge of such facts? The government has the right and power to enact and enforce the most arbitrary laws as to the importation of goods from foreign countries. He who offers them subjects himself and his goods offered for importation to the

operation of those laws. This court does not intend to hold that in exercising this power the United States may seize and forfeit goods offered for importation for the reason such goods are not up to the standard prescribed, but when once offered, examined, condemned

as impure, and rejected and sent out of the United States, it seems to me clear that Congress intended that a subsequent offer of the same goods by any person for importation subjects such goods to forfeiture."

## Vol. X, p. 89. [Act of March 3, 1905.]

**Character of Act.**—In *United States v. Frank*, (S. D. Ohio 1911) 189 Fed. 195, the court answering the claim of the defendant that this was a mere appropriation act said: "But it would seem that a law appropriating a certain sum of money to the Secretary of Agriculture for the purpose of doing certain things which he could constitutionally do, for

the purpose of fixing standards of purity of food, and that he did so fix them, carries with it a necessary implication that he could do that for which the money was appropriated to him for the purpose of doing, and when he fixed the standards then those standards prevailed unless they have been changed since."

## 1909 Supp., p. 137, sec. 1.

The constitutionality of the act is generally conceded and well established. *United States v. Sweet Valley Wine Co.*, (N. D. Ohio 1913) 208 Fed. 85.

Congress has the right not only to pass laws which shall regulate legitimate commerce among the states and with foreign nations, but has full power to keep the channels of such commerce free from the transportation of illicit or harmful articles, to make such as are injurious to the public health outlaws of such commerce and to bar them from the facilities and privileges thereof. Congress may itself determine the means appropriate to this purpose, and so long as they do no violence to other provisions of the Constitution it is itself the judge of the means to be employed in exercising the powers conferred upon it in this respect. *McDermott v. State of Wisconsin*, (1913) 228 U. S. 115, 33 S. Ct. 431, 57 U. S. (L. ed.) 754.

The object of the Food and Drugs Act is to prevent adulteration and misbranding, as therein defined. It prohibits the introduction into any state from any other state "of any article of food or drugs which is adulterated or misbranded, within the meaning of this act." The purpose is to keep such articles "out of the channels of interstate commerce, or, if they enter such commerce, to condemn them while being transported or when they have reached their destinations, provided they remain unloaded, unsold or in original unbroken packages." *Savage v. Jones*, (1912) 225 U. S. 501, 32 S. Ct. 715, 56 U. S. (L. ed.) 1182.

The purpose of the Pure Food Act was (1) to protect purchasers from injurious deceptions by the sale of inferior for superior articles, and (2) to protect the health of the people from the sale of normally wholesome articles to which have been added substances poisonous or detrimental to health. *Hall-Baker Grain Co. v. United States*, (C. C. A. 8th Cir. 1912) 198 Fed. 614.

**Construction.**—The Food and Drugs Act was passed by Congress, under its authority to exclude from interstate commerce impure

and adulterated food and drugs and to prevent the facilities of such commerce being used to enable such articles to be transported throughout the country from their place of manufacture to the people who consume and use them, and it is in the light of the purpose and of the power exerted in its passage by Congress that this act must be considered and construed. *McDermott v. State of Wisconsin*, (1913) 228 U. S. 115, 33 S. Ct. 431, 57 U. S. (L. ed.) 754.

The purpose of the act is to secure the purity of food and drugs and to inform purchasers of what they are buying. Its provisions are directed to that purpose and must be construed to effect it. *United States v. Antikamnia Chemical Co.*, (1914) 231 U. S. 654, 34 S. Ct. 222.

**Shipment of "adulterated or misbranded" food or drugs prohibited.**—The article of food or drugs the shipment or delivery for shipment in interstate commerce of which is prohibited and punished is such as is adulterated or misbranded within the meaning of the act. What it is to adulterate or misbrand food or drugs within the meaning of the act requires a consideration of its other provisions, wherein such adulteration or misbranding is defined. *McDermott v. State of Wisconsin*, (1913) 228 U. S. 115, 33 S. Ct. 431, 57 U. S. (L. ed.) 754.

**State statutes.**—This act does not prevent states from regulating the sale of foods and drugs in intrastate commerce. *State v. Armour & Co.*, (N. D. 1913) 145 N. W. 1033, wherein the court said: "Congress can only regulate interstate commerce. The states have exclusive control of intrastate commerce, and in the absence of legislation of Congress have certain rights of control over interstate commerce within the boundaries of the state; while Congress is limited to control of commerce with foreign nations, among the several states, and with the Indian tribes." The assumption by Congress of its authority to regulate the interstate commerce affects nothing excepting the right of the state to control interstate commerce within its borders and does not in any man-

ner curtail the right of the state to control its own commerce, provided such state control does not incidentally interfere with interstate commerce."

But a state statute in conflict with the provisions of the Food and Drugs Act is void. *McDermott v. State of Wisconsin*, (1913) 228 U. S. 115, 33 S. Ct. 431, 57 U. S. (L. ed.) 754, wherein the court said: "The state may not, under the guise of exercising

its police power or otherwise, impose burdens upon or discriminate against interstate commerce, nor may it enact legislation in conflict with the statutes of Congress passed for the regulation of the subject, and if it does, to the extent that the state law interferes with or frustrates the operation of the acts of Congress, its provisions must yield to the superior federal power given to Congress by the Constitution."

## 1909 Supp., p. 137, sec. 2.

**Limited to interstate and foreign commerce.**—The second section of the Pure Food and Drugs Act is limited in its application to interstate and foreign commerce. The prohibition therein contained runs against the introduction of misbranded drugs into any state, or territory, or the District of Columbia, from any other part of the United States, or from any foreign country. *United States v. Tucker*, (S. D. Ohio 1911) 188 Fed. 741.

**Articles not the subject of bargain and sale included.**—The Pure Food and Drugs Act deals with articles other than those which are the subject of bargain and sale. *Dr. J. L. Stephens Co. v. United States*, (C. C. A. 6th Cir. 1913) 203 Fed. 817.

"Shipment" as used in this section is not limited to a shipment for sale, though it must be in the way of commerce. *Philadelphia Pickling Co. v. United States*, (C. C. A. 3d Cir. 1913) 202 Fed. 150, wherein the court said: "Does the act apply where the owner has shipped to himself for some other business purpose than sale? The trial judge directed the verdict, but no complaint is made of this, if his construction of the act was correct. The statute imposes penalties in three sections, but we are concerned only with sections 2 and 10. The latter section provides for condemnation, and permits an offending article to be seized, if it 'is being transported from one state, territory, district, or insular possession to another for sale; or having been transported remains unloaded, unsold, or in original unbroken packages; or if it be sold or offered for sale in the District of Columbia, or the territories or insular possessions of the United States; or if it be imported from a foreign country for sale; or if it is intended for export to a foreign country.'"

"This section speaks repeatedly of sale, and the courts have had several occasions to consider what Congress meant by the language quoted. In *United States v. 65 Casks* (D. C.) 170 Fed. 449, it appeared that the casks in question (which were insufficiently marked) contained a liquid that had been manufactured and shipped by the owner's agent in Michigan to the owner himself in West Virginia for the primary purpose of being bottled and properly labeled there. It was not to be sold until this had been done, and the District Court held *inter alia* (pages 445, 446) that Congress 'did not . . . have power to restrict one from manufactur-

ing in one state such product and removing it from that state to another for the purpose of personal use and not sale, or for use in connection with the manufacture of other articles to be legally branded when so manufactured.'"

"The Court of Appeals affirmed the judgment in a brief opinion, (175 Fed. 1022, 90 C. C. A. 667), which is silent concerning the power of Congress, and merely gives the following reason for affirmance:

"No attempt to avoid the law, either directly, indirectly, or by subterfuge, has been shown; it appearing that the manufacturer had simply transferred from one point to another the product he was manufacturing for the purpose of completing the same for the market. Under the circumstances disclosed in this case, having in mind the object of the Congress in enacting the law involved, we do not think the liquid extract proceeded against should be forfeited. Reaching this conclusion, we do not find it necessary to consider other questions discussed by counsel and referred to in the opinion of the court below.'"

"In *United States v. 46 Packages*, (D. C.) 183 Fed. 642, it was held that a libel in rem under section 10 was defective, because it failed to aver that the articles seized were transported 'for sale.' The foregoing cases are referred to in *Hipolite Egg Co. v. United States*, 220 U. S. 45, 31 Sup. Ct. 364, 55 L. ed. 364, and although they are not definitely disapproved they are certainly not accepted as correct. At the best, they are noticed with a word or two of comment, and of course they must yield if they clash with the decision or the opinion of the Supreme Court. One of the points decided in the *Hipolite Case* is that section 10 permits the condemnation of adulterated food, although it has not been transported for sale directly, but is intended solely for use as raw material in the manufacture of another product. This is clear, for the court on page 52 of 220 U. S., on page 365 of 31 Sup. Ct. (55 L. ed. 364), states the first contention of the Egg Company to be that 'section 10 of the Food and Drugs Act does not apply to an article of food which has not been shipped for sale, but which has been shipped solely for use as raw material in the manufacture of some other product.'"

"And this contention is declared (page 55 of 220 U. S., on page 366 of 31 Sup. Ct. [55 L. ed. 364]) to be 'untenable.' . . . It



is true that this is a prosecution under section 2, and not a seizure under section 10; but the difference (if important) is in favor of section 2, for its meaning is not restricted by the words 'for sale,' and is therefore even broader than the language of section 10. One of the chief objects of the act is declared in section 2, namely, to forbid 'the introduction into any state or territory,' etc., 'of any article of food . . . which is adulterated;' and, while the section does not attempt to punish criminally every method of 'introduction,' it does punish the method here in question—any person who shall ship or deliver for shipment from any state or territory,' etc., 'shall be guilty of a misdemeanor,' etc.—and the breadth of the prohibition justifies us at least in refusing to narrow the ordinary meaning of the words that define the crime. Of course, the shipment must be in the way of 'commerce.' Such a limitation is constitutionally necessary; but, if the limitation be assumed, no reason is perceived why 'shipment' should be construed to mean 'shipment for sale.' Its ordinary meaning in this connection covers any shipment for any purpose in the course of commerce, and we accept this as the intended scope of the word. And the correctness of such construction seems more probable when we observe that the next penal clause of section 2 should apparently be construed in a similar manner. This clause applies to any person 'who shall receive in any state or territory,' etc., 'and, having so received, shall deliver in original unbroken packages, . . . or [shall] offer to deliver, to any person any such article so adulterated'—the delivery being punished whether it be 'for pay or otherwise.' In other words, to receive and deliver offending articles in the course of commerce is indictable, whatever the business purpose may be. The Court of Appeals of the Second Circuit in *United States v. 300 Cans*, 189 Fed. 352, 111 C. C. A. 83, has also ruled that, since the *Hipolite* decision at all events, a libel for condemnation need no longer aver that the articles were transported for sale—the food there in question having been shipped from Nebraska by the owner to himself in New York, and remaining unsold in original unbroken packages."

**Articles not to be used as food.**—The transportation of decomposed eggs, which are actually unfit for food, for use in tanning is prohibited by this section, as the use to which they are to be put does not take the same out of the category of "adulterated article of food." *United States v. Thirteen Crates of Frozen Eggs*, (S. D. N. Y. 1913) 208 Fed. 950, wherein the court said: "It seems to me clear that the purpose of Congress was to prohibit the transportation of articles in interstate commerce which come within the definition given in the statute and make them subject to seizure and condemnation if so transported. If such is not the purpose, then interstate commerce may be flooded with eggs of this character and the government will be compelled to prove that the intent of the one transporting the article was to

use or sell same as an article of food. Even if the burden is not shifted and the presumption is that it was intended to use or sell such an article as food or as an article of food, still the owner so transporting the article will escape the operation of the statute by swearing to an undisclosed intent which the government will be unable to disprove, unless the article has been actually put on sale or sold as an article of food."

**Meaning of "package" and original unbroken package.**—The word "package," as used in the act, "means the package which passes into the possession of the public, of the real consumer; and the words, 'original unbroken package,' relate . . . to the package in the form in which it is received by the vendee or consignee." *Dr. J. L. Stephens Co. v. United States*, (C. C. A. 6th Cir. 1913) 203 Fed. 817.

"Package" clearly refers to the immediate container of the article which is intended for consumption by the public. *McDermott v. State of Wisconsin*, (1913) 228 U. S. 115, 33 S. Ct. 431, 57 U. S. (L. ed.) 754.

**Intent.**—The mere sending of deleterious or harmful substance by a shipper, even though he may have nothing to do with the condition of the article sent and has no knowledge of such condition, makes him liable to the penalty. *United States v. Sprague*, (E. D. N. Y. 1913) 208 Fed. 419.

**Standards of purity.**—The Secretary of Agriculture under authority of the Act of March 3, 1905, c. 1405, 10 Fed. Stat. Annot. 89, fixed the standards of purity for certain foods and these standards are to be looked to in determining whether food has been transported which was adulterated and misbranded. *United States v. Frank*, (S. D. Ohio 1911) 189 Fed. 195. See *contra* *United States v. St. Louis Coffee & Spice Mills* (E. D. Mo. 1909) 189 Fed. 191.

**Jurisdiction.**—In *United States v. J. L. Hopkins & Co.*, (E. D. N. Y. 1912) 199 Fed. 649, the court said: "The law, in section 2, prohibits the introduction into any state of any article of food or drugs, adulterated or misbranded, and provides that any person who shall ship or deliver for shipment, from any state to any other state, any such adulterated article, shall be guilty of a misdemeanor. The defendant contends that, inasmuch as the statute relates to interstate commerce, no jurisdiction can be acquired, except through the existence of interstate commerce. That much of the defendant's contention is correct, and prosecution can be had in no district except one in which prosecution is authorized and jurisdiction given by the statute. The question of regulation, or the manner of administration in the Department of Agriculture, could not prevail over the express language of the statute."

**Sufficiency of indictment.**—In *Schraubstadter v. United States*, (C. C. A. 9th Cir. 1912) 199 Fed. 568, the court said: "The first objection interposed by defendants challenges the sufficiency of the indictment. The alleged misbranding was preliminarily inves-

tigated by the proper officer of the Department of Agriculture, but it will be seen that the fact of such investigation is not set forth in the indictment, nor does it show that any notice was given by the Secretary of Agriculture to the defendants, notifying them of the violation of said act, nor that defendants were thereby afforded an opportunity to present evidence or to be heard. For these and other grounds of like nature it is contended that the indictment is insufficient. In other words, it is argued that the indictment should set forth the doing of the things required to be done under sections 4 and 5 of the act in question. The very contention has been set at rest to the contrary in the case of *United States v. Morgan*, 222 U. S. 274, 32 Sup. Ct. 81, 56 L. Ed. 198. The defendants in that case added mineral salts to water drawn from the water supply in New

York city, and, charging it with carbonic acid, bottled and sold it as 'Imperial Spring Water.' An invoice of this they sold and shipped into New Jersey, and were indicted for shipping misbranded goods in interstate commerce. The indictment there, as here, did not set forth the facts the want of which it is claimed renders the present one objectionable. The court held the indictment sufficient, however, reversing the judgment of the court below to the contrary."

**Statute of limitations.**—See *United States v. J. L. Hopkins & Co.*, (E. D. N. Y. 1912) 199 Fed. 649.

**No imprisonment for the first offense but merely a fine is provided for by this section where the offense is a petty one.** *Frank v. United States*, (C. C. A. 6th Cir. 1911) 192 Fed. 864.

### 1909 Supp., p. 137, sec. 3.

The power given the secretaries is one of regulation only. It is an administrative power, and does not entitle them to alter or

add to the act. *United States v. Antikamnia Chemical Co.*, (1914) 231 U. S. 654, 34 S. Ct. 222.

### 1909 Supp., p. 138, sec. 4.

**Notice and hearing.**—In *United States v. Morgan*, (1911) 222 U. S. 274, 32 S. Ct. 81, 56 U. S. (L. ed.) 198, the court, commenting on the effect of the provision for notice and hearing found in this section, said: "Whether it confers a right upon the defendant, or results in imposing a duty upon the district attorney, can be determined by a brief examination of a few of the provisions of the act. Under the Pure Food Law not only a manufacturer, but any dealer, shipping adulterated or misbranded goods in interstate commerce is guilty of a misdemeanor. In aid of enforcement of the statute it is made the duty of the Department of Agriculture to collect specimens of such articles so shipped, and the Bureau of Chemistry is required to analyze them. But even if the specimen, on analysis, is found to be adulterated, there is no requirement that the case should be turned over at once to the district attorney, for the reason that the 'party from whom the sample was obtained' might be a dealer holding a guaranty from his vendor that the articles were not adulterated. In such case the dealer is not liable to prosecution, but the guarantor (§ 9) is made 'amenable to the prosecutions, fines and other penalties.' The act, therefore, declares (§ 4) that when, on such examination by the board of chemistry, the article is found to be adulterated, 'notice shall be given to the party from whom the sample was obtained. Any party so notified shall be given an opportunity to be heard.' If it then appears that he has violated the statute, the Secretary of Agriculture is required to certify that fact,

together with a copy of the analysis, to the proper district attorney, who (§ 5), without delay, must 'institute appropriate proceedings,' by indictment, or libel for condemnation, or both, as the facts may warrant.

"But the act also contemplates (§ 5) that complaints may be made to the district attorney by state health officials. In that class of cases, no doubt because the state agents investigate without giving a hearing, the district attorney is not obliged to prosecute unless such state officers 'shall present satisfactory evidence of such violation.' But the very fact that he must do so in that event recognizes that he may begin proceedings against a defendant who has not been given a notice and an opportunity to be heard. In providing for notice in one case, and permitting prosecutions without it in another, the statute clearly shows that there was no intent to make notice jurisdictional. This view is strengthened by the fact that it contains no reference to giving notice to anyone except 'to the party from whom the sample was obtained.' And if, on the hearing given him, it appears that he is a dealer holding a guaranty, the act in providing for proceedings against such guarantor contains no suggestion that a new notice shall be given him before an indictment can be submitted to the grand jury."

"Just what may be the purpose of the requirements of section 4 that the Secretary of Agriculture shall give the notice and opportunity to be heard may not be entirely clear. It will be observed that this section only requires the notice to be given to the

person from whom the sample is obtained, who may be only the bailee of the property of which it is a sample, and knows nothing of its ingredients, and affording him an opportunity to be heard. This may be for the purpose of ascertaining who is the real violator of the law, if the analysis shows such violation, with a view of affording him an opportunity to discontinue its violation and proceed lawfully in the conduct of his business under the act and the requirements of the Department of Agriculture." *United States v. Seventy-Five Barrels of Vinegar*, (N. D. Ia. 1911) 192 Fed. 350.

The notice and hearing provided for in this section are not a condition precedent to the bringing of a suit for adulteration and misbranding. *United States v. Seventy-five Boxes of Alleged Pepper*, (D. C. N. J. 1912) 198 Fed. 934. Compare *Frank v. United*

*States*, (C. C. A. 6th Cir. 1911) 192 Fed. 864.

Who is the "proper" United States district attorney. In section 4 it is provided that the Secretary of Agriculture shall at once certify the fact to the *proper* United States district attorney. This means, and means no more, than that the proceedings shall be certified to the district attorney in whose district prosecution should be had. *United States v. J. L. Hopkins & Co.*, (E. D. N. Y. 1912) 199 Fed. 649.

If for any reason the executive department fails to report violations of this law its neglect leaves untouched the duty of the district attorney to prosecute "all delinquents for crimes and offenses cognizable under the authority of the United States" under Rev. Stat. § 771, 4 Fed. Stat. Annot. 155. *United States v. Morgan*, (1911) 222 U. S. 274, 32 S. Ct. 81, 56 U. S. (L. ed.) 198.

## 1909 Supp., p. 138, sec. 5.

Report of secretary of agriculture.—In *United States v. Twenty Cases of Grape Juice*, (C. C. A. 2d Cir. 1911) 189 Fed. 331, the court construing this section, particularly the provision relating to the report of the secretary of agriculture, said: "The different sections of the food and drugs act while relating to different subjects are consistent and, in many respects, interdependent. The second section provides that any person violating the provisions of the act shall be guilty of a misdemeanor and subject to fine and imprisonment. The tenth section provides that articles sold or transported in violation of the provisions of the act shall be liable to seizure and condemnation. Both sections relate to penalties for violations of the act. The penalty under one section is a fine and imprisonment. The penalty under the other section is the forfeiture of the misbranded or adulterated goods. Both sections are penal in their nature. Punishment is as well inflicted by the forfeiture and loss of property as by a fine. The two sections taken together (with the first section which relates to manufacture in territories) cover the subject of the punishment imposed for breaches of the provisions of the statute. Section 5 of the act must also be read in connection with sections 2 and 10. The latter, as we have seen, relate to penalties. The former provides for the enforcement of such penalties. It makes it the duty of the proper district attorney upon the presentation of 'satisfactory evidence' of a violation of the act by any state health or food officer to cause appropriate proceedings to be instituted and prosecuted. It also provides that the district attorney shall institute such proceedings in case the secretary of agriculture shall report to him any violations of the act. But in this case it is not required that evidence of a violation of the act shall be presented. The report of the secretary is in itself made the basis of proceedings. Now, if section 5 stood apart from other provisions

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of the statute it would contravene a practice so long and well established as almost to amount to a fundamental right, viz.: That proceedings for the punishment of the citizen shall be instituted only after investigation by some public official. To compel a district attorney to institute proceedings upon the report of another official without requiring the latter to investigate before making such report would be most extraordinary. And this act does not so require. It is made the duty of the district attorney to act upon the report of the secretary of agriculture without the presentation of evidence required in other cases only because section 4 of the act throws the duty of making investigation upon the secretary before he makes his report. The preliminary examination in such case is made by the secretary instead of the district attorney. The sections are interdependent and must be read together, and when so read they are found to present an orderly and a just procedure. As then the 'report' of the secretary of agriculture referred to in section 5 is the certificate of facts which he is required to make under section 4, it necessarily follows that the steps required to be taken preliminary to certifying the facts—including notice and hearing—must be taken before such a report as the law requires can be made. And it also follows, upon principles already considered, that when such report is at all a prerequisite to proceedings under section 5, it is as necessary to proceedings for the enforcement of penalties by way of forfeiture as by way of fine or imprisonment."

Duty of United States attorney to institute proceedings.—Section 5 of the act imposes upon the United States attorney of the proper district the duty of instituting the appropriate proceedings whenever he is informed by the local authorities, or by the report and certificate of the Secretary of Agriculture, that the law has been violated, to commence without delay the appropriate

proceedings for the alleged violation of this act. And whenever such information or report is made to him he has no discretion but to proceed as directed by that section; and he is not required to investigate and deter-

mine whether or not the Secretary of Agriculture has performed his duty under the law. *United States v. Seventy-Five Barrels of Vinegar*, (N. D. Ia. 1911) 192 Fed. 350.

## 1909 Supp., p. 138, sec. 6.

"The terms 'drugs' and 'food' as here used are mere terms of description. If the Pharmacopœia or National Formulary says something is a drug, it is a drug under the meaning of the act. Or if it comes under the other description of what a drug is, it is a drug, and so food also is described. There are no standards fixed in either case, for, if any substance or mixture is intended to be used for the cure, mitigation, or prevention of disease of either man or other animals, it is nevertheless a drug whether it is recognized in the Pharmacopœia or National Formulary or not. The standard for food was fixed by the Department of Agriculture under the act of 1903. If one in the business of making food products would look for the standard he would find it in the promulga-

tions of the Secretary of Agriculture made under direct authority of Congress. The Act of 1903 does not describe any offense, but the Act of 1906 says that if any article of food adulterated or misbranded is manufactured or transported so as to become the subject of interstate commerce, the maker, transporter, etc., shall be guilty of an offense. How shall it be known whether he is guilty of an offense or not? The answer is clear, By referring to the standards which have been established under the authority of Congress." *United States v. Frank*, (S. D. Ohio 1911) 189 Fed. 195.

Wine as "food."—Food as used in this section includes "wine." *United States v. Sweet Valley Wine Co.*, (N. D. Ohio 1913) 208 Fed. 85.

## 1909 Supp., p. 138, sec. 7.

The mixture referred to in the first subdivision "in the case of food" must be held to include a chemical compound as well as a mechanical mixture. While this does not accord with the scientific definition of a mixture, yet in common acceptance mixtures and compounds are not discriminated. The evil intended to be remedied by the statute is not limited to a mechanical mixture, but is just as potent when the chemical union results from the two substances with the deleterious effect intended to be prevented by the act. *Lexington Mill & Elevator Co. v. United States*, (C. C. A. 8th Cir. 1913) 202 Fed. 615.

The word "colored" must be held to include any artificially produced change in the natural color of the substance "in a manner whereby damage or inferiority is concealed," even if the change is a removing of color. This is the evident intent of the statute. The act is essentially remedial, and its evident purpose is not to be defeated by any narrowness of construction. *Lexington Mill & Elevator Co. v. United States*, (C. C. A. 8th Cir. 1913) 202 Fed. 615.

"Added."—In *United States v. Forty Barrels & Twenty Kegs of Coca-Cola*, (E. D. Tenn. 1911) 191 Fed. 431, the question in dispute was whether coca-cola was adulterated in that it contained an added ingredient, "caffeine," which was alleged to be a poisonous and deleterious ingredient. On this question the decision of the court was "that the use of the word 'added' as applied to poisonous and deleterious ingredients in articles of food other than confectionery, in sections 7 and 8 of the Act, cannot be regarded as meaningless; and that, by contrast with the provision in section 8 that confectionery, which is usually an artificial

compound, shall be deemed to be adulterated if it contain any 'ingredient deleterious or detrimental to health,' and with the provision in section 11 that admission may be refused to any food or drug offered to be imported into the United States if it be adulterated or misbranded within the meaning of the Act or 'otherwise dangerous to the health of the people of the United States,' it was intended to provide by sections 7 and 8 that any article of food manufactured and sold in this country in interstate commerce should not be deemed to be adulterated merely because it contained a poisonous or deleterious ingredient, except in the case of confectionery, but that all other articles of food, whether simple or compound, were not to be deemed adulterated on account of the presence of a poisonous or deleterious ingredient unless such ingredient was 'added' to the article of food in question, that is, was an ingredient foreign to its natural or normal constituency; and that this distinction applies, by the specific provisions of section 8, to compound articles of food known under their own distinctive names; not an imitation or offered for sale under the distinctive name of any other article, and properly labeled as to the place of manufacture. Thus a natural article of food, for example, coffee, cannot be deemed adulterated, even although the average cup contains a larger amount of caffeine than an ordinary drink of coca-cola, and even if caffeine may properly be regarded as a deleterious ingredient injurious to health, since such caffeine is clearly not an added ingredient to the coffee, foreign to its composition, but is one of the essential ingredients naturally and normally entering into its composition. So an article

of food which is not sold under a distinctive trade name but under a well recognized name that has acquired a distinct meaning in general popular usage, as for example, sausage, cannot be deemed adulterated within the meaning of the Act, however deleterious to health some of its normal ingredients may be, provided that as manufactured and sold it does not contain any other poisonous or deleterious ingredients, added to its normal and customary constituents. And so, likewise, I think it is clear from the provisions of the Act that a compound article of food which is manufactured and sold under its own distinctive name and properly labeled, with whose qualities and effect the public has become familiar, and for which they see fit to buy it, is not to be deemed adulterated within the meaning of the Act, provided that when manufactured and sold under this distinctive name it contains no poisonous or deleterious ingredients in addition to its normal and customary constituents, as it has been habitually and regularly manufactured and sold to the public under such distinctive name; although, of course, if it were attempted to add to an article of food thus sold under its distinctive name another ingredient which it had not regularly and habitually contained under the distinctive name under which it had been sold to the public, and such added ingredient were poisonous or deleterious it would thereby become subject to condemnation under the provisions of the Act."

"Injurious to health."—The object of the law was evidently: (1) To insure to the purchaser that the article purchased was what it purported to be; and (2) to safeguard the public health by prohibiting the inclusion of any foreign ingredient deleterious to health. The statute is to be read in the light of these objects, and the words "injurious to health" must be given their natural meaning. *Lexington Mill & Elevator Co. v. United States*, (C. C. A. 8th Cir. 1913) 202 Fed. 615.

Adulteration by addition of filthy decomposed or putrid substance.—The ordinary use of "adulteration" implies an actual addition to the original substance, through human agency. But the word as used in the section does not restrict this to addition by the hand of man, and if the adulteration of filthy, decomposed, or putrid substance has been added by nature, and is contained in the article to be shipped, it is adulterated in the eyes of the law. *United States v. Sprague*, (E. D. N. Y. 1913) 208 Fed. 419.

In *Sligh v. Kirkwood*, (Fla. 1913) 61 So. 185, it was held that a statute of Florida prohibiting immature citrus fruits produced within the borders of the state from becoming the subjects of shipment or sale, did not conflict with this section. The court said: "By the sixth subdivision of section 7 of the last-named act, the prohibition against vegetable substances, which, as we interpret it, would include citrus fruit, is that if it is whole or in part filthy, decomposed or putrid, then it is debarred as a subject of

commerce. Green or immature fruit may be as deleterious to health as the same fruit in an overripe or decomposed state. The act of Congress debar the latter, but says nothing as to the former, thus leaving the field of deleterious immaturity of fruit open to be dealt with by the states."

"Filthy" as applicable to substance containing bacilli.—A substance containing bacilli liable to cause disease, to such an extent as to make it dangerous for food purposes, is certainly "filthy," under the meaning of that word as generally used, and especially since the result of investigation has shown that filth or dirtiness is dangerous through the germs which it contains, and not solely because of offense to the senses. *United States v. Sprague*, (E. D. N. Y. 1913) 208 Fed. 419.

Adulteration due to decomposition.—See *United States v. Four Hundred & Forty-Three Cans of Frozen Egg Product*, (C. C. A. 3d Cir. 1912) 193 Fed. 589.

"Flavor" and "extract" are not synonymous terms, and consequently the contents of a bottle labeled "Flavor of Vanilla" are not adulterated where the liquid does not contain any extract from the "vanilla bean" but does have a vanilla flavor. *United States v. St. Louis Coffee & Spice Mills*, (E. D. Mo. 1909) 189 Fed. 191.

Alleging adulteration.—An information which charges that there was an adulteration of an article, but fails to state in what particular it was adulterated, states a conclusion without making the necessary averments from which the conclusion can be fairly reached. *United States v. St. Louis Coffee & Spice Mills*, (E. D. Mo. 1909) 189 Fed. 191.

Facts held not to show adulteration or misbranding.—In *Hall-Baker Grain Co. v. United States*, (C. C. A. 8th Cir. 1912) 198 Fed. 614, the facts were as follows: The H. Company, at Kansas City, Mo., on April 3, 1909, contracted to sell to the W. Company at Ft. Worth, Tex., 5,000 bushels of No. 2 red wheat, according to the Missouri official state grades. On April 29, 1909, the H. Company ordered the operator of a public elevator where it stored its grain to ship to the W. Company in fulfillment of this contract No. 2 red wheat. The operator loaded and sent to the W. Company a car of wheat. After this wheat was loaded, the official inspector of the state of Missouri at Kansas City inspected, adjudged, and certified this wheat to be No. 2 red wheat. An invoice of it was forwarded to the W. Company dated May 3, 1909, showing that it was shipped under the contract of April 3, 1909, and subject to Kansas City weights and grades. The wheat arrived in Texas without change. The Texas inspector, the federal inspector, and other witnesses there found it to be, and it was, wheat of another and less valuable grade. None of the officers or employees of the H. Company had any knowledge of this fact, or anything to do with the grading or shipping, except to order the operator of the public elevator to ship No. 2 red wheat.

It was held that the H. Company was not guilty of misbranding or of adulteration within the meaning of sections 7 and 8 of the Pure Food Act. The court said: "The act of Congress was not enacted to catch and punish merchants who are conducting their business by customary and approved methods with no intent to deceive purchasers or to injure the public health, for the mistakes of third persons over whom they have no con-

trol, nor for trivial errors of their own, which at first blush may seem to bring their action within the inhibition of the law, but by which in reality they violate neither its letter nor its spirit."

What constitutes an adulteration of flour. — See *Lexington Mill & Elevator Co. v. United States*, (C. C. A. 8th Cir. 1913) 202 Fed. 615.

## 1909 Supp., p. 139, sec. 8.

State statute on subject of misbranding. — In *Savage v. Jones*, (1912) 225 U. S. 501, 32 S. Ct. 715, 56 U. S. (L. ed.) 1182, wherein it is held that an Indiana statute providing for the disclosure of ingredients of feeding stuffs coming from another state and sold in the original packages, did not conflict with the United States statutes on the subject of foods and drugs, the court said: "It will be observed that in its enumeration of the acts which constitute a violation of the statute, Congress has not included the failure to disclose the ingredients of the article, save in specific instances where, for example, morphine, opium, cocaine, or other substances particularly mentioned, are present. It is provided that the article 'for the purposes of this Act' shall be deemed to be misbranded if the package or label bear any statement, design or device regarding it or the ingredients or substances it contains, which shall be false or misleading (§ 8). But this does not cover the entire ground. It is one thing to make a false or misleading statement regarding the article or its ingredients, and it may be quite another to give no information as to what the ingredients are. As is well known, products may be sold, and in case of so-called proprietary articles frequently are sold, under trade names which do not reveal the ingredients of the composition, and the proprietors refrain from revealing them. Moreover, in defining what shall be adulteration or misbranding for the purposes of the federal act, it is provided that mixtures or compounds known as articles of food under their own distinctive names, not taking or imitating the distinctive name of another article, which do not contain 'any added poisonous or deleterious ingredients' shall not be deemed to be adulterated or misbranded if the name be accompanied on the same label or brand with a statement of the place of manufacture (§ 8). Congress has thus limited the scope of its prohibitions. It has not included that at which the Indiana statute aims. Can it be said that Congress, nevertheless, has denied to the state, with respect to the feeding stuffs coming from another state and sold in the original packages, the power the state otherwise would have to prevent imposition upon the public by making a reasonable and non-discriminatory provision for the disclosure of ingredients, and for inspection and analysis? If there be such denial it is not to be found in any express

declaration to that effect. Undoubtedly Congress, by virtue of its paramount authority over interstate commerce, might have said that such goods should be free from the incidental effect of a state law enacted for these purposes. But it did not so declare. There is a proviso in the section defining misbranding for the purposes of the Act that 'nothing in this Act shall be construed' as requiring manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas 'except in so far as the provisions of this Act may require to secure freedom from adulteration or misbranding' (§ 8). We have already noted the limitations of the provisions referred to. And it is clear that this proviso merely relates to the interpretation of the requirements of the Act, and does not enlarge its purview or establish a rule as to matters which lie outside its prohibitions." See also *Standard Stock Food Co. v. Wright*, (1912) 225 U. S. 540, 32 S. Ct. 784, 56 U. S. (L. ed.) 1197.

This section is not void for uncertainty as applied to an indictment for misbranding wines, for not establishing a standard for the various wines enumerated in the indictment. *United States v. Sweet Valley Wine Co.*, (N. D. Ohio 1913) 208 Fed. 85, wherein the court said: "Respecting the second ground of the demurrer, the argument as stated in the brief of counsel is as follows: 'Our second ground of demurrer goes to all the five counts of the indictment, and it is that the said act of Congress is void as applied to this particular case because it fails to fix standards for the various wines enumerated in said counts. We do not contend by this ground of demurrer that the said act of Congress is unconstitutional as applied to other cases, but what we maintain is that it is void for uncertainty and indefiniteness as applied to this case.'

"And to that point are cited a number of cases in which the proposition is urged that a penal act is void for uncertainty in which the offense depends, 'not on any standard erected by the law which may be known in advance, but on one erected by a jury, and especially so as that standard must be as variable and uncertain as the views of the different juries may suggest, and as to which nothing can be known until after the commission of the crime.' This citation is typical of other authorities depended upon by counsel for defendant. They are cases

in which the question of what is a just and reasonable rate or toll of compensation for the transportation of passengers or freight is left open to determination by the various tribunals before which the case comes by the statute which makes an undue charge an offense.

"Again we say that the words used both in the statute and in this indictment must be given their ordinary and common meaning in the absence of something to demand a special definition. The word 'wine' is, by general acceptance and standard definition, understood to mean the fermented juice of the undried grape. The contention of the defendant would make it practically impossible for Congress to pass an act to correct the evils at which this statute is aimed, for the reason that it would be necessary, not only to amplify the act with very particular and minute definitions of standards, but to be constantly amending it and supplementing it as new devices and compounds were placed upon the market. All that can be done, granting that Congress has the right to strike at the evils in question, is to pass a statute in general terms, using words of ordinary acceptance."

**Meaning of "compound."**—See *Frank v. United States* (C. C. A. 6th Cir. 1911) 192 Fed. 864.

In the case of a "compound" it is not a compliance with the section merely to mark the word "compound" on the package but the substances composing the compound must be indicated. *William Henning & Co. v. United States*, (C. C. A. 5th Cir. 1912) 193 Fed. 52.

**Alleging misbranding.**—The information should set out the facts which go to show a misbranding. *United States v. St. Louis Coffee & Spice Mills*, (E. D. Mo. 1909) 189 Fed. 191.

**Illustrations.**—*A can containing sesame oil and bearing a label reading "Imported Salad Oil Morel Brand"* is not misbranded as the label does not import that the can contains olive oil. *Von Bremen v. United States*, (C. C. A. 2d Cir. 1912) 192 Fed. 904.

**The words "pure pepper"** used on boxes containing a combination of ground pepper and ground piper longum held to amount to misbranding. *United States v. Seventy-five Boxes of Alleged Pepper*, (D. C. N. J. 1912) 198 Fed. 934.

**"Hudson's Extract."**—Where there is no proof that the words "Hudson's Extract" have a well-known meaning, an imitation of vanilla marked "Hudson's Extract," without giving any indication as to what the article is composed of, shows a clear case of misbranding under the pure food law. *Hudson Mfg. Co. v. United States*, (C. C. A. 5th Cir. 1912) 192 Fed. 920.

**The use of the geographical name "Mocha"** in connection with sale of coffee grown in Abyssinia was declared to be a misbranding under a rule adopted by virtue of section 3, in *United States v. Thomson & Taylor Spice Co.*, (N. D. Ill. 1912) 198 Fed. 565. In this case the defendant company was charged with

a violation of the misbranding section of the pure food law, in that there had been the use of the geographical name "Mocha" in connection with the sale of coffee grown in Abyssinia. Against the defendant it was urged the word "Mocha" could lawfully be used only to designate coffee grown in Arabia. The court said: "The facts are that on one side of the Red Sea is Arabia and on the other side is Abyssinia. Coffee is, and for centuries has been, grown in both of these countries. Up to about 200 years ago practically all of the Arabian product and a portion of the Abyssinian product was shipped out through the port of Mocha, located on the Arabian side of the Red Sea. Because of this fact, this coffee was called Mocha. At that time, owing to the formation of a sand bar obstructing the entrance to the harbor of Mocha, that port ceased to be the point of shipment for the coffee product, and since that time it has come out mainly through the port of Aden, in Arabia. This is the case now with respect to both the Arabian and Abyssinian product, as it was up to 200 years ago with respect to both products at the port of Mocha.

"The pure food regulation adopted under the authority conferred by the pure food law is as follows:

"(c) The use of a geographical name in connection with a food or drug product will not be deemed a misbranding when, by reason of long usage, it has come to represent a generic term, and is used to indicate a style, type, or brand; but in such cases the state or territory where any such article is manufactured or produced shall be stated upon the principal label."

"It will be observed that Mocha is not a place where the coffee is manufactured or produced. As above stated, it is merely the port through which originally the coffee referred to found its way to market. This being true, the above regulation plainly requires the use of the word 'Abyssinian' in connection with the word 'Mocha' to cover coffee grown in Abyssinia, as the same law requires the use of the word 'Arabian' in connection with 'Mocha' to cover coffee grown in Arabia.

"In view of the fact that it was agreed on all sides that this case was brought as a test to determine this question, the minimum penalty of \$1 will be imposed."

**Hair tonic.**—See *Armour v. Wanamaker*, (C. C. A. 3d Cir. 1913) 202 Fed. 423, where in the court said: "The proofs on behalf of the plaintiffs, which was the only testimony in the cases, tended to show that Mrs. Armour, the decedent, a few days before her death, bought in defendant's store in Philadelphia, hair tonic contained in a bottle closed with a tight, ground glass stopper. The bottle was labeled as being an 'Extract from Herbs, Roots and Flowers,' but in reality about 60 per cent. to 80 per cent. of it was alcohol. Under the legislative definition of section 8 of the federal Food and Drug Act of 1906, this bottle was misbranded, in that said section provides that there is a misbranding, in case of drugs, . . . if

the package fail to bear a statement of the quantity of proportion of any alcohol . . . contained therein. The proofs also tended to show that, in further contravention of the provisions of section 2 of said act, which provides that the introduction into any state . . . from any other state . . . of any . . . drugs, . . . which is misbranded, is hereby prohibited, the defendant delivered said misbranded bottle to the purchaser's home in New Jersey. The omission of the defendant to properly brand, as required by statute, this bottle as containing alcohol, and the introduction of the package into an interstate commerce prohibited by the act, clearly afforded competent evidence for submission to a jury on the question of defendant's negligence. The principle is clear that the omission to fulfill a statutory imposed obligation creates statutory negligence."

"*London Dry Gin*" contained in a label

affixed to a bottle containing gin is not a descriptive phrase, which points to the place of origin, but describes a well known liquor having certain characteristics that identify it wherever it may be made, and the fact that the liquor is not made in London does not show that the bottle is misbranded. *United States v. Thirty-Six Bottles of London Dry Gin*, (E. D. Pa. 1913) 205 Fed. 111.

*Bottles labeled "Grenadine Syrup"* held on the evidence not to have been misbranded. *United States v. Thirty Cases Grenadine Syrup*, (D. C. Mass. 1912) 199 Fed. 932.

*Bottles and labels thereon, representing the contents to be champagne* which representation is false may be forfeited for misbranding. *United States v. Five Cases of Champagne*, (N. D. N. Y. 1913) 205 Fed. 817.

*Misbranding of flour*.—See *Lexington Mill & Elevator Co. v. United States*, (C. C. A. 8th Cir. 1913) 202 Fed. 615.

## 1909 Supp., p. 141, sec. 9.

In general.—Dealers who sell to their customers a high grade of goods, packed and inspected in accordance with approved methods, and expressly guaranteed under the Pure Food Act, with no defect discoverable by the exercise of the sense of sight, smell, or taste, and hotel keepers and victualers who furnish such goods to their guests for food, are not liable for injuries to such customers or guests caused by eating such food, though it is in fact found to be poisonous. *Trafton v. Davis*, (1913) 110 Me. 318, 86 Atl. 179, following *Bigelow v. Maine Cent. R. Co.*, (1912) 110 Me. 105, 85 Atl. 396.

Time of obtaining guaranty.—In *Steinhardt Bros. & Co. v. United States*, (C. C. A. 2d Cir. 1911) 191 Fed. 798, it was held that a guaranty obtained by a dealer four days before his trial and more than eighteen months after prosecution was initiated against him was ineffective as a defense. The court said: "Four days before the trial, more than 18 months after prosecution was initiated, defendant obtained the signature of such a guaranty by another corporation, known as *Deimel Bros. & Co.*, doing a similar business in the same building as defendant. There was some testimony as to business relations between the two corporations, and as to the one holding a controlling interest in the

other. The trial judge refused to admit the guaranty in evidence on the express ground that it was dated June 6, 1910; whereas the information was filed November 24, 1909. Such refusal is assigned as error. In our opinion his ruling was correct. If Congress had intended that a dealer could avoid conviction by obtaining a guaranty from the manufacturer after his prosecution had begun, it would presumably have evidenced that intention by providing 'no dealer shall be convicted,' instead of providing that 'no dealer shall be prosecuted.' So, too, the section provides that he is to have the guaranty signed by the person 'from whom he purchases the articles,' language which seems to imply that guaranty and purchase are related transactions. Moreover, the guaranty is to be of such a sort and so given that the guarantor can be himself convicted of the offense. He surely could be if his guaranty had been signed before the shipment of a misbranded article; the shipment being the offense. It would seem that he could not be convicted of the offense of shipment when he did not sign the guaranty until long after the offense had been committed. We think the statute should be construed according to its natural interpretation. The judgment is affirmed."

## 1909 Supp., p. 141, sec. 10.

Constitutionality.—"Bearing in mind the authority of Congress to make effectual regulations to keep impure or misbranded articles out of the channels of interstate commerce, we think the provisions of § 10 are clearly within its power. Indeed it seems evident that they are measures essential to the accomplishment of the purpose of the act." *Mr. Justice Day in McDermott v. State of Wisconsin*, (1913) 228 U. S. 115, 33 S. Ct. 431, 57 U. S. (L. ed.) 754.

Proceedings summary in character.—These proceedings for the seizure and condemnation of property which is impure or adulterated are intended to be in a sense summary, and yet the statute is construed to give the owner a right to a hearing in a court of record with a right of review upon questions of law by writ of error in the Circuit Court of Appeals, and, where more than one thousand dollars is involved, finally in the Supreme Court. *Four Hundred & Forty-Three Cans of Frozen*



*Egg Product v. United States*, (1912) 226 U. S. 172, 33 S. Ct. 50, 57 U. S. (L. ed.) 174.

**Jurisdiction.**—Section 10 provides for the seizure of goods within any district where the same may be found. But that relates to a civil proceeding against the goods themselves, and does not in any way determine in what jurisdiction a criminal proceeding can be brought. The provision of the Constitution, that the trial of all crimes shall be by jury, and such trial held in the state where the crime shall have been committed, does not in any way affect prosecution under this statute, for the state in which prosecution is to be had is clearly defined by the statute itself. *United States v. J. L. Hopkins & Co.*, (E. D. N. Y. 1912) 199 Fed. 649.

**Condition precedent.**—When a proceeding is instituted by a United States attorney under this section solely upon the report and certificate of the Secretary of Agriculture to him of a violation of said act, and not upon his own initiative, or upon information furnished to him by the local authorities, such proceedings can be sustained, although the Secretary of Agriculture has not, prior to the commencement of such proceedings, in fact given the notice and afforded to the person from whom the sample was

obtained an opportunity to be heard, as provided in section 4. *United States v. Seventy-Five Barrels of Vinegar*, (N. D. Ia. 1911) 192 Fed. 350, refusing to follow *United States v. Twenty Cases of Grape Juice*, (C. C. A. 2d Cir. 1911) 189 Fed. 331, to the contrary.

**Sufficiency of libel.**—See *United States v. Certain Cans of Syrup*, (E. D. Pa. 1911) 192 Fed. 79.

**Trial by jury.**—It is probable that Congress inserted the provision for a trial by jury with a view to removing any question as to the constitutionality of the act. *Four Hundred & Forty-Three Cans of Frozen Egg Product v. United States*, (1912) 226 U. S. 172, 33 S. Ct. 50, 57 U. S. (L. ed.) 174.

**Appeal.**—In seizures under this act the proceedings in the District Court are at law, and the Circuit Courts of Appeals are without jurisdiction to review the same on appeal. *United States v. Hudson Mfg. Co.*, (C. C. A. 5th Cir. 1912) 200 Fed. 956.

A writ of error is the only method of reviewing a condemnation proceeding under this section. *Lexington Mill & Elevator Co. v. United States*, (C. C. A. 8th Cir. 1913) 202 Fed. 615.

## GAME ANIMALS AND BIRDS.

### Vol. III, p. 152, sec. 3.

**Construction of statute.**—"Unquestionably said act makes it unlawful for a person to deliver to any common carrier for transportation and for any common carrier to transport from one state or territory to another state or territory the bodies or parts thereof of any wild animals or birds that have been killed in violation of the laws of the state or territory where they were killed, but permits the transportation of dead birds or animals killed during the open season, when they may be lawfully taken and the export of which is not prohibited by the laws of the state or territory or district where they are killed. But it requires that all packages containing said birds or animals, the ones permitted to be shipped, of course, in interstate commerce, shall be marked and designated in a certain way, that the contents of the packages may be readily ascertained on inspection of the outside, and provides a fine of \$200 for each violation by the shipper and the consignee knowingly receiving such article shipped and the carrier transporting same. It is apparent from this law that the Con-

gress recognized, not only the power of the states to preserve and protect their game and fish, but the extreme difficulty of the successful exercise of such power, and provided, as it could do, reasonable regulations for the shipment of such game as was not unlawfully killed, and was permitted to be exported from the state in which it was captured to another state, and whether this was done with a view to facilitate the shipment of such game, or to assist the different states in the enforcement of their game laws, by requiring such shipments to be so made, labeled, and marked that the nature of the contents thereof may be readily ascertained from a casual inspection of the outside of the package, so that the officer enforcing the local measures will not be troubled to examine such shipments to ascertain if they are but subterfuges to evade the game laws of the locality where discovered, can make no difference. This law is a valid one, and its requirements are plain." *Eager v. Jonesboro, Lake City & Eastern Exp. Co.*, (1912) 103 Ark. 288, 147 S. W. 60.

## HABEAS CORPUS.

Vol. III, p. 162, sec. 751.

**Scope of the writ.**—The proper federal court may release by writ of habeas corpus one who is being restrained of his liberty for many years by virtue of the judgment of a federal court beyond its jurisdiction and therefore void, but it may not release one so held by virtue of a judgment which is erroneous but within the jurisdiction of the court which rendered it, and hence not void. *Stevens v. McClaughry*, (C. C. A. 8th Cir. 1913) 207 Fed. 18.

**In custody of state court—Will not interfere with state court.**—To the same effect as the original note, see *Ex parte Bartlett*, (E. D. Wis. 1912) 197 Fed. 98.

**The writ cannot perform the office of a writ of error.**—*Glasgow v. Moyer*, (1912) 225 U. S. 420, 32 S. Ct. 753, 56 U. S. (L. ed.) 1147; *Johnson v. Hoy*, (1913) 227 U. S. 245, 33 S. Ct. 240, 57 U. S. (L. ed.) 497; *Ex parte Spencer*, (1913) 228 U. S. 652, 33 S. Ct. 709, 57 U. S. (L. ed.) 1010; *Charlton v. Kelly*, (1913) 229 U. S. 447, 33 S. Ct. 945, 57 U. S. (L. ed.) 1274, 46 L.R.A.(N.S.) 397; *Ex parte Blodgett*, (N. D. Ia. 1911) 192 Fed. 77; *Stevens v. McClaughry*, (C. C. A. 8th Cir. 1913) 207 Fed. 18.

Vol. III, p. 167, sec. 753.

**Unconstitutional state statute.**—The repugnancy of a statute to the constitution of a state by whose legislature it was enacted cannot authorize a writ of habeas corpus from a court of the United States, unless the

petitioner is in custody by virtue of such statute, and unless also the statute is in conflict with the Constitution of the United States. *Ex parte Januszewski*, (S. D. Ohio 1911) 196 Fed. 123.

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## HEALTH AND QUARANTINE.

Vol. III, p. 214, sec. 4792.

**State quarantine laws.**—Quarantine regulations are essential measures of protection which the states are free to adopt when they do not come into conflict with federal action. In view of the need of conforming such measures to local conditions, Congress from the beginning has been content to leave the

matter for the most part, notwithstanding its vast importance, to the states and has repeatedly acquiesced in the enforcement of state laws. *Minnesota Rate Cases*, (1913) 230 U. S. 352, 406, 33 S. Ct. 729, 57 U. S. (L. ed.) 1511, 48 L.R.A.(N.S.) 1151.

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## HOMICIDE.

Vol. III, p. 231, sec. 5339.

**Former jeopardy.**—Where, upon an indictment for murder in the first degree, the jury finds the defendant guilty of murder in the second degree, and he appeals and obtains a new trial, it amounts to a waiver of the plea

of former jeopardy, and he may be tried the second time for murder in the first degree. *United States v. Gonzales*, (W. D. Wash. 1913) 206 Fed. 239.

## HOSPITALS AND ASYLUMS.

Vol. III, p. 259, sec. 4825.

**Instrumentality of United States government.**—“A consideration of the provisions of the act of Congress of March 21, 1866, which created and provided for the perpetual maintenance of the National Home for Disabled Volunteer Soldiers, as a great national charity to be supported by appropriations from the national treasury, together with an examination of the many subsequent acts of Congress which have explicitly defined the purposes, limited the powers, regulated the management, and controlled the expenditures of the Home, leads us to the conclusion that

the essential character and functions of this ‘establishment’ are those of an agency—an instrumentality of the United States government.” King, J. in *Brooks Hardware Co. v. Greer*, (Me. 1913) 87 Atl. 889.

Trustee process does not lie against the National Home for Disabled Volunteer Soldiers in an action brought in a state court, as it has no place of business “within the state” where the land in use by it has been ceded to the United States. *Brooks Hardware Co. v. Greer*, (Me. 1913) 87 Atl. 889.

Vol. III, p. 261, sec. 4830.

**Allowance of interest in decree against Home.**—A decree allowing interest on an amount found due a contractor upon two contracts for the construction of buildings for the National Home is not erroneous by virtue of such allowance. *National Home for Disabled Volunteer Soldiers v. Parrish*, (1913) 229 U. S. 494, 33 S. Ct. 944, 57 U. S. (L. ed.) 1296, affirming (C. C. A. 6th Cir. 1912) 194 Fed. 940, wherein the court said: “It is urged that interest is not recoverable against the United States in the absence of some statutory provision or authorized stipulation, and that, as the Home is a governmental agency, a like exemption applies to it. It is quite true that the United States cannot be subjected to the payment of interest unless there be an authorized engagement to pay it or a statute permitting its recovery. . . . But this exemption has never as yet been applied to subordinate governmental agencies. On the contrary, in suits against collectors to recover moneys illegally exacted as taxes and paid under protest the settled rule is,

that interest is recoverable without any statute to that effect, and this although the judgment is not to be paid by the collector but directly from the treasury. . . . Without now attempting to lay down a rule for all governmental agencies, we think the exemption of the United States is not applicable to the Home. It is a distinct corporate entity, invested with powers, duties and responsibilities which, in the judgment of Congress, required that it be given power to sue in its own name and be subjected to liability to be sued. Although under the ultimate supervision of Congress, it has a board of managers which exercises a general control over its affairs, and has a corps of other officers of its own, who are in immediate charge of its activities. It makes contracts and incurs contractual liabilities in its own name, expends and disburses the moneys available for its support and maintenance, and in general occupies a position which takes it without the reasons underlying the Government’s exemption from interest.”

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## IMMIGRATION.

Vol. III, p. 314, sec. 8.

A civil action may properly be brought for the failure to comply with the provisions of this statute. *United States v. Atlantic Fruit Co.*, (C. C. A. 2d Cir. 1913) 206 Fed. 440.

1909 Supp., p. 162, sec. 2.

**Power of Congress.**—Congress may exclude aliens of a particular race or class from the

United States, prescribe the terms and conditions upon which aliens may come into

this country or remain here, establish regulations for sending out of the country such aliens as come here in violation of law and such as remain here in violation of law, and may commit the enforcement of such laws to the executive officers of the government without judicial intervention or interference. *Ex parte Pouliot*, (E. D. Wash. 1912) 196 Fed. 437.

The term "aliens," as used in the act, has reference to alien immigrants and not to alien residents. *United States v. Tsuji Suekichi*, (C. C. A. 9th Cir. 1912) 199 Fed. 750. See also *United States v. Rodgers*, (C. C. A. 3d Cir. 1911) 191 Fed. 970.

**Moral turpitude.**—In *United States v. Uhl*, (S. D. N. Y. 1913) 203 Fed. 152, which was a habeas corpus proceeding, it appeared that the petitioner was an alien seeking admission to this country and it was established before the immigration officials that he had been convicted in England of the offense of criminal libel in that he had published defamatory statements regarding the king. The officials went further, examined the report of the proceedings at the trial and determined therefrom that the acts of the petitioner involved moral turpitude. Thereupon they found that he had been convicted of a crime embracing it and ordered his exclusion. It was held that this was error, as the offense did not, in its inherent nature, involve moral turpitude and the petitioner was therefore released from custody. The court said: 'In determining whether aliens are entitled to admission, the immigration authorities act in an administrative and not in a judicial capacity. They must follow definite standards and apply general rules. Consequently, in classifying offenses I think that they must designate as crimes involving moral turpitude those which in their inherent nature include it. Their function is not, as it seems to me, to go behind judgments of conviction and determine with respect to the acts disclosed by the testimony the questions of purpose, motive and knowledge which are often determinative of the moral character of acts. Besides, the testimony is seldom available, and to consider it in one case and not in another is to depart from uniformity of treatment. In my opinion when it has been shown that an immigrant has been convicted of a crime, the only duty of the administrative officials is to determine whether that crime should be classified as one involving moral turpitude, according to its nature and not according to the particular facts and circumstances accompanying a commission of it. I do not think the immigration law intends that where two aliens are shown to have been convicted of the same kind of crime, the authorities should inquire into the evidence upon which they were convicted and admit the one and exclude the other. It is true that if they do not take such course some aliens who have been convicted of high crimes may be excluded although their particular acts evidence no immorality and that some who have been convicted of slight offenses may be admitted although the facts

surrounding their commission may be such as to indicate moral obliquity. But such results always follow the use of fixed standards and such standards are, in my opinion, necessary for the efficient administration of the immigration laws.'

**Time of admission of guilt.**—The provision of this section, excluding persons who admit having committed a crime involving moral turpitude, applies to admissions made after entry into the country as well as prior to entry. *United States v. Williams*, (C. C. A. 2d Cir. 1912) 200 Fed. 538.

**Evidence—Proof of specified kind required.**—In *United States v. Williams*, (S. D. N. Y. 1913) 203 Fed. 155, which was a case involving the right of Cipriana Castro, late president of Venezuela, to enter this country, the court said: "The board of special inquiry has held, and its decision has been affirmed upon appeal to the Secretary of Commerce and Labor, that Gen. Castro shall be excluded because he has admitted the commission of a crime involving moral turpitude, viz., the murder of Gen. Paredes, and therefore falls within the excluded class of 'persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude.' It is to be noted that Congress has required in respect to this particular class of aliens proof of a specified kind and no other, viz., either a conviction in the country where the crime was committed or an admission by the alien. There is no pretense of any conviction, and I think ordinary proof is not sufficient. Testimony of unimpeached eye-witnesses that they had seen Gen. Castro kill Gen. Paredes with his own hand in cold blood would not only be insufficient, but would be wholly incompetent. Therefore telegrams passing between the state department and its representatives at Caracas upon which the board relied are not evidence whatever to connect Gen. Castro with the death of Gen. Paredes. When examined before the special board, he had the right to insist that the proof on this point be restricted to that required by the act, viz., his own admission. This provision must have been intended as a limitation upon the power of the immigration authorities. It deprives them of the right to try the question of guilt at all. So it is a privilege to aliens because it insures them against any such trial. This privilege is entirely taken away if an admission may be rested upon presumptions arising from the alien's refusing to answer questions on the subject when under examination. I think the act contemplates an explicit and voluntary admission."

**Exclusive power is given the immigration officials** to determine what is satisfactory evidence under this section. *United States v. Rodgers*, (C. C. A. 3d Cir. 1911) 191 Fed. 970.

**Burden of proof.**—The burden is upon the immigration authorities to show that any alien denied the right to enter does fall within one of these exceptions to the general

privilege. Although an alien who has not yet entered may not enjoy the constitutional guaranties of citizens, he has rights under

this law which must be respected. *United States v. Williams*, (S. D. N. Y. 1913) 203 Fed. 155.

### 1909 Supp., p. 163, sec. 3.

**Constitutionality.**—In *Zakonaite v. Wolf*, (1912) 228 U. S. 272, 33 S. Ct. 31, 57 U. S. (L. ed.) 218, the constitutionality of this section was attacked because violative of the guaranties that no person shall be deprived of life, liberty or property without due process of law, and that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, as contained in the Fifth and Sixth Amendments. The court in sustaining the constitutionality of the section, said: "As to the first point, an examination of the evidence upon which the order of deportation was based convinces us that it was adequate to support the secretary's conclusion of fact. That being so, and the appellant having had a fair hearing, the findings are not subject to review by the courts. With respect to the second point little more need be said. It is entirely settled that the authority of Congress to prohibit aliens from coming within the United States and to regulate their coming includes authority to impose conditions upon the performance of which the continued liberty of the alien to reside within the bounds of this country may be made to depend; that a proceeding to enforce such regulations is not a criminal prosecution within the meaning of the Fifth and Sixth Amendments; that such an inquiry may be properly devolved upon an executive department or subordinate officials thereof, and that the findings of fact reached by such officials, after a fair though summary hearing, may constitutionally be made conclusive, as they are made by the provisions of the act in question. The appellant raises some other constitutional objections, viz.: that the Immigration Act vests in the federal authorities the power to try an immigrant for a violation of the penal laws of the state of which he has become a resident, and so interferes with the police powers of the state; that the act vests judicial powers in an executive branch of the Government; that it violates the constitutional guaranty of the privilege of the writ of habeas corpus, and the like. These are without substance, and require no discussion."

**Place of commission of offense.**—In *United States v. Lair*, (C. C. A. 8th Cir. 1912) 195 Fed. 47, it appeared that the indictment, omitting the formal and superfluous parts, charged "that the defendant at Chicago, within the Northern Judicial District of Illinois, unlawfully, willfully, and knowingly did import into the United States for the purpose of prostitution . . . a certain alien woman, naming her, who was then a citizen of the Republic of France." It was contended that the offense charged in the indictment could not have been committed at Chicago

as the offense must have been consummated the moment the alien reached the United States which must have been at some other place than Chicago. In overruling this contention the court said: "Did the court rightly assume to so know as a fact against the finding and judgment of the United States District Court for the Northern District of Illinois that the offense was committed within that district? We think not. Count 1 of the indictment does not allege that this woman 'came as an immigrant from the Republic of France into the United States.' The averment is that the woman 'was then a citizen of the Republic of France;' that is, when she was imported into the United States at Chicago, as alleged in the indictment. Whether or not she 'came over the sea' direct from the Republic of France into the United States at New York, or at some other place on the Atlantic coast and thence by rail, or in some other manner, to Chicago, we have no means of knowing. . . . This woman might have been resident in the Dominion of Canada, and from there came by a Canadian boat, flying the Canadian flag, into and through the Straits of Mackinaw, thence into Lake Michigan and direct to Chicago. Or she may have come direct from France into the Dominion of Canada via the Gulf of St. Lawrence, thence by boat to Toronto, thence by rail to Georgian Bay, and thence by a Canadian boat through the Straits of Mackinaw into Lake Michigan and direct to Chicago without entering the United States or being unlawfully within their jurisdiction, until she landed at Chicago. True, while upon the lake, she would be upon the waters of the United States, and may have been so when in the Straits; but, if the woman did not leave the boat, she might be within the jurisdiction of Canada, and not within the United States for the purpose forbidden by this act of Congress. It was not impossible, therefore, for the woman to have been first brought into the United States for the unlawful purpose at Chicago. But the question is, not so much, Where did the woman first enter the United States? as it is, Where did the defendant commit the offense? It was not necessary that he should have accompanied the woman from some foreign country into the United States in order to have committed the offense. If he while in Chicago had arranged by correspondence with this woman in France or some other foreign country to come from such country to Chicago for the unlawful purpose, and had sent to her a through ticket from her home to Chicago, or the money to pay her passage, and she had come to Chicago pursuant to such arrangement, might not the offense have been committed in Chicago?"

**Time of committing offense.**—“Time is not an element of the offense; and, if committed within three years prior to the finding of the indictment, would be sufficient. The act of 1907 contains a general repealing clause of prior acts; but section 28 saves from the effect of such repeal all acts or things done or committed at the time the act is to take effect. This would save all offenses committed under the act of 1903, and they might be prosecuted under that act after the act of 1907 became effective.” *United States v. Lair*, (C. C. A. 8th Cir. 1912) 195 Fed. 47.

**Time for deportation.**—“Section 3, both in the original act and as amended, relates exclusively to the importation of aliens for the purposes of prostitution or other immoral purposes, the holding of such persons for such purposes in pursuance of such importation, and aliens found inmates of houses of prostitution after they have entered the United States or who derive benefit from the earnings of the same. This section, unlike section 2, contains in its body the remedy to be applied, namely, deportation ‘in the manner’ provided by sections 20 and 21 of the act, from which it is evident that Congress meant to deal with this class of persons separately from the larger class included in section 2. Now ‘in the manner provided’

does not necessarily include the three-year limitation contained in sections 20 and 21; and when we take into account that in amending the original section 3 Congress dropped the three-year limitation therein contained, changed the clause ‘shall be deported as provided by’ to the clause ‘shall be deported in the manner provided,’ and that the amendment was intended to effectuate the recommendation of a commission, appointed to look into the matter, that the three-year limitation should be eliminated, and that the members of Congress having the amendment in hand, as shown by the Congressional Record, believed that the limitation was thereby eliminated, it was rightly found by the court below, we think, that the words ‘in the manner provided’ were not intended to include the three-year limitation, but only the procedure contained in those sections. That this was the intention of the amendment is made still clearer by the provision in the same amendment that any alien convicted under the provisions of the act might be sentenced to a prison in this country for a period of ten years, at the expiration of which his deportation should take place.” *Chomel v. United States*, (C. C. A. 7th Cir. 1911) 192 Fed. 117.

### 1909 Supp., p. 164, sec. 5.

**Degree of proof.**—Under this act, which makes the offense a misdemeanor, the government, even when proceeding against the defendant for the penalty only, must fur-

nish the degree of proof required in a criminal case. *United States v. Regan*, (C. C. A. 2d Cir. 1913) 203 Fed. 433.

### 1909 Supp., p. 166, sec. 10.

The decision of the board of special inquiry is final, and will not be inquired into on habeas corpus proceedings, nor is it material that the body of the relator is not produced in court on the return day of the writ.

*United States v. Williams*, (S. D. N. Y. 1913) 203 Fed. 292.

This section is cited in *United States v. Williams*, (S. D. N. Y. 1913) 204 Fed. 844, 846, 847, 848.

### 1909 Supp., p. 166, sec. 12.

**Requirement mandatory.**—The requirement of this section that the manifest shall be filled up at the port of embarkation, is mandatory. *United States v. Coombes*, (C. C. A. 2d Cir. 1912) 200 Fed. 400, wherein the court said: “The words, being precise and unambiguous, should be enforced according to their plain meaning. Consideration of sections 12 and 15 shows that Congress had a definite scheme in mind, which it used appropriate words to express. It distinguished very clearly between the requirements imposed upon masters of vessels bringing aliens into the United States and those imposed upon masters of vessels taking alien passengers out of the United States. It distinguished clearly between the penalties to be imposed in the two cases. Lists of all aliens coming into the country were to be furnished, containing information especially concerning

their right to admission. On the other hand, lists of alien passengers only going out of the country with very little information were required. Masters of vessels bringing in aliens, who failed to comply with the act, were subjected to a penalty for each alien ‘concerning whom the above information is not contained in any list as aforesaid.’ But masters of vessels taking alien passengers out of the United States were subjected only if they failed ‘without good cause’ to deliver the list, to a penalty of \$10 ‘for each alien not included in said list,’ the fine in no case to exceed \$100. All this shows the plain intention to be more stringent in the case of aliens coming into, than of alien passengers going out of, the United States. If we have a right to look into the reasonableness of the requirement under consideration, it seems to us entirely so. Alien immigrants

are more likely to answer the questions accurately when they embark than they are at the end of a voyage, which gives them an opportunity to advise each other of the various causes which will prevent their admission

into the United States. Besides, it is fairer to advise them of their disabilities, if any, at the port of embarkation, so that they may be saved a useless voyage, if they are ineligible."

## 1909 Supp., p. 168, sec. 16.

"Landing."— "When section 16 provides that a 'temporary removal shall not be considered a landing,' the reference is to landing as effecting the lawful entry of the alien into the United States. 'Landing' refers, not to physically being on land, but to an act equivalent to an entry. In section 19 it will be noted that the cost of the maintenance of deported aliens 'while on land' shall be borne by the owner of the vessel. Surely, if Congress deemed it necessary to provide in plain language that expense of maintenance 'while on land' should be paid by the owners of vessels, in the case of aliens sub-

sequently excluded, it would have expressly provided (if it so intended) that expense of maintenance of aliens ultimately admitted should be similarly paid. Section 19 recognizes that the alien, though not entitled to a 'landing,' may physically be on land, and he is on land whether at Ellis Island or elsewhere than on the vessel. Reading sections 16 and 19 together, it is apparent that the act had provided for a sensible and necessary method of handling these arriving immigrants." *United States v. Holland-America Line*, (S. D. N. Y. 1913) 205 Fed. 943.

## 1909 Supp., p. 169, sec. 19.

Purpose of section.— This section is not aimed at the aliens of the excluded class, but at the owners of vessels unlawfully bringing them into this country. *United States v. Nord Deutscher Lloyd*, (1912) 223 U. S. 512, 32 S. Ct. 244, 56 U. S. (L. ed.) 531, wherein the court said: "The Government might in large measure protect itself by inspection, rejection and order of deportation, but it is purposed also, as far as possible, to protect the alien. He might be ignorant of our laws and ought to be deterred from incurring the expense of making a passage which could only end in his being returned to the country from whence he came. This policy could best be subserved by securing the co-operation of the transportation companies, and to this end the statute required that they should not only maintain the aliens unlawfully brought by them into this country, but should take them back free of charge. In the absence of this last provision the company might well afford to accept as passengers those known or suspected to belong to the excluded class. It would receive from them their passage money from Europe to America. If they passed the inspection the transaction was ended. If they were deported the company would be at the trifling expense of maintaining them while here. But if it could charge and secure payment for the return passage, it would collect two fares instead of one. This would have made the transportation of an excluded alien more profitable than the carrying of one who could lawfully enter. This was so obvious that the statute not only required the cost of their

passage to be borne by the transportation company, but prohibited the making of a charge or the taking of security for the return passage, which might be collected or enforced at the end of the journey. *United States v. Nord Deutscher Lloyd*, (1912) 223 U. S. 512, 32 S. Ct. 244, 56 U. S. (L. ed.) 531.

Scope of section.— This section has no extra-territorial operation, and a vessel owner cannot be indicted for what he did in a foreign country, but such an owner and a passenger can in a foreign country make a contract which will be of force in the United States, and if by reason of facts occurring in this country the statute operates to rescind the contract, the rights and duties of the parties can be determined in this country and acts of commission or omission which as a result of the rescission are here unlawful can here be punished. *United States v. Nord Deutscher Lloyd*, (1912) 223 U. S. 512, 32 S. Ct. 244, 56 U. S. (L. ed.) 531.

Failure to enter alien on ship's manifest.— It was not the intention of the Immigration Act that an alien should be deported in case the ship's master failed, either wilfully or negligently, to include him in the manifest, and such an alien, though literally "brought to this country in violation of law" within the meaning of this section, is not within its provisions. *United States v. Williams*, (S. D. N. Y. 1909) 193 Fed. 228.

Strictly construed.— This section must be strictly construed. *International Mercantile Marine Co. v. United States*, (C. C. A. 2d Cir. 1912) 192 Fed. 887.

## 1909 Supp., p. 170, sec. 20.

Deportation within three years.— The alien must be taken into custody and deported, that is, taken out of the country,

within three years. *International Mercantile Marine Co. v. United States*, (C. C. A. 2d Cir. 1912) 192 Fed. 887.

**Deportation of Chinese.**—The Immigration Act of 1907 is applicable to Chinese aliens illegally coming to this country, notwithstanding the special acts relating to the exclusion of Chinese. *United States v. Prentiss*, (C. C. A. 7th Cir. 1912) 202 Fed. 65; *Billings v. Ham*, (C. C. A. 1st Cir. 1913) 202 Fed. 914.

Where the officers of the government see fit to bring proceedings for the deportation of Chinese under this act instead of the Chinese Exclusion Acts they must follow strictly the provisions of this act; they cannot invoke the provisions of both. *United States v. Sisson*, (C. C. A. 2d Cir. 1913) 206 Fed. 450.

**Sufficiency of warrant for arrest or deportation.**—A warrant for the arrest or deportation of an alien need only comply substantially with the law and need not conform to all technicalities of criminal pleading. *Ex parte Pouliot*, (E. D. Wash. 1912) 196 Fed. 437, wherein the court said: "Both the warrant of arrest and the deportation warrant charge that the alien Pouliot has been found unlawfully in the United States, and that he is a member of the excluded classes, in that he procured, imported, or brought into the United States a woman or girl for the purpose of prostitution or other immoral purpose. Such charge is a sufficient compliance with the law. The alien was fully apprised of the charge against him and was given full opportunity to defend against it. The claim that the charge should state the name of the woman brought in and the time and place where she was brought in is not well founded. . . . The claim that he cannot be deported until after conviction of the crime of importing the woman into this country, and that the warrant should charge such conviction, is without merit. Section 2 of the act of 1910 excludes persons who have been convicted of, or admit having committed, a felony, or other crime or misdemeanor involving moral turpitude; but no such degree or character of proof is required in the case of those who procure or attempt to bring in prostitutes, or women or girls for the purpose of prostitution, or for other immoral purposes. . . . There is a variance between the warrant of arrest and the warrant of deportation in the case of the Masse woman; the former reciting that she entered the United States at Eastport, Idaho, in the year 1908, for the purpose of prostitution, while the latter charges an entry at Detroit, Mich., in the year 1911. Both warrants charge, however, that subsequent to her entry into the United States the woman was found an inmate of a house of prostitution, and practicing prostitution. The latter is a distinct ground for deportation under section 3 of the act of 1910, and the time of deportation is not limited to

three years from the date of entry. . . . Furthermore, the woman unlawfully entered this country on both dates and at both places. The warrants are therefore sufficient."

**Amendment of warrant of deposition.**—Where, on proceedings to deport Chinese persons because illegally in the United States, they are erroneously ordered to be deported to China, the court, on habeas corpus proceedings, will not discharge them but will amend the warrant so as to require their deportation to the proper country from whence they come. *United States v. Sisson*, (C. C. A. 2d Cir. 1913) 206 Fed. 450.

"Country from whence they came."—In proceedings for the deportation of Chinese persons under this act where it is shown that they came into this country from Canada, and there is no proof that they were born in China, evidence that they are Chinese is no proof that China is the land from whence they came and they should be returned to Canada instead of China. *United States v. Sisson*, (C. C. A. 2d Cir. 1913) 206 Fed. 450.

But it has been held that the words "returned to the country whence he came" were intended to refer to the place of nativity or citizenship. *Frick v. Lewis*, (C. C. A. 6th Cir. 1912) 195 Fed. 693.

**Review by courts.**—Unless and until it is proved to the satisfaction of the judge that a hearing properly so called was denied before the immigration officers, the merits of the case are not open and the denial of a hearing cannot be established by proving that the decision is wrong. *Prentiss v. Seu Leung*, (C. C. A. 7th Cir. 1913) 203 Fed. 25.

The findings of the immigration officers on deportation proceedings under this section are conclusive on questions of fact if there is any evidence to support them, but errors of law may be reviewed on habeas corpus. *United States v. Williams*, (C. C. A. 2d Cir. 1912) 200 Fed. 538. See also *Prentiss v. Di Giacomo*, (C. C. A. 7th Cir. 1911) 192 Fed. 467, followed in *Prentiss v. Stathakos*, (C. C. A. 7th Cir. 1911) 192 Fed. 469; *United States v. Williams*, (S. D. N. Y. 1913) 204 Fed. 828.

Where there is nothing to support a charge, the department cannot rightfully issue a warrant to deport. But where a fair though summary hearing has been given, in ascertaining whether there is or is not any proof tending to sustain a charge, it is not open to courts to consider either admissibility or weight of proof according to the ordinary rules of evidence, even if it believe the proof was insufficient and the conclusion wrong. The question is whether anything was offered that tends, though slightly, to sustain the charge. *Frick v. Lewis*, (C. C. A. 6th Cir. 1912) 195 Fed. 693.

## 1909 Supp., p. 170, sec. 21:

**Failure to guard safely.**—*United States v. Pavy*, (E. D. N. Y. 1912) 193 Fed. 1006,

the evidence was held to be insufficient to hold the captain of a vessel liable for the es-



cape of an immigrant who was about to be deported.

**Re-entry after temporary absence.**—Where an alien who has lived in this country three years leaves temporarily, the three year period begins to run again from the time of his return, so that if he violates any provision of the Immigration Act on his return he may be deported any time within three years thereafter. *Frick v. Lewis*, (C. C. A. 6th Cir. 1912) 195 Fed. 693; *Siniscalchi v. Thomas*, (C. C. A. 6th Cir. 1912) 195 Fed. 701.

**Deportation to avoid necessity for extradition proceedings.**—Where the record discloses that an alien is in this country in violation of the immigration laws, an abuse of discretion on the part of the immigration authorities cannot be predicated of the discharge of official duty simply because the government of the country of which the alien is a subject desired and requested his return thereto. *Siniscalchi v. Thomas*, (C. C. A. 6th Cir. 1912) 195 Fed. 701.

**Necessity for conviction under section 3.**—The right to deport an alien under this sec-

tion for bringing into this country an alien woman for purposes of prostitution does not depend upon a conviction under section 3 of this act. *Frick v. Lewis*, (C. C. A. 6th Cir. 1912) 195 Fed. 693. See also *Siniscalchi v. Thomas*, (C. C. A. 6th Cir. 1912) 195 Fed. 701.

**Procedure.**—Officers of the government, to whom the determination of questions of deportation are intrusted, are not bound by the rules of criminal procedure, nor by rules of evidence applied in the courts. It is not enough for a review of their decision on habeas corpus that there was no sworn testimony, or no record of the testimony or of the decision. No formal complaint or pleadings are required. The alien's opportunity to be heard need not be upon any regular set occasion, nor according to the forms of judicial procedure. It may be such as will secure the prompt, vigorous action contemplated by Congress and appropriate to the nature of the case. *Siniscalchi v. Thomas*, (C. C. A. 6th Cir. 1912) 195 Fed. 701.

## 1909 Supp., p. 172, sec. 25.

**Finality of decision excluding alien.**—The law is well settled that one seeking to enter the United States is entitled to a fair hearing as to his right to do so before the executive officers, though the hearing may be a summary one; that, having had such a hearing, the decision of the Commissioner of Immigration, or of the Secretary of Commerce and Labor on appeal, against his right to enter, is due process of law, and is conclusive upon the immigrant, even though wrong. If a fair, though summary, hearing has been denied the immigrant, the District Court has jurisdiction to hear the matter, upon the merits, upon habeas corpus, and release the immigrant, if it be shown on the hearing before it, even by evidence not offered on the hearing before the executive officers, that he does not belong to any one of the excluded classes. As a preliminary to entering upon a trial of the merits, the District Court must first determine that the immigrant was denied a fair hearing before the Commissioner of Immigration, or before the Secretary upon appeal to him from the Commissioner. *United States v. Williams*, (S. D. N. Y. 1911) 190 Fed. 897; *United States v. International Mercantile Marine Co.*, (C. C. A. 3d Cir. 1912) 194 Fed. 408; *Prentiss v. Cosmas*, (C. C. A. 7th Cir. 1912) 196 Fed. 372; *Ex parte Pouliot*, (E. D. Wash. 1912) 196 Fed. 437; *United States v. Ruiz*, (C. C. A. 5th Cir. 1913) 203 Fed. 441.

In *Ex parte Pouliot*, (E. D. Wash. 1912) 196 Fed. 437, the court said:

"The claim that the petitioners were not accorded a full and fair hearing before the executive officers is based upon the fact that the inspector took certain affidavits *ex parte* and in the absence of the petitioners, and reported certain facts communicated to him by

third persons, to the department. There is no denial of the fact that the petitioners were given a full and fair opportunity to be heard, and that all testimony offered in their behalf was received. What amounts to such a full and fair hearing as the law contemplates has never been defined by the courts. Perhaps the practice of submitting *ex parte* affidavits and of reporting independent facts is not to be commended; but the mere fact that such a report has been made, or such affidavits transmitted, will not entitle an alien to a release on habeas corpus, unless it appears that he has, or may have been, prejudiced thereby. No such prejudice can be predicated on the acts of the inspector in this case. The *ex parte* affidavits taken, and the *ex parte* statements made, simply tend to confirm facts which appear in the testimony of the petitioners themselves, and could not change the result. Were I to exclude all incompetent testimony and determine the case *de novo* on the competent testimony alone, I could not reach a different conclusion."

In *United States v. Williams*, (S. D. N. Y. 1911) 190 Fed. 686, a writ of habeas corpus against the United States Commissioner of Immigration to compel him to release an alien about to be deported was dismissed for reasons stated by the court as follows:

"The alien is deported, among other reasons, as a person likely to become a public charge. Having been accorded a hearing, such as is required under the Japanese Immigrant Case, (1903) 189 U. S. 86, 23 S. Ct. 611, 47 U. S. (L. ed.) 721, the court cannot inquire as to whether there is any evidence at all which would justify the board in coming to that conclusion as matter of fact or matter of law. As I understand the

decisions of the Supreme Court, the only cases in which a court may interfere are those in which the immigrant has been denied some right accorded him by the statute itself, or in case the facts appear without contradiction from which as matter of law it follows that he is not an alien at all.

... Even the determination of that question, if it depends upon disputed facts, seems to be within the control of the executive.

... Nor do I understand that even an abuse of authority is reviewable, provided that a hearing be given and certain elementary procedural rights are observed in form. The Japanese Immigrant Case, *supra*, came up on demurrer to a traverse alleging that the hearing was 'pretended,' and that the relator did not know what the inquiry was about. This I interpret as meaning that abuse of their powers by the authorities is a matter only of executive discipline provided that the requisite forms are not violated. If so, it is quite clear that there is no such review as comes up on motion for a nonsuit in an action at law before a jury, and that the fact that the record has no evidence justifying the result in law is no ground for discharging the alien. Therefore I do not here examine the question of whether there is any evidence whatever in the writ which could possibly justify the Secretary of Commerce and Labor in deporting the relator, either as one admitting that he had committed a crime, or as one likely to become a public charge, because both those questions I hold to be without my jurisdiction. If this be so, it becomes unnecessary to determine whether the admission of having committed a crime involving moral turpitude mentioned in section 2 of the act must take place at the time of the hearing or may occur before. It also renders unnecessary a determination whether the admission actually made upon the hearing by the relator was an admission of the commission of such a crime. It is enough that the relator is an alien and that he has been accorded the opportunity to call witnesses, to be represented by counsel, to be informed of what is charged against him, and to have a hearing before the designated tribunal and a chance to present his side. All these he has, and that takes the matter away from a court."

The hearings and examinations, though summary, must nevertheless afford the alien fair opportunity to establish his right to enter the United States, or remain therein after entry; and if such fair opportunity has not been accorded, he has not had due process of law, and may, for relief, avail himself of a writ of habeas corpus. *United States v. Martin*, (W. D. N. Y. 1912) 193 Fed. 795.

## 1909 Supp., p. 173, sec. 26.

**Review.**—The discretion which the Secretary of Labor is given by this section cannot be reviewed by the courts. *United States v. Williams*, (S. D. N. Y. 1913) 204 Fed. 847.

Originally the decision of the appropriate immigration officers was final if adverse to the admission of the alien; by the next amendment the decision was final whether adverse or favorable; and by this act it is final only when adverse to the alien. *United States v. Lim Jew*, (N. D. Cal. 1910) 192 Fed. 644.

**Finality of decision admitting alien.**—This section reinstates the law respecting the finality of the decisions of the immigration officers as it stood prior to the Act of March 3, 1903 (10 Fed. Stat. Annot. 102). The action of the Commissioner of Immigration in ordering an alien admitted into the United States is not *res judicata* as against any further action of the board of immigration looking to a deportation of the defendant, as being unlawfully within this country, within three years after his entry herein; nor is such action, being in favor of the defendant's admission, and not adverse thereto, a bar, nor an estoppel against the government proceeding in the courts for determining the defendant's rights to remain in this country. It is only when the decision of the customs officer excludes an alien from admission that his decision is final. *Lim Jew v. United States*, (C. C. A. 9th Cir. 1912) 196 Fed. 736.

**Necessity for following rules of criminal procedure.**—The rules which ordinarily obtain in criminal procedure need not be applied or followed, and formal pleadings are not required, as the taking of testimony of statements of witnesses is not surrounded by the limitations and barriers of judicial proceedings. *United States v. Martin*, (W. D. N. Y. 1912) 193 Fed. 795.

**Counsel to represent alien.**—"There is nothing in the statute which calls for the presence of counsel at the examination of aliens preliminary to admission; nothing to indicate that it was the intent of Congress that these investigations in hundreds of thousands of cases touching the qualifications of an alien seeking to enter were to be conducted as trials in court, with counsel present to represent the alien, witnesses called to testify, and elaborate examination and cross-examination of them. On the contrary, Congress relegated this question to administrative boards who might act summarily and expeditiously, and, to provide against an abuse of their discretion, accorded to the alien a right of appeal to the Secretary of Commerce and Labor. Nor do the rules provide for the presence of counsel at such examinations. The only rule cited regulates the amount of fees which the attorney of an alien may exact." *United States v. Williams*, (S. D. N. Y. 1911) 190 Fed. 897.

## 1909 Supp., p. 175, sec. 35.

A warrant of deportation is defective which does not name the country from whence the alien came and to which he is to be deported. For this reason it is uncertain, and authorizes deportation nowhere. It must contain specific directions for the protection of the

party to be deported, and for the information of the deporting authorities and agencies. And it ought to be clear whether the alien is being deported under section 3, 20, 21, or 35 of the Immigration Act. *Ex parte Yabucanin*, (D. C. Mont. 1912) 199 Fed. 365.

## 1909 Supp., p. 175, sec. 36.

Chinese aliens, entering into the United States surreptitiously in a manner prohibited by this act, and the rules made in pursuance of it, may be summarily deported by order of the Secretary of Commerce and Labor

at any time within three years. *United States v. Wong You*, (1912) 223 U. S. 67, 32 S. Ct. 195, 56 U. S. (L. ed.) 354, *followed* in *Frick v. Lee Tung Jung*, (C. C. A. 6th Cir. 1913) 205 Fed. 38.

## 1909 Supp., p. 178, sec. 1.

This section is considered in *United States v. Holland-America Line* (S. D. N. Y. 1913) 205 Fed. 943.

## 1912 Supp., p. 89, sec. 1.

**Alien defined.**—An alien has been defined to be "one born out of the jurisdiction of the United States, and who has not been naturalized under their Constitution and laws." *Low Wah Suey v. Backus*, (1912) 225 U. S. 460, 32 S. Ct. 734, 56 U. S. (L. ed.) 1165.

**Finality of decisions of immigration officials.**—That Congress may pass laws forbidding aliens or classes of aliens from coming within the United States and may provide for the expulsion of aliens or classes of aliens from its territory and may devolve upon the executive department or subordinate officials the right and duty of identifying and arresting such persons, is well settled. A series of decisions in the Supreme Court has settled that such hearings before executive officers may be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and

orders made upon such hearings it must be shown that the proceedings were manifestly unfair, that the action of the executive officers was such as to prevent a fair investigation or that there was a manifest abuse of the discretion committed to them by the statute. In other cases the order of the executive officers within the authority of the statute is final. *Low Wah Suey v. Backus*, (1912) 225 U. S. 460, 32 S. Ct. 734, 56 U. S. (L. ed.) 1165.

The three years' period of limitation provided by the original section within which a steamship company could be required to pay costs of deportation is abrogated by the amendment, but the amendment has no retroactive effect. *United States v. International Mercantile Marine Co.*, (E. D. Pa. 1913) 204 Fed. 702.

## 1912 Supp., p. 90, sec. 2.

**Construction and constitutionality.**—In *Bugajewitz v. Adams*, (1913) 228 U. S. 585, 33 S. Ct. 607, 57 U. S. (L. ed.) 978, Mr. Justice Holmes, having before him the construction and constitutionality of this statute, said: "By the Act of February 20, 1907, c. 1134, § 3, 34 Stat. 898, 899, any alien woman found practicing prostitution within three years after she should have entered the United States was to be deported 'as provided by sections twenty and twenty-one of this act.' This section was amended by the Act of March 26, 1910, c. 128, § 2, and the limitation of three years was stricken out, but the amendment still refers to §§ 20, 21, and orders deportation 'in the manner provided by' §§ 20, 21. The beginning of these two sections provides for the taking into custody of aliens subject to removal, within three years from entry, and so it has

been argued in other cases that the three-year limitation still holds good. The construction of the amendment was not relied on here, but before we can deal with the constitutional question it becomes necessary to dispose of that point. We are of opinion that the effect of striking out the three-year clause from § 3 is not changed by the reference to §§ 20, 21. The change in the phraseology of the reference indicates the narrowed purpose. The prostitute is to be deported, not 'as provided' but 'in the manner provided' in §§ 20, 21. These sections provide the means for securing deportation, and it still was proper to point to them for that. . . . The attempt to reopen the constitutional question must fail. It is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful.

The determination by facts that might constitute a crime under local law is not a conviction of crime, nor is the deportation a punishment; it is simply a refusal by the government to harbor persons whom it does not want." See also *Schwartz v. Adams*, (1913) 228 U. S. 592, 33 S. Ct. 609, 57 U. S. (L. ed.) 980.

The provision of this section that "any alien . . . who shall receive, share in, or derive benefit from any part of the earnings of any prostitute . . . shall be deemed to be unlawfully within the United States and shall be deported, . . ." is not unconstitutional as an infringement of the police power of the states. *Siniscalchi v. Thomas*, (C. C. A. 6th Cir. 1912) 195 Fed. 701.

**Time of deportation unlimited.**—To the same effect as the original note, see *Ex parte Cardonnel*, (N. D. Cal. 1912) 197 Fed. 774; *Ex parte Garcia*, (N. D. Cal. 1913) 205 Fed. 53.

**Not retroactive.**—In *United States v. Tsuji Suekichi*, (C. C. A. 9th Cir. 1912) 199 Fed. 750, the court said: "It is perfectly manifest, from a careful reading of the amendatory act, that it is not intended to be retroactive. It prescribes that any alien who shall do the things therein denounced shall be deemed to be unlawfully within the United States, looking to the future. Then it provides that any alien who shall, after he has been debarred or deported in pursuance of the provisions of this section (section 3 of the act of 1910), attempt to return to or to enter the United States, shall be deemed guilty of a misdemeanor, and any alien who shall be convicted under any of the provisions

of this section shall at the expiration of his sentence be taken into custody and returned to the country whence he came, etc., all providing with reference to future conduct, and not in any way relating to what has been done in the past.

"Words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied."

"Applying the rule here, there can be no doubt that it was not the intentment of Congress to make section 3 of the act of 1910 retroactive in its operation."

**Harboring alien.**—This section denounces the importation into the United States of any alien for the purpose of prostitution; but it does not denounce the harboring of any alien for like purpose, except it be in pursuance of such importation. The act of 1907 made it an offense to harbor for the purpose of prostitution any alien woman or girl; but this part of the act was declared unconstitutional, as inimical to the police powers of the state, in *Keller v. United States*, (1909) 213 U. S. 138, 29 Sup. Ct. 470, 53 L. Ed. 737, 16 Ann. Cas. 1066, and the amendatory act purged the old statute of this objection. *United States v. Tsuji Suekichi*, (C. C. A. 9th Cir. 1912) 199 Fed. 750.

**Return after temporary absence.**—When an alien prostitute once steps beyond the borders of the United States for any purpose, however temporary or transitory, she has no right to return here to resume her illegal calling. *Ex parte Pouliot*, (E. D. Wash. 1912) 196 Fed. 437.

## IMPORTS AND EXPORTS.

### 1909 Supp., p. 180, sec. 1.

**Scope of statute.**—While the Act of 1909 prohibits the importation of opium except for medicinal purposes, it does not make it a criminal offense to divert it for other purposes unless the party so using it knows "the same to have been imported contrary to law"

and it does not apply to opium imported before its enactment. Obviously also it has nothing to do with domestic grown opium. *Marks v. United States*, (C. C. A. 2d Cir. 1912) 196 Fed. 476.

### 1909 Supp., p. 180, sec. 2.

**When offense complete.**—The offense described in this section is committed whenever smoking opium is fraudulently and knowingly brought within the territorial limits of the United States although the

opium may not have been landed from the ship or been carried across the customs lines. *United States v. Caminata*, (E. D. Pa. 1912) 194 Fed. 903.

## INDIANS.

### Vol. III, p. 337, sec. 463.

An attempt of the Secretary of War to establish an Indian reservation would be futile, as such action would by virtue of this section be a plain encroachment of the prerogative of another department of the govern-

ment. *Northern Pac. Ry. Co. v. Mitchell*, (E. D. Wash. 1913) 208 Fed. 469.

This section is quoted in *Leecy v. United States*, (C. C. A. 8th Cir. 1911) 190 Fed. 289.

### Vol. III, p. 356, sec. 2078.

Strictly construed.—This section being penal should be strictly construed. *United States v. Douglas*, (C. C. A. 8th Cir. 1911) 190 Fed. 482, 36 L.R.A.(N.S.) 1075.

"Trade" as used in the section should be given its usual and ordinary meaning and

includes the purchase, by a woman industrial teacher employed by the government on an Indian reservation, of cattle furnished by the United States and issued to Indians. *United States v. Douglas*, (C. C. A. 8th Cir. 1911) 190 Fed. 482, 36 L.R.A.(N.S.) 1075.

### Vol. III, p. 357, sec. 2079.

Contract by treaty prohibited.—It is clear that this section prohibits the making of any contract with the Indians by treaty. *Starr*

*v. Long Jim*, (1913) 227 U. S. 613, 33 S. Ct. 358, 57 U. S. (L. ed.) 670.

### Vol. III, p. 379. [*Sale of cattle of Indians to persons not members of same tribe prohibited.*]

All cattle purchased by the government are affected by this section. *United States v. Anderson* (1913) 228 U. S. 52, 33 S. Ct. 500, 57 U. S. (L. ed.) 727.

Inapplicable to cattle purchased by Indians with own funds.—The statute is a part of the Act of July 4, 1884, making an appropriation for the support and contingent expenses of the Indian Department. It provides that the President may use any sum appropriated for the subsistence of the Indians and not absolutely necessary for that purpose for the purchase of cattle for the benefit of the Indians for whom such appropriation is made. Cattle purchased with money so appropriated are the property of the United States. They do not cease to be such because of their delivery to the Indians for a particular purpose and with a limited right of disposal thereof. It was to protect such property and to prevent the purchase thereof from the Indians without the consent of the government that the criminal provision of the statute was inserted. Where, however, cattle are purchased by an Indian with his own funds or by some officer of the government with funds belonging to him the law referred to can have no application, and was not so intended. *United States v. Anderson*, (D. C. Ore. 1911) 189 Fed. 262.

"Sale" as including mortgage.—The statute has been construed to apply to mort-

gages. *Rider v. La Clair*, (Wash. 1914) 138 Pac. 3, wherein the court said: "That a mortgage is not a sale, but only a lien, has been declared by many if not a majority of all the courts; but it seems to us that it can make no difference whether it is a sale or a lien within the statute. It has been so often declared by statute as well as by judicial decisions that an Indian is not *sui juris*, that because of his inaptitude and congenital lack of an understanding of values, he should, so long as he maintains his tribal relations, be considered a ward of the government—that we find ready application of one of the first principles of statutory construction, that is, a consideration of the old law, the mischief and the remedy. From the time of *Worcester v. Georgia*, (1832) 6 Pet. 515, 582, 8 U. S. (L. ed.) 483, down to *United States v. Celestine*, (1909) 215 U. S. 278, 30 S. Ct. 93, 54 U. S. (L. ed.) 195, it has been the rule of all courts to construe doubtful legislation in favor of the Indian. When so considered, we have no hesitation in holding that a mortgage made by an Indian on cattle held in virtue of the statute is void when made without the sanction of the agent having supervision of the affairs of his tribe. The point is made that the statute is limited in its application to cattle in the possession of the Indian at the time of the passage of the act, because the act is not general, but was included in a bill

appropriating money for the Indian department for the fiscal year 1884. Were this a state statute, there might be some merit in this contention; but it is well known that many of the general laws passed by Congress are tacked onto appropriation bills and to the sundry civil bill, there being no constitutional limitation to hamper Congress in this respect. We think, too, that the act is broad enough to cover the increase of such cattle as the government may furnish."

**Knowledge.**—When one purchases from an Indian cattle which have been previously purchased by the government within the meaning of the act of Congress referred to, he violates the law, although he may not have known that the cattle were so purchased. *United States v. Anderson*, (D. C. Ore. 1911) 189 Fed. 262.

### Vol. III, p. 379, sec. 2129.

**"Trader."**—A trader or seller of merchandise upon eliminated land is not a trader within the Indian country, requiring a license under section 2129 et seq. *Rider v. La Clair* (Wash. 1914) 138 Pac. 3.

### Vol. III, p. 382, sec. 2139.

**"Indian country."**—It is settled law that when the Indian title to lands is extinguished, such lands are no longer "Indian country," that thereafter the general statute prohibiting introduction of intoxicants into the "Indian country" no longer *proprie vigore* applies to such lands, and that if the treaties or statutes by virtue of which the Indian title to such lands is extinguished do not prohibit introduction of intoxicants thereon, or do not continue the application of the general statute, it is lawful to introduce intoxicants there. *United States v. Twelve Bottles of Whiskey*, (D. C. Mont. 1912) 201 Fed. 191.

The criterion to determine what is "In-

dian country" is that all the country which was declared to be Indian country by the Act of June 30, 1834, c. 161, 4 Stat. 729, remains Indian country as long as the Indians retain their original title, and in the absence of a different provision by treaty or by act of Congress ceases to be Indian country whenever that title is extinguished. *Evans v. Victor*, (C. C. A. 8th Cir. 1913) 204 Fed. 361.

That portion of Oklahoma formerly the Indian Territory is still governed by this section. *United States Express Co. v. Friedman*, (C. C. A. 8th Cir. 1911) 191 Fed. 673; *Evans v. Victor*, (E. D. Okla. 1912) 199 Fed. 504.

### Vol. III, p. 384, sec. 1.

**"Indian country."**—It must be assumed that, in the act of 1897, Congress used the words "Indian country" in the accepted sense. *Clairmont v. United States*, (1912) 225 U. S. 551, 32 S. Ct. 787, 56 U. S. (L. ed.) 1201.

In Oklahoma this statute is still in force, at least with respect to the introduction of liquor into Indian country from points outside the state, notwithstanding the Oklahoma Enabling Act which authorized the state to legislate on the subject of the use of intoxicating liquors by the Indians therein. *United States v. Wright*, (1913) 229 U. S. 226, 33 S. Ct. 630, 57 U. S. (L. ed.) 1160.

The Pueblo Indians of New Mexico are affected by this section. *United States v. Sandoval* (1913) 231 U. S. 28, 34 S. Ct. 1.

Ignorance of fact that sale was made to Indian.—In *United States v. Healy*, (D. C. Mont. 1913) 202 Fed. 349, a verdict against one charged with an unlawful sale of intoxicating liquor to an Indian in violation of this section, was set aside by the court on its own motion. The court said: "In this case the court, of its own motion, vacates the sentence and judgment, sets aside the verdict, and discharges the defendant. The conviction was for a felony, an unlawful sale of intoxicating liquor to an Indian con-

trary to Act Jan. 30, 1897, c. 109, 29 Stat. 506. The evidence was that the sale was solicited from defendant, in the ordinary course of his trade of retail liquor dealer in the city of Butte by said Indian, who therein was in the service of government officers as a decoy. It was claimed that there was suspicion that defendant was making like unlawful sales, and it was sought to entrap him. In this instance defendant was ignorant that the purchaser was an Indian, and nothing in the latter's dress, manner, speech, or appearance served to put him on inquiry therein; the Indian approximating those not Indians. The court instructed the jury that in view of the evidence its duty was to convict, and the jury returned a verdict accordingly. After further consideration, I am persuaded a conviction under such circumstances is unjust and contrary to public policy. Hence, the conviction having been at this term, the judgment being 'in the breast of the court,' and the court having full power over it, the order vacating the same. See *ex parte Lange*, 18 Wall. 167, 21 L. Ed. 872. Decoys are permissible to entrap criminals, but not to create them; to present opportunity to those having intent to or willing to commit crime, but not to ensnare the law-abiding in

unconscious offending. Where a statute, as here, makes an act a crime regardless of the actor's intent or knowledge, ignorance of fact is not excuse if the act be done voluntarily; but when done upon solicitation by the government's instrument to that end ignorance of fact stamps the act as involuntary, and excuses, or at least estops the government from a conviction. In the former case the actor is bound to know the facts, and acts at his peril. In the latter case he is relieved of the obligation by the government's invitation, which is of the nature of fraudulent concealment and deceit, and, if not consent, yet doth work an estoppel. Though the seller has violated the statute, he was the passive instrument of the government, and his is a blameless wrong for which he cannot be justly convicted. If, however, the decoy is one whose appearance, or otherwise, conveys knowledge of his disability, or is sufficient to put the seller on inquiry, any sale made is voluntary, establishes guilt, and warrants conviction. For in such case the seller is either of guilty intent, or negligent ignorance or recklessness, which relieves the government's participation of any taint of fraudulent concealment or deceit.

"It will be observed the case at bar is not of those where the actor knows his act violates the law. Of the latter is he who, on solicitation, sells or passes money known to him to be counterfeit, or he who thus mails

prohibited matter, or he who thus sells intoxicants without a license or in 'dry' territory. These latter acts are criminal, let the status of the solicitor be what it may; and hence that he is a decoy does not neutralize the criminal quality of the act. In the case at bar the act is innocent but for the status of the solicitor, and because he is a decoy of concealed disability the act is blameless, and there is estoppel against conviction. Were it otherwise, honest men could easily be made felons. Many of the government's Indian wards are not distinguishable from Caucasians. Any purveyor of liquors, and any one moved by hospitality to share thereof with guests, ignorant of their status, would unhesitatingly sell or give to them. As decoys in the service of government officers, what instruments of oppression they might be to men devoted to law, but ignorant of their disability. That the seller is suspected of voluntary like sales does not justify entrapping as here; for thereby a law-abiding person may as easily be ensnared. And the result proves nothing but overzeal, to put it mildly, of government officers. The practice cannot be tolerated, and a conviction for an offense so procured cannot stand."

Osage Indian ward. — In *Mosier v. United States*, (C. C. A. 8th Cir. 1912) 198 Fed. 54, a person was convicted under this act for selling liquor to an Osage Indian who was under the charge of an Indian superintendent.

## Vol. III, p. 385, sec. 2140.

"Indian country" includes that portion of the state of Oklahoma which formerly comprised the Indian Territory. *Evans v. Victor*, (E. D. Okla. 1912) 199 Fed. 504.

## Vol. III, p. 387, sec. 2145.

The words "sole and exclusive jurisdiction" as employed in this section do not mean that the United States must have sole and exclusive jurisdiction over the Indian country in order that that section may apply to it; the words are used in order to describe the laws of the United States which by that section are extended to the Indian country. *Donnelly v. United States*, (1913) 228 U. S. 243, 33 S. Ct. 449, 57 U. S. (L. ed.) 820.

Murder committed against Indian by one not an Indian. — This section in connection with sec. 5339 (3 Fed. Stat. Annot. 231) plainly includes within its terms the offense of murder committed against the person of an Indian within an Indian reservation by a person not of Indian blood. *Donnelly v. United States*, (1913) 228 U. S. 243, 33 S. Ct. 449, 57 U. S. (L. ed.) 820.

## Vol. III, p. 388, sec. 9.

Scope of section. — In *Donnelly v. United States*, (1913) 228 U. S. 243, 33 S. Ct. 449, 57 U. S. (L. ed.) 820, it was insisted that this section constitutes the only legislation of Congress providing for punishing the crime of murder when committed upon an Indian within the limits of an Indian reservation, and that it operated to repeal § 2145 (see 3 Fed. Stat. Annot. 387), but the court said: "This argument is plainly untenable. The act of 1885, of itself, provides for the punishment of crimes committed by Indians

only. So far from impliedly repealing § 2145, Rev. Stat., it manifestly repeals in part the limitation that was imposed by § 2146 upon the effect of § 2145. It was pointed out by this court in *Ex parte Crow Dog*, (1883) 109 U. S. 556, 571, that 'The provisions now contained in §§ 2145 and 2146 of the Revised Statutes were first enacted in § 25 of the Indian Intercourse Act of June 30, 1834, 4 Stat. 729, 733, c. 161. Prior to that, by the Act of May 19, 1796, 1 Stat. 469, c. 30, and the Act of March 30, 1802, 2 Stat. 139,

c. 13, offenses committed by Indians against white persons, and by white persons against Indians, were specifically enumerated and defined, and those by Indians against each other were left to be dealt with by each tribe for itself, according to its local customs. The policy of the government in that respect has been uniform. The point decided was that certain general expressions in the treaty with the Sioux Indians made in 1868 had not the effect of impliedly repealing the express limitation contained in § 2146. As a result, Crow Dog went unpunished by the federal authority for the murder of Spotted Tail, another Indian. And this no doubt was one of the causes that led to the enactment of § 9 of the Act of March 3, 1885, 23 Stat. 385, as was pointed out in *United States v. Kagama*, (1886) 118 U. S. 375, 383, where § 9 was sustained as valid and constitutional in both its branches, namely, that which provides for the punishment of the crimes enumerated when committed by Indians within the territories, and

that which provides for the punishment of the same crimes when committed by an Indian on an Indian reservation within a state of the Union; and see *In re Wilson*, (1891) 140 U. S. 575, 578."

This section does not apply to Indians whose reservation was thrown open, and who received allotments, under the provisions of the act of Congress of February 8, 1887, known as the Dawes Act, prior to the amendment of that act by the act of Congress of May 8, 1906, c. 2348, 34 Stat. at Large, 182, Fed. Stat. Annot. Supp. 1909, p. 204. *State v. Lott*, (1912) 21 Idaho 646, 123 Pac. 491.

**White persons.**—The federal courts have no jurisdiction under this act of the prosecution of one white person for killing another white person. *United States v. La Plant*, (S. D. S. D. 1911) 200 Fed. 92.

**Indictment.**—An indictment in a federal court for a homicide committed within an Indian reservation should allege that the defendant is an Indian. *United States v. La Plant*, (S. D. S. D. 1911) 200 Fed. 92.

## Vol. III, p. 390, sec. 2148.

"Indian country is a country to which the Indians retained the right of use and occupancy, involving—under certain restrictions—freedom of action and of enjoyment in their capacity as a distinct people, unless by virtue of some reservation expressed at the time of extinguishment of such title, and clearly appearing. In the absence of such, the term does not apply to any tract owned and controlled by the government and devoted by it, whether as a so-called reservation or mere foundation, to the benefit of the Indians, exclusively or otherwise, unattended by any semi-independent use and occupancy involving such title, ownership, and control as has always inhered in the Indians as a distinct people and not merely as individual wards. Whether a reservation for any purpose affecting Indians is of a character sufficient to stamp such lands as Indian country within the meaning of the law must depend upon the scope and purpose of the act creating it, and the nature of the title, use, and occupancy, how held, exercised, and enjoyed."

*United States v. Myers*, (C. C. A. 8th Cir. 1913) 206 Fed. 387.

**Land set apart for schools.**—The setting apart of a limited tract of the public domain for a school which the government devotes mainly, or even entirely, to the training and education of Indian children, attending in their individual capacity, does not operate to convert that tract into Indian country as defined in the statute. *United States v. Myers*, (C. C. A. 8th Cir. 1913) 206 Fed. 387.

The land relinquished to the United States by the Act of June 6, 1900, c. 813, 31 Stat. 676, passed in ratification of an agreement between the United States and the Kiowa, Comanche, and Apache tribes of Indians in Oklahoma entered into October 21, 1892, is no longer Indian land within the meaning of this section although part of the land was reserved by order of the Secretary of the Interior for agency, school, religious and other purposes. *United States v. Myers*, (C. C. A. 8th Cir. 1913) 206 Fed. 387.

## Vol. III, p. 397, sec. 6.

**Suits in equity.**—Rev. Stat. § 723, 4 Fed. Stat. Annot. 530, which declares that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law" does not apply to the United States court created for Indian Territory under this act. *Dill v. Ebey*, (1913) 229 U. S. 199, 33 S. Ct. 620, 57 U. S. (L. ed.) 1148, wherein the court said:

"In *Indian Land & Trust Co. v. Shoenfelt*, (C. C. A. 8th Cir. 1905) 135 Fed. 484, the Circuit Court of Appeals for the Eighth Circuit, in an action commenced by bill in equity in the United States court in the Indian Territory, seems to have held that § 723, Rev. Stat., was applicable. But see a later decision by the same court in *St. Louis & S. F. R. Co. v. Cundieff*, (C. C. A. 8th Cir. 1909) 171 Fed. 319."

## Vol. III, p. 406, sec. 31.

The construction placed upon the general laws of Arkansas by the Supreme Court of

that state prior to their being put in force by this section, must be followed by the



courts in construing them. *Glenn v. Ardmore*, (1912) 32 Okla. 414, 122 Pac. 658.

The Arkansas statute (Mansf. Dig. c. 20) provided that the common law of England, so far as applicable and of a general nature, and all statutes of the British Parliament, in aid of or to supply the defect of the common law, made prior to the fourth year of James the First, etc., should be the rule of decision in Arkansas. When this statute was extended over the Indian Territory by act of Congress, it was subject to the same construction that had been placed upon it by the Arkansas Supreme Court. *Clay v.*

*Robertson*, (1912) 30 Okla. 758, 120 Pac. 1102.

A domestic corporation in the Indian Territory, prior to statehood, was governed by chapter 109, Mansf. Dig. Ark. (Ind. T. Ann. St. 1899, c. 50), which had been extended over the Indian Territory by this section. *International Bank of Coalgate v. Mullen*, (1911) 30 Okla. 547, 120 Pac. 257, Ann. Cas. 1913C 180.

This section is cited in *Bank of Grove v. Dennis*, (1911) 30 Okla. 70, 118 Pac. 570; *Ellis v. Terrell*, (Ark. 1913) 158 S. W. 957.

### Vol. III, p. 414, sec. 38. [*Tribal marriages valid, issue legitimate.*]

Necessity of valid marriage under laws or tribal customs of tribe. — While Congress by the act of May 2, 1890, validated all marriages theretofore contracted under the laws or tribal customs of any Indian nation, then located in the Indian Territory, and declared that the issue of such marriages should be deemed legitimate and entitled to all inheritances of property or other rights, the

same as in the issue of other forms of lawful marriage, it did not attempt to, nor did the act have the effect of, legitimating the issue born of an adulterous relation. There must have first existed a valid marriage under the laws or tribal customs of the tribe. *Oklahoma Land Co. v. Thomas*, (1912) 34 Okla. 681, 127 Pac. 8.

### Vol. III, p. 424, sec. 8.

Act still in force. — Generally speaking, the control of the liquor traffic is within the police powers of the state; but the shipping and traffic in intoxicating liquors from state to state is interstate commerce, and as such is clearly within the control of Congress. Congress has by this act prohibited the shipment of intoxicating liquors into that part of Oklahoma formerly known as the Indian Territory. This act has never been repealed, and is yet in full force and effect. *State v. Eighty-nine Casks of Beer*, (1912) 36 Okla. 151, 128 Pac. 267.

The Oklahoma Enabling Act was no repeal, express or implied, of this section so far as pertains to the carrying of liquor from without the new state into that part of it which was the Indian Territory (saving as to liquor brought in by the state for the use of state agencies established under the provisions of the Enabling Act). *Ex parte Webb*, (1912) 225 U. S. 663, 32 S. Ct. 769, 56 U. S. (L. ed.) 1248.

### Vol. III, p. 439, sec. 3.

Jurisdiction to determine right of possession of town lots in Choctaw Nation. — The United States Courts of the Indian Territory had jurisdiction of actions to determine the right of possession of town lots in the Choctaw Nation, prior to the passage of the Cur-

tis act and the Atoka agreement therein contained, and the passage of that act did not divest the courts of jurisdiction over an action then pending. *Lewis v. Sittle*, (1911) 30 Okla. 530, 121 Pac. 1078.

### Vol. III, p. 442, sec. 11.

The tax exemption provision in the section adds value to the property allotted and no state statute or subsequent federal statute in conflict with the provision is valid. *Choate v. Trapp*, (1912) 224 U. S. 665, 32 S. Ct. 565, 65 U. S. (L. ed.) 941, followed in *Gleason v. Wood*, (1912) 224 U. S. 679, 32 S. Ct. 571, 56 U. S. (L. ed.) 947, and *English v. Richardson*, (1912) 224 U. S. 680, 32 S. Ct. 571, 56 U. S. (L. ed.) 949.

Where a woman enrolled as a Creek freedman selected an allotment under this section and died before the adoption of the original Creek treaty (Act March 1, 1901, c. 676, 31 Stat. 861), and the land so selected was allotted to her heirs after her death, the Creek law of descent and distribution governs the descent of the land, and the Arkansas law of descent and distribution does not apply. *Woodward v. De Graffenried*, (1912) 36 Okla. 81, 131 Pac. 162.

## Vol. III, p. 444, sec. 14.

**Right of owner of improvements on omitted lands to purchase same.**—In *Cochran v. Hocker*, (1912) 34 Okla. 233, 124 Pac. 953, the facts were as follows: The town of Sapulpa was incorporated in 1898, under section 14. Pursuant to this section, the boundaries of the town for municipal purposes were established. Section 15 provided for the creation of the town-site commissions and the sale of town lots by these commissions. But no action was taken under this section. Thereafter, by section 10 of the act of March

1, 1901, c. 676, § 1 St. at L. 864, known as the "Original Creek Treaty," different provisions were made for establishing town-site boundaries and the sale of the lots therein. Under this treaty, the town-site boundaries of Sapulpa were established, and the lands here involved were omitted from the town site. It was held that the owner of the improvements on these omitted lands had no vested right to purchase the land, and that the omission thereof from the town-site boundaries left the land subject to allotment.

## Vol. III, p. 449, sec. 21.

**Death of Creek Indian before receiving allotment.**—In the case of a full-blood Creek Indian entitled to enrollment but who died after April 1, 1899, after he had been enrolled but before receiving his allotment, his

heirs took such allotment free from restrictions as to alienation and on August 15, 1904, could convey valid title to same. *Bilby v. Gilliland*, (Okla. 1913) 137 Pac. 687.

## Vol. III, p. 452, sec. 26.

**Curtsey.**—It has been held that in view of this section and the act of May 2, 1890, ch. 182, § 31, 3 Fed. Stat. Annot. 406 and act of June 7, 1897, ch. 3, § 1, 3 Fed. Stat. Annot. 437, the common law was made applicable to all persons in Indian Territory so that

the estate by the curtesy attached in favor of the husband to Indian lands upon the arising of conditions on which that estate is based at common law. *Armstrong v. Wood*, (E. D. Okla. 1911) 195 Fed. 137.

## Vol. III, p. 453, sec. 29.

**Right of creditors of deceased allottee.**—Under the treaty between the United States and the Choctaw and Chickasaw Tribes of Indians, known as the "Atoka Agreement," the allotted lands of the deceased members of either of such tribes, after such lands have

passed to the heirs of the deceased, cannot be sold by creditors of deceased to satisfy debts or obligations incurred by him prior to the time at which such lands were to become alienable. *Redwine v. Ansley*, (1912) 32 Okla. 317, 122 Pac. 679.

## Vol. III, p. 472, sec. 1.

**By this act certain provisions of the law of Arkansas relating to corporations were extended over and put in force in Indian Territory, with such substitution of terms as to make them applicable.** Prior to this act no provision of law existed for the creation of corporations for the conduct of business in its nature local to Indian Territory. By the adoption of the sections of the Arkansas law specified a complete system of laws for the creation and control of corporations within the Indian Territory was provided. While it

was accomplished by an act of Congress, and the sections of the Arkansas law adopted became as much a part of the act as if set forth in *hæc verba* therein, it was in effect very similar to the laws of the several states relating to the creation and control of domestic corporations, in that its operation was confined to the territory comprised within what was known as Indian Territory. *Boyd v. Great Western Coal & Coke Co.*, (E. D. Okla. 1911) 189 Fed. 115.

## Vol. III, p. 473, sec. 4.

**Failure to designate agent.**—The plaintiff, an Illinois corporation, sent agents into the Indian Territory and Arkansas to take orders for enlarging pictures. The orders, when taken, were sent to it at its home office in Chicago, where the pictures were enlarged, and the pictures with frames were shipped by it to agents, different from those who

took orders, who delivered them to the patrons and collected the money, which they remitted to plaintiff. It was held that this was interstate commerce, and that a failure by the plaintiff to designate a resident agent in the Indian Territory upon whom service might be had under the provisions of sections 4 and 5, requiring foreign corpora-

tions to designate an agent in the Indian Territory before beginning to carry on business, did not render void a bond, executed by one of its delivering agents in the Indian

Territory, conditioned for the faithful performance of his duty as such wherever the plaintiff sent him. *Chicago Crayon Co. v. Rogers*, (1911) 30 Okla. 299, 119 Pac. 630.

### Vol. III, p. 475, sec. 1.

**Private rights must be respected.**—Legislative grants of privileges or powers to corporate bodies, like those to a railroad company, to locate, contract, maintain, and operate its line of railway and necessary appurtenances under this act, confer no license

to construct and use them in disregard of the private rights of others, and with immunity for their invasion. *Choctaw, O. & G. R. Co. v. Drew*, (1913) 37 Okla. 396, 130 Pac. 1149, 44 L.R.A.(N.S.) 38.

### Vol. III, p. 479, sec. 15.

**Notice by referee.**—Where, in a suit for 160 acres of land, defendant disclaimed as to all but 49 acres thereof, to which it set up title in virtue of alleged condemnation proceedings pursuant to this section, which requires notice by the referees "to all persons interested," and where the notice given was "to all persons having any claim or any interest in said described premises of whatsoever kind or nature," without naming the plaintiffs who were conceded to be the owners thereof, it was held that said notice was void and conferred no jurisdiction on the court, and that, too, although the judgment approving the report of the referees recited that they "gave notice in the manner as provided by law." *Bruner v. Ft. Smith & W. R. Co.*, (1912) 33 Okla. 711, 127 Pac. 700.

**Compensation for damages.**—Under this section before a railway company exercising the right of eminent domain thereunder may take or condemn lands, full compensation for the same and for all damages done by the construction of the road or the taking of the lands must be first made to the individual owner, occupant, or allottee of such lands or to the tribe or nation through or in which the same is situated, and where possession is taken without such payment, and the land is subsequently allotted, the allottee may maintain ejectment to secure possession. *Denver, W. & M. R. Co. v. Adkinson*, (1911) 28 Okla. 1, 119 Pac. 247.

### Vol. III, p. 485. [*Commission to Five Civilized Tribes.*]

**Law governing devolution of allotment.**—Where a duly enrolled citizen of the Creek Nation died on March 1, 1901, before receiving his allotment for which on August 23, 1902, certificate of selection issued to his heirs, it was held that chapter 49 of Mansfield's Digest of the Laws of Arkansas (Ind. T. Ann. St. 1899, §§ 1820-1843) governed the devolution of the allotment, as provided

by the Indian Appropriation Act of May 27, 1902 (32 Stat. 258, c. 888) and section 6 of an act of Congress approved June 30, 1902, ratified July 26, 1902 (32 Stat. 500, c. 1323), known as the Creek Supplemental Agreement, to be applied as if deceased had received title to his allotment and died seized thereof. *Brady v. Sizemore*, (1912) 33 Okla. 169, 124 Pac. 615.

### Vol. III, p. 490, sec. 15.

**The period of limitation or alienation.**—To the same effect as the original note, see *United States v. Hemmer*, (D. C. S. Dak. 1912) 195 Fed. 790.

### Vol. III, p. 491. [*Further application of homestead laws to Indians—patented lands held in trust.*]

This act did not repeal, amend, or modify any of the provisions of the earlier act of March 3, 1875, c. 131, § 15 (3 Fed. Stat. Annot. 490). It did not extend from five years to twenty-five years the restriction of the lands acquired by an Indian homesteader under the earlier act. *Hemmer v. United*

*States*, (C. C. A. 8th Cir. 1912) 204 Fed. 898.

**Restriction on alienation.**—To the same effect as the first paragraph of the original note, see *United States v. Hemmer*, (D. C. S. Dak. 1912) 195 Fed. 790.

### Vol. III, p. 493, sec. 3.

This section is quoted in *Leecy v. United States*, (C. C. A. 8th Cir. 1911) 190 Fed. 289.

## Vol. III, p. 494, sec. 5.

"The act of 1887 was adopted as part of the Government's policy of dissolving the tribal relations of the Indians, distributing their lands in severalty, and conducting the individuals from a state of dependent wardship to one of full emancipation with its attendant privileges and burdens. Realizing that so great a change would require years for its accomplishment and that in the meantime the Indians should be safeguarded against their own improvidence, Congress, in prescribing by the act of 1887 a system for allotting the lands in severalty whereby the Indians would be established in individual homes, was careful to avoid investing the allottee with the title in the first instance, and directed that there should be issued to him what is inaptly termed a patent, but is in reality an allotment certificate, declaring that for a period of twenty-five years, or such enlarged period as the President should direct, the United States would hold the allotted land in trust for the sole use and benefit of the allottee, or, in case of his death, of his heirs, and at the expiration of that period would convey to him by patent the fee, discharged of the trust and free of any charge or incumbrance; and, as a safeguard against improvident conveyances or contracts made in anticipation of the ul-

timate or real patent, it was expressly provided that any conveyance of the land, or any contract touching the same, made before the expiration of the trust period should be absolutely null and void. It is thus made plain that it was the intention of Congress that the title should remain in the United States during the entire trust period, and that, when conveyed to the allottee or his heirs by the ultimate patent at the expiration of that period, it should be unaffected by any prior conveyance or contract touching the land." *Monson v. Simonson*, (1913) 231 U. S. 341, 34 S. Ct. 71.

A deed and mortgages, executed by a member of the absentee Shawnee tribe or band of Indians, of lands allotted to such Indian and held in trust for him by the United States, under Act of Congress Feb. 8, 1887, c. 119, 24 Stat. 388, as amended by Act of March 3, 1891, c. 543, 26 Stat. 1018, are void. *Perkins v. Cissell*, (1912) 32 Okla. 827, 124 Pac. 7.

This section is cited in *Leecy v. United States*, (C. C. A. 8th Cir. 1911) 190 Fed. 289; *Chase v. Dextater*, (1911) 147 Wis. 581, 132 N. W. 904; *Vachon v. Nichols-Chisholm Lumber Co.*, (Minn. 1913) 144 N. W. 223.

## Vol. III, p. 496, sec. 6.

The language that such Indians "should be subject to the laws, both civil and criminal, of the state or territory in which they reside," is as plain and comprehensive as it could well be made. It could not have been the intention of Congress to render these Indians subject generally to the criminal laws both of the state and the nation. The language quoted plainly makes them amenable to the criminal laws of the state, and thereby removes them from the plane of national penal legislation, unless such legislation is by express provision in particular cases made applicable to them. *State v. Nimrod*, (1912) 30 S. D. 239, 138 N. W. 377.

**Jurisdiction of state courts.**—Upon the completion of allotments made and the patenting of the lands to the allottees by trust patents, each and every member of the respective bands or tribes of Indians to whom allotments are made "shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside;" and the state courts

accordingly have jurisdiction to try an Indian for any public offense, except the introduction of liquor into the Indian country, where such Indian has taken an allotment. *State v. Lott*, (1912) 21 Idaho 646, 123 Pac. 491.

**Applicable to Alaska.**—Two classes of Indians born within the territorial limits of the United States are declared to be citizens thereof, namely, Indians who have received allotments under any act or treaty, and Indians who have severed their tribal relations by taking up their residence separate and apart from any tribe, and have adopted the habits of civilization. The act is so specific and far-reaching in its scope that it must be held to be general in its purpose and intent, and to apply to every Indian within the territorial limits of the United States. Being such, section 1891, R. S., 7 Fed. Stat. Annot. 271, makes it applicable in Alaska; it being organized territory. *Nagle v. United States*, (C. C. A. 9th Cir. 1911) 191 Fed. 141.

## Vol. III, p. 500, sec. 3.

**Suit for breach of lease.**—The United States has capacity to sue to recover damages for the breach of a lease made by an Indian allottee with the approval of the Secretary of the Interior, or to protect or enforce any other Indian property right which remains

under the control and supervision of the Secretary or the Indian agent, his subordinate, because such suits are indispensable to the protection and enforcement of the governmental rights of the United States and its governmental policy to protect the property

rights of the Indians and to teach them the arts of civilized life. *United States v. Gray*, (C. C. A. 8th Cir. 1912) 201 Fed. 291. See

also *United States v. Fitzgerald*, (C. C. A. 8th Cir. 1912) 201 Fed. 295.

### Vol. III, p. 501, sec. 5.

This act is amendatory of, and further extends the provisions of, the general allotment act of February 8, 1887 (24 Stat. at 388, c. 119), which, in section 8, by express terms does not include the territory then occupied by the Creeks in the Indian Territory. Section 5 of the former act expressly provides that its provisions shall not be held or construed to apply to the lands commonly called and known as the "Cherokee Outlet." But in no wise does said latter act extend its provisions to the territory occupied by

the Creeks, who, as we have seen, were expressly reserved from its operation by the act of February 8, 1887. This act, as to the territory named in section 8 thereof, was therefore not affected by the passage of the latter statute; hence that provision of said statute, conferring upon an illegitimate child the right to inherit from the father, was without effect upon the right of inheritance as to the Creek Indians in the Indian Territory. *Porter v. Wilson*, (1913) 39 Okla. 500, 135 Pac. 732.

### Vol. III, p. 503, sec. 1.

By this act Congress authorized suits to be brought against the United States in its Circuit Courts, "involving the right of any person, in whole or in part of Indian blood or descent" (with certain exceptions) "to any allotment of lands under any law or treaty." Prior to the amendment, the United States could not be sued in such a case. But the amendment required that "in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant." Commenting upon this, the court said in *McKay v. Kalyton*, (1907) 204 U. S. 458, 469, 27 S. Ct. 346, 51 U. S. (L. ed.) 566: "Nothing could more clearly demonstrate, than does this requirement, the conception of Congress that the United States continued as trustee to have an active interest in the proper disposition of allotted Indian lands and the necessity of its being made a party to controversies concerning

the same, for the purpose of securing a harmonious and uniform operation of the legislation of Congress on the subject." *Heckman v. United States*, (1912) 224 U. S. 413, 32 S. Ct. 424, 56 U. S. (L. ed.) 820. See also *Goat v. United States*, (1912) 224 U. S. 458, 32 S. Ct. 544, 56 U. S. (L. ed.) 841.

It is manifest that no Indian would have occasion to seek relief under this statute until his right had been denied by the Interior Department. It is certain that the purpose of this statute was to confer substantial rights upon Indian claimants. *Leecy v. United States*, (C. C. A. 8th Cir. 1911) 190 Fed. 289.

This section was considered in *Sully v. United States*, (D. C. S. D. 1912) 195 Fed. 113; *Drapeau v. United States*, (D. C. S. D. 1912) 195 Fed. 130; *United States v. Mani*, (D. C. S. D. 1912) 196 Fed. 160.

### Vol. III, p. 505, sec. 7.

**Jurisdiction to appoint guardian of minor heirs.**—Under the terms of this section which provides that the interests of minor heirs "shall be sold by a guardian duly appointed by the proper court," the probate courts of Oklahoma territory were the proper courts to appoint guardians of minor heirs of a deceased Indian to whom a patent containing restrictions upon alienation had been issued for lands allotted to him, and had jurisdiction to order a sale of such lands. *United States Fidelity & Guaranty Co. v. Hansen*, (1912) 36 Okla. 459, 129 Pac. 60.

**Purchase price a trust fund.**—Where allotted lands of a deceased Indian were sold pursuant to the provisions of section 7, the purchase price remained a trust fund so long as the United States government retained possession or control, but the trust character ended when the possession and control was relinquished by the government. *United States Fidelity & Guaranty Co. v. Hansen*, (1912) 36 Okla. 459, 129 Pac. 60.

### Vol. X, p. 121, sec. 1.

**Act not confined to Indians alone.**—It will be observed that this act of February 2, 1903, provides, "in which any person shall be charged with the crime of murder," etc., thereby making the said act apply to all persons whomsoever, whether Indians or whites.

It does not purport to be limited to Indians only. There is no distinction between whites and Indians so far as the operation of this law is concerned. *State v. Nimrod*, (1912) 30 S. D. 239, 138 N. W. 377.

Vol. X, p. 122, sec. 1. [*Act of Feb. 2, 1903.*]

**Minimum punishment.**—In *Williams v. State*, (1912) 7 Okla. Crim. 529, 124 Pac. 330, it was held that on a trial for a violation of this statute the trial court erred in instructing the jury that the minimum punishment was five years imprisonment.

Vol. X, p. 130. [*Act of Feb. 19, 1903.*]

**In general.**—Registration laws are of a statutory origin, and the statute must in each case be examined to determine what instruments are to be recorded, where they are to be recorded, and the effect of a failure to record. Provision as to these matters was made by Congress when it declared that the registration laws of Arkansas should be of force in the Indian Territory, and that the clerk of the court should be ex officio recorder. On the creation of a new district for registration, instruments already registered need not be re-registered in the new district if the statute does not expressly make that course necessary. *First Nat. Bank*

of *Claremore v. Keys*, (1913) 229 U. S. 179, 33 S. Ct. 642, 57 U. S. (L. ed.) 1140.

Sections 648 and 659 of chapter 27, Mansfield's Digest of the Laws of Arkansas, put in force in the Indian Territory by this Act were, in so far as they affected the conveyance by a married woman of her lands, inconsistent with section 4621, c. 104, of Mansfield's Digest (Ind. T. Ann. St. 1899, § 3021), which was in force prior thereto, and to the extent of such inconsistency said sections 648 and 659 were not in force in Indian Territory prior to statehood. *Adkins v. Arnold*, (1912) 32 Okla. 167, 121 Pac. 186.

Vol. X, p. 138, sec. 2. [*Act of April 28, 1904.*]

**Effect of act.**—This act continuing and extending in their operation all the laws of Arkansas theretofore put in force in the Indian Territory, so as to embrace all persons and estates in said territory, whether Indian, freedman, or otherwise, was not intended to and did not work a repeal of section 15 of the act of July 1, 1902, c. 1362, 32 Stat. at L. 642, 10 Fed. Stat. Annot. 150, providing that lands allotted to members and freedmen of the Chickasaw and Choctaw Nations

should not be affected by any deed, debt, or obligation, of any character, contracted prior to the time at which said land may be alienated. In *re Davis' Estate*, (1912) 32 Okla. 209, 122 Pac. 547.

Moreover this section did not repeal by implication, or otherwise, section 6 of the Supplemental Creek Agreement (Treaty with Creek Indians, June 30, 1902, 32 Stat. 500). *Washington v. Miller*, (1912) 34 Okla. 259, 129 Pac. 58.

Vol. X, p. 141. [*Act of April 23, 1904.*]

This act was intended to limit the power of the Secretary to cases specifically mentioned therein, and not to allow him to cancel any trust patent whenever he thought it ought to be canceled for the best interests of

the Indian. It does not deal in any way with the power of the courts. *United States v. La Roque*, (C. C. A. 8th Cir. 1912) 198 Fed. 645.

## Vol. X, p. 149, sec. 6.

**Sale after selection but before patent.**—Where an allottee made formal selection of land at a land office under this act and before she received a patent therefor sold the land, it was held that, as there was no contest within nine months as provided for in paragraph 71 of the act, her right to the patent

became vested as of the date of the selection, so that she had an equitable interest in the land which she could properly convey, and having subsequently received her patent her conveyance became valid. *Thomason v. Wellman*, (C. C. A. 8th Cir. 1913) 206 Fed. 895.

## Vol. X, p. 149, sec. 11.

**Effect of this section and section 18.**—By section 11 it is provided that there shall be allotted by the Commission of the Five Civilized Tribes to each enrolled member of the tribe lands equal in value to 110 acres of the average allottable lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by

the government survey, which lands may be selected by each allottee so as to include his improvements. By section 18 of the same act it is made unlawful, after 90 days after the ratification of the act, for the member of the tribe to inclose or hold in his possession more land in value than 110 acres of the average allottable lands of the Cherokee Na-

tion, either for himself or his wife or for each of his minor children. These provisions of the act clearly contemplate that any member of the tribe shall have a right to select as his allotment lands upon which he owns the improvements, and that his wife and minor children shall have the right to select as their allotments lands upon which he owns the improvements, and that after 90 days after the ratification of the act, the fact that an Indian has theretofore owned

the improvements and held possession of lands in acreage in excess of what he is entitled to take as allotment for himself, his wife, and his minor children, shall not preclude others from taking such land as their allotment, because it is made unlawful for a member of the tribe, although he owns the improvements, to hold the lands, unless needed as allotment for himself, or his wife and minor children. *Harnage v. Martin*, (Okla. 1913) 136 Pac. 154.

### Vol. X, p. 150, sec. 12.

This section relates only to homesteads. — In re Lands of Five Civilized Tribes, (E. D. Okla. 1912) 199 Fed. 811.

Allotment in name of deceased allottee. — The section has no application to an allotment made in the name of a deceased allottee because the language confines it to living allottees and the reason for such section can

only exist in the case of a living allottee. *United States v. Dowden*, (E. D. Okla. 1911) 194 Fed. 475.

"Inalienable" as here used to restrict the disposition of lands, includes disposition by will. *Taylor v. Parker*, (1912) 33 Okla. 199, 126 Pac. 573.

### Vol. X, p. 150, sec. 13.

This section relates only to freedman allotments. — In re Lands of Five Civilized Tribes, (E. D. Okla. 1912) 199 Fed. 811.

### Vol. X, p. 150, sec. 15.

The language of the section means that there shall be no burden on the title or charge against such allotment, and that the same shall in no event become liable for any debt or obligation contracted prior to the removal of restrictions. In re Davis' Estate, (1912) 32 Okla. 209, 122 Pac. 547.

Torts perpetrated prior to allotment. — This section does not exempt the allottee from liability for torts perpetrated prior to the allotment. *Simmons v. Mullens*, (1912) 33 Okla. 184, 122 Pac. 518.

### Vol. X, p. 150, sec. 16.

"Alienable" as here used to restrict the disposition of lands, includes disposition by will. *Taylor v. Parker*, (1912) 33 Okla. 199, 126 Pac. 573.

"Issuance of patent." — In In re Lands of Five Civilized Tribes, (E. D. Okla. 1912) 199 Fed. 811, the court said: "The question is presented as to when 'issuance of patent' may be said to be accomplished. The term 'issuance,' as defined by the several dictionaries, may be said to be the act of putting, sending, or giving out; promulgation; distribution. We have seen that the Atoka Agreement provided that the chief executives of the two nations should jointly execute and 'deliver' to each allottee a patent or patents conveying all right, title, and interest of the tribes in the lands allotted to him. Clearly the

delivery of the patent to the allottee under this provision is its issuance."

The date of patent is determined by the date upon which the patent is signed by the last governor or principal chief of the tribe, as the case may be. In re Lands of Five Civilized Tribes, (E. D. Okla. 1912) 199 Fed. 811.

The restriction imposed by the proviso to section 16, prohibiting alienation for less than the appraised value, can only become operative as to any particular tract after the expiration of the one, three, or five years restriction, as the case may be. Until that time, no alienation is permitted. In re Lands of Five Civilized Tribes, (E. D. Okla. 1912) 199 Fed. 811.

### Vol. X, p. 150, sec. 19.

In a suit to enforce a contract providing for the payment of money, where it appeared from the allegations of the answer that the consideration thereof was a sale of the improvements on and possession of lands held by the promisee, in violation of this act, it

was held that the same furnished no consideration for the contract, and that a demurrer thereto was improperly sustained. *Cornelius v. Murray*, (1912) 31 Okla. 174, 120 Pac. 653.

## Vol. X, p. 151, sec. 22.

**Alienable by heirs.**—Lands allotted (homestead and surplus) under the provisions of section 22, in the name of a deceased member of the Choctaw Tribe of Indians, are alienable by his heirs after lawful selection, prior to the lapse of one, three, or five years, and prior to the issuance of certificate of patent. *Hoteyabi v. Vaughn*, (1912) 32

*Okla.* 807, 124 *Pac.* 63, following *Hancock v. Mutual Trust Co.*, (1909) 24 *Okla.* 391, 103 *Pac.* 566.

Allotments made in the name of dead allottees are subject to the restrictive provisions contained in sections 15 and 16 of this act. *United States v. Dowden*, (E. D. *Okla.* 1911) 194 *Fed.* 475.

## Vol. X, p. 151, sec. 23.

On the question as to whether the land conveyed by the allotment certificate mentioned in this section is alienable, the court, in *United States v. Dowden*, (E. D. *Okla.* 1911) 194 *Fed.* 475, said: "Of course, as to whether the interest in the land conveyed by the allotment certificate was alienable depends upon whether these heirs as to this land came within some of the provisions of law imposing restrictions upon alienation. Under the treaty and grant by which these tribal lands were originally vested in the Choctaw and Chickasaw Nations, the tribes could not alienate them without the consent of the United States, and it is contended by counsel for complainant that these restrictions upon alienation followed the land into the hands of the individual allottees, and

that even if it does not appear as to any particular land that Congress in providing for the allotment to the individual members of the tribes imposed restrictions upon its alienation, still it cannot be alienated by such allottee without the consent of the United States, unless such right of alienation affirmatively appears in the acts of Congress. To this I cannot agree. The Commission to the Five Civilized Tribes was created and empowered to negotiate an extinguishment of the tribal title to these lands and an allotment thereof to the members of the tribes in severalty. The restrictions upon the alienation which attached to the tribal title must be held to have ceased with the extinguishment of that title."

## Vol. X, p. 153, sec. 26.

**Reservation of land for town sites.**—If, in the exercise of the authority given the Secretary of the Treasury by this act and the act of May 31, 1900, c. 598, 3 *Fed. Stat. Annot.* 470, to reserve land for town sites and sell the same, outstanding invalid in-

struments relating to the lands interfere with the work of the government in the dispositions of such town site, by clouding title, the United States may maintain a suit to cancel such instruments. *United States v. Dowden*, (E. D. *Okla.* 1911) 194 *Fed.* 475.

## Vol. X, p. 162, sec. 55.

This section must be construed in connection with those sections of *Mansfield's Digest* governing municipal corporations, and as it does not prescribe the method of procedure,

section 924 of *Mansfield's Digest* applies. *Redmond v. Sulphur*, (1912) 32 *Okla.* 201, 120 *Pac.* 262.

## Vol. X, p. 167, sec. 1.

**Constitutionality.**—This section in so far as it authorizes the Secretary of the Interior to grant a right of way in the nature of an easement for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas through lands which have been allotted in severalty to any individual In-

dian under any law or treaty, but which has not been conveyed to the allottee with full power of alienation, is not subject to the objection that it is in violation of the fifth amendment to the Federal Constitution. *Texas Co. v. Henry*, (1912) 34 *Okla.* 342, 126 *Pac.* 224.

## 1909 Supp., p. 191, sec. 2.

**Children included.**—See *Gritts v. Fisher*, (1912) 224 *U. S.* 640, 32 *S. Ct.* 580, 56 *U. S. (L. ed.)* 928, wherein the court said: "The controversy here arises out of the provision in § 2 of the act of April 28, 1906, as amended June 21 following, for the enrollment of

'children who were minors living March 4, 1906,' which the defendants regard as including children born after September 1, 1902, and living on March 4, 1906. The appellants contend, first, that it does not include children born after September 1, 1902, but only



such as were born prior to that date and for whom no application for enrollment was made within the time limited by the act of July 1, 1902; that is, on or before October 31, 1902; and, second, that if it does include children born after September 1, 1902, it arbitrarily takes from the appellants and others similarly situated property which is theirs and gives it to others, and therefore is violative of due process of law. The last contention rests upon another, viz., that the act of July 1, 1902, vested in the members living on September 1, 1902, who were enrolled under that act, an absolute right to receive all lands of the tribe not reserved or allotted thereunder and all funds of the tribe not used in the payment of tribal debts.

"We are unable to assent to the first contention. The provision in question says

'children who were minors living March 4, 1906,' and those words as naturally and aptly embrace children born after as before September 1, 1902. Had it been intended, as is claimed, merely to extend the time for filing applications on behalf of children living on September 1, 1902, and therefore born on or before that date, it is reasonable to believe that other words more appropriate to the occasion would have been used."

The Secretary of the Interior had the power of revision and correction until the final moment when jurisdiction was expressly taken from him under this section. *United States v. Fisher*, (1912) 223 U. S. 95, 32 S. Ct. 196, 56 U. S. (L. ed.) 364, followed in *Cherokee Nation v. Whitmire*, (1912) 223 U. S. 108, 32 S. Ct. 200, 56 U. S. (L. ed.) 370.

## 1909 Supp., p. 199, sec. 19.

**Constitutionality.**—The power of Congress thus to extend the restriction upon alienation was sustained by this court in *Tiger v. Western Inv. Co.*, (1911) 221 U. S. 286, 31 S. Ct. 578, 55 U. S. (L. ed.) 738. There the question related to a conveyance of inherited lands, made by a Creek Indian, of the full-blood, without the approval of the Secretary of the Interior as required by section 22. The conveyance had been executed after the expiration of the five-year limitation upon alienation prescribed by the supplemental agreement with the Creek Nation (act of June 30, 1902, c. 1323, § 16; 32 Stat. 503); but meanwhile, during the continuance of the

original restriction, this act had been enacted. It was held that the restriction of the later statute was valid. *Heckman v. United States*, (1912) 224 U. S. 413, 32 S. Ct. 424, 56 U. S. (L. ed.) 820.

This section is cited in *Frame v. Bivens*, (E. D. Okla. 1909) 189 Fed. 785.

**Provision not retroactive.**—The provision that "every deed executed before, or for the making of which a contract or agreement was entered into before, the removal of restrictions, be and the same is hereby declared void," is not retroactive. *Casey v. Bingham*, (1913) 37 Okla. 484, 132 Pac. 663.

## 1909 Supp., p. 199, sec. 20.

A lease not made under the order of the proper court as provided in this section is invalid. *Jennings v. Wood*, (C. C. A. 8th Cir. 1911) 192 Fed. 507.

An agricultural lease of restricted lands made since statehood by a Choctaw Indian in violation of the provisions of the Atoka Agreement ratified and approved by act of

Congress June 28, 1898 (Act June 28, 1898, c. 517, 30 Stat. 495), as modified by this act is void, and the validity of such lease may be questioned in an action by the grantee of the allottee, who holds under a deed from such allottee made after her restrictions have been removed. *Chapman v. Siler*, (1912) 30 Okla. 714, 120 Pac. 608.

## 1909 Supp., p. 200, sec. 22.

**Sale of ward's interest in allotted land.**—The guardian and mother of the Cherokee minor children made, under section 22, application to the proper court for an order permitting her to sell and convey to the proposed purchaser of the mother's interest the undivided interest of her minor children and wards in the allotted lands inherited by them from their deceased father by filing in the court her petition, setting up the price offered by said purchaser and her contract to sell her interest to him, and introduced evidence to establish that the price offered for her wards' interests was the fair, reasonable market value thereof. The court thereupon made an order directing the sale of the minors' interests in the lands, and directed

the guardian to convey to the purchaser of her interest the interests of her wards and to execute therefor her deed as guardian, all of which was done; and, upon report thereof made by the guardian to the court, the sale in all things was approved. It was held, that the sale was made in substantial compliance with said section 22. *Wilson v. Morton*, (1911) 29 Okla. 745, 119 Pac. 213.

**Conveyances prior to this act.**—Prior to the passage of this section full-blooded Indian heirs being members of any of the Five Civilized Tribes in Oklahoma, could not convey their allotted lands unless there had been actual removal of restrictions by the Secretary of the Interior prior to the conveyance. *United*

*States v. Knight*, (C. C. A. 8th Cir. 1913) 206 Fed. 145.

Approval by Secretary of Interior no longer necessary.—Since the passage of the Act of May 27, 1908, Fed. St. Annot. Supp. 1909, p. 232, deeds by full-blooded Indian

heirs do not have to be approved by the Secretary of the Interior although the allottee of the land may have died before the passage of that act. *United States v. Knight*, (C. C. A. 8th Cir. 1913) 206 Fed. 145.

### 1909 Supp., p. 200, sec. 23.

Due execution and attestation.—Whether a will is acknowledged before or approved by a judge of the United States Court for the Indian Territory, or a United States commissioner, or a judge of a county court of the state of Oklahoma, involves the ques-

tion of due execution and attestation. *Homer v. McCurtain*, (Okla. 1914) 138 Pac. 307.

The acknowledgment and approval of an Indian will under this section was examined, and held sufficient in *Proctor v. Harrison*, (1912) 34 Okla. 181, 125 Pac. 479.

### 1909 Supp., p. 204. [Act of May 8, 1906.]

This amendment is not retroactive in its effect. *State v. Lott*, (1912) 21 Idaho 646, 123 Pac. 491.

The act is cited in *Chase v. Dextater*, (1911) 147 Wis. 581, 132 N. W. 904.

### 1909 Supp., p. 206, sec. 1.

This act applies only to allottees receiving trust patents after its passage. *Mattison v. Connerly*, (1912) 46 Mont. 103, 126 Pac. 851.

### 1909 Supp., p. 217. [Osage reservation—limit of credit allowed by traders, increased.]

Burden of proof.—In view of the policy of the statute, the relative position of the parties and the protection necessarily extended to Indians, the burden is on the plaintiff not only to bring his claim within the permission of the statute in fact, but also to

prove that he had done so, in case of dispute. He occupies the position of advantage and that rather than formal logic determines the burden of proof. *Tinker v. Midland Valley Mercantile Co.*, (1914) 231 U. S. 681, 34 S. Ct. 252.

### 1909 Supp., p. 221, par. fourth.

Restrictions upon alienation of this character attach to and run with the land, and the inability to convey disqualifies the heir as well as the immediate allottee. *Aaron v. United States*, (C. C. A. 8th Cir. 1913) 204 Fed. 943.

This paragraph is considered at some length in *United States v. Board of Com'rs of Osage County*, (W. D. Okla. 1911) 193 Fed. 485.

### 1909 Supp., p. 221, par. seventh.

Scope of paragraph.—Under the provision of this paragraph adult members of the Osage Tribe, to whom certificates of competency were issued by the Secretary of the Interior, could sell and convey, manage, control, and dispose of their surplus allotted lands, but could not sell the oil, gas, coal, or other mineral covered by said lands. These provisions apply only to voluntary conveyances by the allottee, such as were effected by the personal will of the owner, and not to the creation of liens or transmissions of title by operation of law, unless arising out of the further provision making the surplus lands subject to taxation. *Neilson v. Alberty*, (1913) 36 Okla. 490, 129 Pac. 847.

The act being a complete and special act, and containing no provision for the exemption of moneys borrowed and secured by mortgage on the surplus lands of an allottee of the Osage tribe, executed after the issuance of the certificate of competency provided for therein, the same are not exempt from the payment of a debt of the allottee, although contracted prior to the issuance of patent. *Lynn v. Brown*, (Okla. 1913) 132 Pac. 810.

The exception in paragraph 7 does not affect the restrictions upon the alienation and taxation of homesteads of Osage allottees and their heirs who obtain no certificates of competency, but is limited in its effect to the homesteads of those who procure such cer-

tificates. *Aaron v. United States*, (C. C. A. 8th Cir. 1913) 204 Fed. 943.

In *Hunter v. Hooper*, (Okla. 1913) 132 Pac. 490, it was held that the surplus lands

of a member of the Osage tribe of Indians who had not received a certificate of competency were taxable at the end of three years from this act by virtue of par. 7, section 5.

### 1909 Supp., p. 223, sec. 3.

The proviso concluding this section, upon which so much stress has been placed by plaintiff, simply means that nothing done in pursuance of the provisions in said section shall in any wise affect any valid existing law or contract, and the sole purpose of which was to protect the holders of valid

leases or contracts, and which were to remain in full force and unimpaired by anything done or authorized by the passage of said act. *Leahy v. Indian Territory Illuminating Co.*, (1913) 39 Okla. 312, 135 Pac. 416.

### 1909 Supp., p. 232, sec. 1.

**Constitutionality.**—This act so far as it attempts to subject to taxation lands of Cherokees exempt from taxation by the provisions of section 13 of the Cherokee Agreement of July 1st, 1902 (Act July 1, 1902, c. 1375, 32 Stat. 717), is unconstitutional. *Weilep v. Audrain*, (1912) 36 Okla. 288, 128 Pac. 254.

Cherokee allottees, by virtue of the Cherokee Agreement, under which, in consideration of their relinquishment of all claim to the tribal property, they were to receive allotments of the lands in severalty, which were to be nontaxable for a specified period while the title remained in the original allottees, acquired vested rights of exemption from state taxation, protected by the United States Constitution, fifth amendment, from abrogation during that period, as was attempted by the act of May 27, 1908 (35 Stat. at L. 312, c. 199), removing the restrictions

upon alienation, and providing that lands from which such restrictions had been removed should be subject to taxation. *Whitmire v. Trapp*, (1912) 33 Okla. 429, 126 Pac. 578.

The removal of restrictions against alienation by this act did not take away from land allotted under the Curtis Act of June 28, 1898, 30 Stat. L. 505, 3 Fed. Stat. Annot. 442, the right of exemption from taxation. *Choate v. Trapp*, (1912) 224 U. S. 665, 32 S. Ct. 665, 65 U. S. (L. ed.) 941.

The allotments of minor Creek Indians were made inalienable by section 4 of the treaty of March 1, 1901 (31 Stat. 861), and continued so, where the infancy continued, until the passage of Act Cong. May 27, 1908, c. 199, 35 Stat. 312. *Texas Co. v. Henry*, (1912) 34 Okla. 342, 126 Pac. 224.

This section is cited in *Bartlett v. United States*, (C. C. A. 8th Cir. 1913) 203 Fed. 410.

### 1909 Supp., p. 233, sec. 2.

**Minors.**—"When Congress included minors in section 1, it had the right in other sections of the law to declare who should be considered minors for the purposes of that section. This it did in the latter part of section 2 above quoted. It is said that the declaration there made being in a proviso is limited to the section in which it is found. Congress expressly declared that such was not its intention, for instead of saying, the term minor or minors as used in this section,

it said, 'the term minor or minors, as used in this act.' *Truskett v. Closser*, (C. C. A. 8th Cir. 1912) 198 Fed. 835.

This act prohibits a male allottee under 21 and a female allottee under 18 years of age from alienating his or her allotments, and renders them subject to the jurisdiction of the county courts in the exercise of their probate jurisdiction. *Cochran v. Teehee*, (Okla. 1913) 138 Pac. 563.

### 1909 Supp., p. 233, sec. 3.

**Purpose.**—Congress did not intend by section 3 to make that which was black white, or the reverse, nor did it undertake to overthrow the multiplication table, neither of which things could it do, nor did it attempt. But what Congress intended to accomplish, and did accomplish, by declaring the "enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of such citizen or freedman," was to require resort to the rolls and records as a fixed and definite pub-

lic record from which alone it can be ascertained whether an allottee does, or does not, possess the qualified age or requisite degree of Indian blood to enable him to alienate his lands. *Bell v. Cook*, (E. D. Okla. 1911) 192 Fed. 597.

**Constitutionality.**—Plenary authority to fix the terms and conditions under which restrictions from the lands allotted to the members of the Creek Tribe of Indians should be removed is vested in Congress, and that portion of the act containing, as one of such

conditions and terms, the provision that the enrollment records of the Commissioner to the Five Civilized Tribes shall hereafter be conclusive evidence as to the age of said citizen or freedman is not unconstitutional and void, but a valid exercise of the authority vested in Congress. *Yarbrough v. Spalding*, (1912) 31 Okla. 806, 123 Pac. 843.

**Restriction on admissibility of rolls.**—The rolls of citizenship and of freedmen are made conclusive evidence of the quantum of Indian blood and of age, and therefore are not admissible, by virtue of the act of Congress, for other purposes. *Warren v. Canard*, (1911) 30 Okla. 514, 120 Pac. 599. See also *Cochran v. Teehee*, (Okla. 1913) 138 Pac. 563.

The provision that the rolls of citizenship

of the Five Civilized Tribes "shall hereafter be conclusive evidence as to the age of said citizen or freedman," does not make such rolls conclusive evidence of the age of a citizen, when the transaction involved had been entirely completed prior to the passage of this act and the suit instituted after the passage of the act. *Williams v. Joins*, (1912) 34 Okla. 733, 126 Pac. 1013.

The enrollment records of the Commissioner to the Five Civilized Tribes of Indians, as provided for in Act June 10, 1896, c. 398, 29 Statutes at Large 321, 3 Fed. Stat. Annot. 431 [Roll of Freedmen] are by this section conclusive evidence as to the age of citizens and freemen allottees of said tribes. *Campbell v. McSpadden*, (1912) 34 Okla. 377, 127 Pac. 854.

### 1909 Supp., p. 233, sec. 4.

**Validity and scope.**—This section is valid, and under and by virtue thereof the lands of all allottees of the Five Civilized Tribes of Indians, from which restrictions have been

or shall be removed, are subject to taxation under the general laws of the state equally with property of all other persons. *Nelson v. Wood*, (Okla. 1912) 122 Pac. 1103.

### 1909 Supp., p. 234, sec. 5.

This section only attempts to render void contracts, conveyances, etc., made prior to the removal of restrictions. *Casey v. Bingham* (1913) 37 Okla. 484, 132 Pac. 663.

### 1909 Supp., p. 234, sec. 6.

The provision that the person and property of minor allottees of the Five Civilized Tribes shall, except as otherwise provided by law, be subject to the control and jurisdiction of the probate court of the State of Oklahoma is in the nature of a restriction; by Congress, on the alienation of land belonging to minor allottees, and can be removed only by a regular proceeding, provided by statute, through the instrumentality of the county court. *Tirey v. Darneal*, (1913) 37 Okla. 606, 133 Pac. 614.

**Construction of last clause.**—In *Heckman v. United States*, (1912) 224 U. S. 413, 32 S. Ct. 424, 56 U. S. (L. ed.) 820, the court commenting on the last clause of this section, said: "It is urged that this clause did not confer authority to sue, but was inserted merely to rebut any possible inference of an intention to deny this right to the United States. This seems to us a strained construction in view of the obvious purpose

of the act. And it fails to give adequate effect to the words 'such suits to be brought on the recommendation of the Secretary of the Interior, without costs or charges to the allottees, the necessary expenses incurred in so doing to be defrayed from the money appropriated by this act.'"

In *Truskett v. Closser*, (C. C. A. 8th Cir. 1912) 198 Fed. 835, the court said: "The appellants claim that the phrase 'except as otherwise specially provided by law' refers to and includes the laws of Oklahoma. It is apparent, however, that the law therein mentioned must be federal law, and not state law. It cannot for a moment be supposed that Congress would take the trouble to place under the jurisdiction of a particular court the affairs of Indian minors, and in the same section provide that the state might by its action entirely nullify that provision."

### 1909 Supp., p. 235, sec. 8.

The obvious purpose is to continue supervision over the right of full-blood Indians to dispose of lands by will, and to require conveyances of interests of full-blood Indians in

inherited lands to be approved of by a competent court. *Tiger v. Western Inv. Co.*, (1911) 221 U. S. 286, 31 S. Ct. 578, 55 U. S. (L. ed.) 738.

### 1909 Supp., p. 235, sec. 9.

The actual pendency of an administration proceeding is not necessary to confer power

upon a county court to approve conveyance executed by full-blood heirs of Indian allot-

tees to their inherited lands where it is made to appear to the court that the ancestor from whom the land was inherited resided in the county wherein the application for approval is made, at the time of his death. *Mullen v. Short*, (1913) 38 Okla. 333, 133 Pac. 230.

Necessity for approval by Secretary of the Interior.—Since the passage of this act

the approval by the Secretary of the Interior of a deed by a full-blooded Indian heir is not necessary although the death of the allottee occurred before the passage of the act; approval by the court having jurisdiction over the estate being sufficient. *United States v. Knight*, (C. C. A. 8th Cir. 1913) 206 Fed. 145.

## 1912 Supp., p. 96, sec. 1.

Upon the sale of an allotment of an incompetent Indian, the purchase price received by the United States has the same legal status as the allotment itself had, and therefore is not subject to alienation by the Indian, and property that is purchased by the United States for the Indian with said purchase price, the title being taken in the United States, also has the legal status of the allotment, and is not subject to alienation. In other words, the purchase price of such an allotment when sold by the United States, or its proceeds when the United States uses such purchase price to purchase other property for the Indian, taking title

in the name of the United States, does not become subject to alienation by the Indian. The United States taking the title in its own name in trust for the Indian is as an express and unequivocal manifestation of its intention not to relinquish the trust—not to turn the property over to the Indian to do with as he may please; it rests exclusively with the United States, as trustee and as guardian of the Indian, to determine when, if at all, it will relinquish the trust and turn over the property to the Indian to do therewith as he may choose. *Rider v. La Clair*, (Wash. 1914) 138 Pac. 3.

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## INTERIOR DEPARTMENT.

### Vol. III, p. 537, sec. 441.

Administrative and not legislative power is conferred by this section. *United States v. George*, (1913) 228 U. S. 14, 33 S. Ct. 412, 57 U. S. (L. ed.) 712.

### Vol. III, p. 537, sec. 441, cl. third.

This section and clause are quoted in *Leecy v. United States*, (C. C. A. 8th Cir. 1911) 190 Fed. 289.

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## INTERNAL REVENUE.

### Vol. III, p. 581, sec. 3177.

Enforcement of oleomargarine law.—This section is applicable to the collection or enforcement of the specific tax imposed on oleomargarine by the Act of August 2, 1886, 24 Stat. L. 209, c. 840, 3 Fed. Stat. Annot. 119. *United States v. Barnes*, (1912) 222 U. S. 513, 32 S. Ct. 117, 56 U. S. (L. ed.) 291, wherein the court said: "The cases of *Craft v. Schafer*, (C. C. A. 6th Cir. 1907) 154 Fed.

1002; *Tucker v. Grier*, (C. C. A. 8th Cir. 1908) 160 Fed. 611, and *Hastings v. Herold*, (C. C. N. J. 1910) 184 Fed. 759, although not involving § 3177, disclose some contrariety of opinion in the lower federal courts upon the matter principally discussed herein, and we deem it appropriate to observe that our conclusion has been reached only after a careful consideration of those cases."

## Vol. III, p. 585, sec. 3186.

**Validity of lien as to subsequent incumbrances.**—When the requirements of the assessment and demand have been complied with, the lien of the government is superior to that of anyone acquiring any interests in the property after the date of demand. The government's lien is unaffected by the fact that a subsequent incumbrancer or purchaser became such without knowledge that the government had any interest in the property or claim upon it. *United States v. Curry*, (D. C. Md. 1912) 201 Fed. 371, wherein the court said: "It would seem that by a comparatively slight change of the statute law the rights of the United States could be sufficiently protected without endangering the interests of other persons. The collector

of internal revenue at the time he makes demand upon the taxpayer might be required to transmit a copy of the demand to some office in which judgments and other recognized liens upon real estate are recorded and the records of which are consequently carefully examined by conveyancers. Whether public policy does or does not require that section 3186 shall be repealed or amended in some way as that above suggested is a question of policy for Congress. The present state of the law was called to its attention at least six years ago. Part 1, Proceedings American Bar Ass'n 1906, p. 598. It has, however, not taken any action. The courts must enforce the law as they find it."

## Vol. III, p. 588, sec. 3196.

**Sale of chattels not condition precedent.**—Before resort to the sale of real estate owned by a delinquent taxpayer can be had, proceedings need not be taken to recover the

amount due to the United States from the sale of the chattels and personal effects of such delinquents. *United States v. Curry*, (D. C. Md. 1912) 201 Fed. 371.

## Vol. III, p. 600, sec. 3224.

**Restraining corporation officers from paying tax.**—In view of the provisions of this section and section 3226, 3 Fed. Stat. Ann. 601, it has been held that an injunction will not be granted restraining the officers of a

corporation from paying the corporation tax provided for by Act of Aug. 5, 1909, sec. 38, Fed. Stat. Annot. 1909 Supp. p. 822. *Straus v. Abrast Realty Co.*, (E. D. N. Y. 1912) 200 Fed. 327.

## Vol. III, p. 601, sec. 3226.

**Enforcement of oleomargarine law.**—This section is applicable to the collection and enforcement of the specific tax imposed on oleomargarine by act of Congress of Aug. 2, 1886, c. 840, 24 Stat. L. 209, 3 Fed. Stat. Annot. 120. *Weaver v. Ewers*, (C. C. A. 8th Cir. 1912) 195 Fed. 247.

**Question already raised by application to commissioner for review of assessment.**—The provision of this section requiring an appeal to the Commissioner of Internal Revenue as a condition precedent to the maintenance of an action to recover a tax, does not apply where the matter has already been brought before the commissioner on an application to review an assessment of taxes. *Weaver v. Ewers*, (C. C. A. 8th Cir. 1912) 195 Fed. 247, wherein the court said: "Notwithstanding, however, the provision of section 3226 above mentioned, that no suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority, or any sum alleged to

have been excessive or in any manner wrongfully collected, until an appeal shall have been duly made to the Commissioner of Internal Revenue according to the provisions of the law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the Commissioner has been had therein, we are of the opinion that, as the law does not require idle acts, the first ground of demurrer must be overruled, as the purpose and requirement of the statute above quoted has been fully met by the application for review of the assessment made to the Commissioner of Internal Revenue as set out in the petition. What the Commissioner of Internal Revenue thought about the assessment had been obtained upon full statement of the facts, and it would have been a useless form again, after the tax was paid, to appeal to the Commissioner and obtain the same judgment. The reason for the appeal did not exist, and hence the appeal after tax was paid was not necessary."

## Vol. III, p. 603, sec. 3228.

**Refund of legacy tax on contingent interests.**—The limitation provided for in the section does not apply to the refund of legacy tax provided for by Act of June 27, 1902,

c. 1160, § 3, 3 Fed. Stat. Annot. 787. *United States v. Shipley*, (C. C. A. 3d Cir. 1912) 197 Fed. 265.

**Vol. III, p. 604, sec. 3229.**

A deputy internal revenue collector has authority to at least transmit an offer of compromise, and when he turns over money, received for the purpose of effecting the compromise, to his superior, and it is retained, it will be presumed that the offer was accepted. *Willingham v. United States*, (C. C. A. 5th Cir. 1913) 208 Fed. 137.

A failure to follow the technical rules of

procedure laid down by the Internal Revenue Department will not invalidate a compromise under this section. *Willingham v. United States*, (C. C. A. 5th Cir. 1913) 208 Fed. 137.

Compromise of claim against corporation failing to file corporation tax return.—See *United States v. Acorn Roofing Co.*, (E. D. N. Y. 1912) 204 Fed. 157.

**Vol. III, p. 607; sec. 3239.**

Certified copy of records of internal revenue collector.—In *Daniel v. State*, (1912) 11 Ga. App. 799, 76 S. E. 162, there was a holding as follows: "In the trial of an indictment for the illegal sale of intoxicating liquor, a certified copy from the records of the internal revenue collector of the United States, showing that the accused has paid a special tax as a retail liquor dealer, is admissible in evidence. . . . Whether or not such a certified copy is evidence of an ap-

plication for the internal revenue tax receipt of the United States, as required by section 3239 of the Revised Statutes of the United States, . . . so as to shift the burden of proof on the defendant, under the provisions of the act of the General Assembly of August 21, 1911 (Acts 1911, p. 180), need not be decided, since, under the decisions above cited, the evidence was admissible without reference to the provisions of that act."

**Vol. III, p. 608, sec. 3242.**

Sufficiency of indictment.—See *John Gund Brewing Co. v. United States*, (C. C. A. 8th Cir. 1913) 204 Fed. 17.

**Vol. III, p. 614, sec. 3244, cl. third.**

Rectification of distilled spirits, in the legal sense, means any process, exclusive of "original and continuous distillation from mash, wort, or wash, through continuous closed vessels and pipes, until the manufacture thereof is complete," by which the spirits are separated from the substance with which it is mixed or combined. The rectifier may take the raw spirit of the distiller, and, by

repeated processes of distillation, separate the spirit from the oils and impurities left in it by the distiller; or he may take the refuse material of the manufacturer of ginger or vanilla extract, saturated with alcohol, and by distillation separate the spirit from that material. *Henry K. Wampole & Co. v. United States*, (C. C. A. 3d Cir. 1911) 191 Fed. 573.

**Vol. III, p. 622, sec. 3246.**

Apothecaries.—The exemption as to apothecaries in this section does not embrace one who recovers alcohol from a substance with which it has been previously mixed. *Henry K. Wampole & Co. v. United States*, (C. C. A. 3d Cir. 1911) 191 Fed. 573, wherein the court said: "Such a person is not one of the 'apothecaries' referred to in the exempting clause, [which] . . . provides that no

compounder who is an apothecary shall be liable for the special tax as to any spirits which he sues exclusively in the preparation of medicines. The recovery of spirits from the dregs of the vanilla bean or ginger root is not the business of an apothecary; the use of spirits in compounding medicines is. The exempting clause relates to the latter and not the former business."

**Vol. III, p. 630, sec. 3248.**

Bay rum.—The language of the revenue laws is comprehensive enough to cover all distilled spirits and includes bay rum, which is obtained by distilling rum with the leaves

of the bayberry, or by mixing various oils with alcohol. *Jordan v. Roche*, (1913) 228 U. S. 436, 33 S. Ct. 573, 57 U. S. (L. ed.) 908.

**Vol. III, p. 647, sec. 3271.**

Possession.—The government requires distillers to furnish distillery warehouses, sub-

ject to approval of the Commissioner of Internal Revenue. It has placed them under

the direction and control of collectors and in immediate charge of storekeepers with the keys. It has through severe penalties guarded against removal of whisky until the tax is paid. While these means of control and protection do not divest the distiller of title to either warehouse or whisky, it is plain that during the time of storage he is made to surrender the dominion and control of an owner. This is none the less true because the "duty which revenue officers owe in re-

gard to the security of the warehouse and the safe-keeping of the spirits therein" is to the government. Nor is such surrender of dominion and control affected by the joint custody of the warehouse that is given to the storekeeper and proprietor. His property is so exclusively held and dominated by the government, that not even his creditors can seize it through attachment or other process. *Pattison v. Dale*, (C. C. A. 6th Cir. 1912) 196 Fed. 5.

### Vol. III, p. 656, sec. 3287.

This section is cited in *Pattison v. Dale*, (C. C. A. 6th Cir. 1912) 196 Fed. 5.

### Vol. III, p. 659, sec. 3293.

**Discretion of commissioner in requiring new bond.**—In *Brown v. Foster*, (C. C. A. 4th Cir. 1912) 194 Fed. 855, it appeared that in the year 1905 one Foster, a distiller, gave bonds under this section to the United States for the payment of the taxes due upon certain whisky to be paid within eight years from and after the entry of the whisky in the bonded warehouse, i. e., until the year 1913. His surety upon the bond was the United States Fidelity & Guaranty Company, and the premium on the bonds to the surety company appears to have been paid in full. Thereafter F. transferred all his interest in the whisky to the complainant, and departed from the country and because a citizen of, and was at the time of the action by the Commissioner of Internal Revenue herein after mentioned residing in, the Republic of Mexico. In April, 1910, the whisky referred to was, after due legal proceedings, adjudged forfeited to the United States for alleged violations of the internal revenue law, and judgment was rendered for the value of the same in excess of the taxes due the government of the United States, and thereafter the whisky was restored or released to the complainant, upon his executing to the United States a bond for the value of the whisky in excess of the tax. The surety on the warehousing bonds then gave notice to the Commissioner of Internal Revenue that it would contest any claim that its liability as surety on the bond continued after such forfeiture and release, and in view of the complication that had arisen in the case, especially the seizure and release and the notice from the surety, the commissioner concluded that a new bond should be given under the provisions of this section, and the complainant having failed to give a new bond when required so to do; the commissioner proceeded to collect the tax by distraint, and advertised the whisky for sale. The complainant then brought an action to enjoin the sale as threatened by the commissioner. The principal question raised was whether the power lodged in the commissioner under this section to require a new bond is one which so far rests in his discretion as that the court cannot review his action in a case in which it is not alleged or proven that any

ulterior purpose existed, or there has been any improper abuse of the discretion lodged in him. The court said: "The deposit of the spirits in the warehouse and the extension of the time for the payment of taxes is solely for the benefit of the distiller, and to enable him to give bond for the payment of the tax instead of paying the tax at once. . . . Except for this privilege given to him, the government could call upon him to pay the tax at once. In the opinion of this court the facts in this case are not sufficient to allow the court to interfere with the discretion lodged in the Commissioner of Internal Revenue. Where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involve questions of law or fact, will not be reviewed by the courts unless he has exceeded his authority, or this court should be of opinion that his action was clearly wrong. Whether such decision is right or wrong, is not the question. In the case at bar, not only the principal obligor of the bond departed from the jurisdiction and became a citizen of a foreign country, but the liquor in question had been seized by the government upon an information for an infraction of the internal revenue laws; had been actually adjudged forfeited, and then released to a different party than the original distiller, and the surety on the bonds had notified the commissioner that it was no longer bound on his bond. In view of these complications, the Commissioner of Internal Revenue, in the exercise of the discretion vested in him by the terms of the statute, required a new bond, and it does not appear to this court that the exercise of his discretion was so palpably wrong, and such an invasion of the property rights of the complainant, as to require an interference by a court with the action of the Commissioner of Internal Revenue. Whilst an ultimate recourse to the judiciary may be reserved in all cases where the action of the officer is an invasion of property rights and is in excess of his authority, or palpably and clearly erroneous, or an abuse of discretion lodged in him, yet the case at bar does not come within these categories."



## Vol. III, p. 671, sec. 3296.

**Construction.**—Revenue laws are not penal laws in the sense that requires them to be construed with great strictness in favor of the defendant. They are rather to be regarded as remedial in character, and intended to prevent fraud, suppress public wrong, and promote the public good. They should be so construed as to carry out the intention of the legislature in passing them and to most effectually accomplish these objects. *United States v. Thompson*, (W. D. Va. 1911) 189 Fed. 838.

**Indictment.**—An indictment is sufficient, although it departs from the exact language of the statute, if the language used is substantially that of the statute. *United States v. Thompson*, (W. D. Va. 1911) 189 Fed. 838.

An indictment is sufficient which follows the language of the statute. *Rosenfeld v. United States*, (C. C. A. 7th Cir. 1912) 202 Fed. 469, wherein the court said: "Count 4 charges the violation of that clause of section 3296 wherein it is made a criminal act for any person to conceal or aid in the concealment of any distilled spirits upon which the tax has not been paid, and which have been removed to a place other than the distillery warehouse provided by law, in that it is charged that defendant unlawfully, knowingly, and willfully, and with intent to defraud the United States, did conceal and aid in the concealment of certain distilled spirits on which the tax had not been paid, and which had theretofore unlawfully been removed from the Illinois Fruit Distilling Company to defendant's place of business. The language follows the statute and accords with the language of the indictment approved by the Supreme Court in *Pounds v. United States*, 171 U. S. 35, 18 Sup. Ct. 729, 43 L. Ed. 62. The court says: 'The offense was purely statutory. In such case it is generally sufficient to charge the defendant with acts coming within the statutory description in the substantial words of the statute without any further expansion of the matter—citing *United States v. Simmons*, 96 U. S. 360, 24 L. Ed. 819, and *United States v. Britton*, 107 U. S. 655, 2 Sup. Ct. 512, 27 L. ed. 520.' The point there made was that the indictment failed to al-

lege that there was a warehouse provided by law to which the spirits alleged to have been concealed should have been removed. The point made here is that count 4 does not charge that the spirits in question had theretofore been removed from a certain distillery to a place other than a distillery warehouse, with intent to defraud the United States.

"In *Miller v. United States*, 136 Fed. 581, 69 C. C. A. 355, this court adopted the rule above quoted, but held it did not apply to the facts of the case before it, since the defendant was there charged with knowingly and willfully procuring the presentation to the Commissioner of Pensions of a certain false and fraudulent affidavit without naming the person who made the presentation, or stating that his name was unknown, etc. The indictment was therefore held insufficient under the rule laid down in *United States v. Simmons*, supra. Here no such condition exists. Defendant was fully advised by count 4 of the charge which he was required to meet."

**Application to spirits produced at illicit distillery.**—"The language used in the statute most plainly makes it illegal to remove any untaxed spirits, and as by way of proviso it necessarily excepted removals from all distilleries to the warehouse provided by law at such distilleries. Therefore, as I read it, the statute forbids all removals of untaxed spirits except from a registered distillery to the warehouse at that distillery; and, in case of brandy, except from a registered distillery to the designated place of deposit, which is the distillery warehouse provided by law. No reason suggests itself why Congress should have intended that this statute should not apply to removals of untaxed spirits produced at an illicit distillery. The statute was enacted to facilitate the collection of revenue from distilled spirits. There was therefore reason for an intent to make such removals as entirely illegal as removals from registered distilleries." *United States v. Thompson*, (W. D. Va. 1911) 189 Fed. 838.

This section is cited in *Tucker v. United States*, (C. C. A. 7th Cir. 1912) 196 Fed. 200.

## Vol. III, p. 677, sec. 3305.

This section is cited in *Grain Distillery No. 8 of Eastern Distillery Co. v. United States*, (C. C. A. 4th Cir. 1913), 204 Fed. 429.

## Vol. III, p. 685, sec. 3317.

**Sufficiency of indictment.**—An indictment was held to be sufficient under this section although it failed to charge directly that the revenue tax on the distilled spirits had not been paid at the time of removal, the allegation being that the removal was made of

distilled spirits on which the defendant "then and there well knew and had reasonable grounds to believe that the internal revenue tax then imposed by law had not been paid." *Rosenfeld v. United States*, (C. C. A. 7th Cir. 1912) 202 Fed. 469.

## Vol. III, p. 702, sec. 1.

The report of the committee which submitted to the House of Representatives the draft of this statute may properly be resorted to for the purpose of determining the

scope of the statute passed on the strength of it. *W. A. Gaines & Co. v. Turner-Looker Co.*, (C. C. A. 6th Cir. 1913) 204 Fed. 553.

## Vol. III, p. 734, sec. 3376.

Insufficient indictment. — See *United States v. Don Kee*, (N. D. Cal. 1911) 192 Fed. 733.

## Vol. III, p. 765, sec. 36.

This section was not repealed by the Act of Feb. 9, 1909, ch. 100, 35 Stat. L. 614, Fed. Stat. Annot. 1909 Supp. p. 180, which relates to the importation of opium. *Marks v. United States*, (C. C. A. 2nd Cir. 1912) 196 Fed. 476, wherein the court said: "The Act of 1890 then applies clearly to the manufacture of opium imported after 1909 where the manufacturer has no knowledge that it was unlawfully imported; to the manufacture of opium imported into this country prior to 1909, and to opium grown in this country. In all these cases the Act of 1909 has no application. If the Act of 1890 is inapplicable, the manufacture of opium of these classes can be carried on with impunity. Moreover, we think that the Act of 1890 should have a still broader application. In our opinion it applies to every case where, as a matter of fact, a man engages in the manufacture of smoking opium in the United States, regardless of whether it was imported before or after 1909 and regardless of his knowledge concerning its importation. If the defendant desired to engage in the manufacture of smoking opium, he was obliged to do it according to law, and if he did not do so he broke the statute of 1890 notwithstanding that in case he knew that the opium he used had been imported contrary to law he might also by receiving the same have violated the statute of 1909."

"The statement is made in the defendant's brief in support of its argument that the Act of 1890 is inoperative, that the Treasury Department 'now refuses to accept the bonds of opium manufacturers as provided by the Act of 1890.' We think this statement erroneous. The regulations of the Treasury Department of July 1, 1911, to which our attention has been directed, provide for the giving of bonds. Moreover we do not see how a departmental refusal to accept the bonds prescribed by the statute would constitute any authority for the defendant to violate the statute. The Treasury Department cannot repeal an act of Congress."

**Manufacturer of opium for smoking purposes.** — The purpose of the statute is to tax and regulate the manufacture of smoking opium, and it applies, manifestly, to any

process by which the crude opium is converted into a product fit for smoking. Any such process constitutes manufacture within such a limited statute even if it might not amount to manufacture under a statute of general application. The contrary is the equivalent of saying that the manufacture of smoking opium cannot be regulated because it is not a manufactured product. *Marks v. United States*, (C. C. A. 2nd Cir. 1912) 196 Fed. 476.

The mere mixing of smoking opium with the residue of opium that has been smoked and heating the same is not a "manufacture of opium for smoking purposes" within the meaning of the statute. The manufacture which the statute contemplates is complete when from the crude opium there has been produced the smoking opium, with which alone, as defendant contended, he operated, in its unsmoked and smoked condition. *United States v. Shelley*, (1913) 229 U. S. 239, 33 S. Ct. 635, 57 U. S. (L. ed.) 1167; *Shelley v. United States*, (C. C. A. 2d Cir. 1912) 198 Fed. 88. In the former case the court said: "Section 36 must be read in connection with the accompanying administrative provisions, which render it clear that the tax was designed to yield substantial revenue, and not merely or primarily to prohibit the manufacture of smoking opium. It may easily be believed that if (irrespective of constitutional limitations upon its power) Congress were undertaking to stamp out the practice of opium smoking, it might prohibit such processes of reclaiming as were charged against the defendant in the second and third counts of this indictment. But it is not so easy to believe, in the absence of clear language requiring such a construction, that in prescribing a revenue tax upon the manufacture of opium for smoking purposes, it intended to subject the same substance more than once to the tax, or to require surveillance over opium-smoking resorts—in which, it would seem, such treatment of the residuum might most readily be conducted—the same as over a factory or other establishment where the primary conversion of crude opium into smoking opium is conducted."

## Vol. III, p. 783, sec. 29.

The legacy tax is not a lien on the testator's real estate. — *United States v. Hankey*, (D. C. Mass. 1912) 198 Fed. 355.

For cases on section 29, see *Muentner v. Union Trust Co.*, (C. C. A. 9th Cir. 1912) 195 Fed. 480; *United States v. Farr*, (E. D.

Pa. 1912) 196 Fed. 996; *United States v. Fitts*, (S. D. N. Y. 1912) 197 Fed. 1007; *Baldwin v. Eidman*, (S. D. N. Y. 1913) 202 Fed. 968; *Ford v. United States*, (C. C. A.

2d Cir. 1913) 205 Fed. 130; *Eidman v. Baldwin*, (C. C. A. 2d Cir. 1913) 206 Fed. 428; *Muentzer v. Bliss*, (C. C. A. 9th Cir. 1913) 208 Fed. 140.

### Vol. III, p. 784, sec. 30.

**Nature of remedy.**—A common-law action may not be maintained under this section to recover the tax from an executor as a debt. *United States v. Fitts*, (S. D. N. Y. 1912) 197 Fed. 1007, wherein the court said: "The precise question here presented came up under the act of 1864, supra, before the District Court of the United States for the Eastern District of Pennsylvania in 1886. Butler, J., held that the statute provided a specific method for collecting the tax on legacies and successions; that the tax was made a lien on all the decedent's property, and that, in case the executor did not pay it to the collector, provision was made in the statute whereby the lien should be enforced by suit against any one having possession and the property be sold under the judgment. It was pointed out that there was no provision for suit against the executor or administrator, and that, as the statute provided a

method for enforcing compliance with its terms, no other remedy could be resorted to. *U. S. v. Trucks' Adm'r* (D. C.) 27 Fed. 541. This decision was upheld by the Circuit Court of the Third Circuit in *United States v. Trucks' Adm'r*, 28 Fed. 846, in an opinion by McKennan, J. The question was squarely before the court and the decision went to the merits, the court holding that a common-law action could not be maintained to enforce the payment of legacy taxes imposed by the Act of June 30, 1864, and that the United States must pursue the remedy of the statute where the tax had not been paid. The act of 1898 being, as heretofore pointed out, literally the same in this regard as the act of 1864, it may be said that the *Trucks' Case* has been authority for 25 years, and any other interpretation would hardly be justified in a court of first instance."

### Vol. III, p. 787, sec. 3.

The words "which shall not have become vested," mean the same as "absolutely vested in possession or enjoyment" in a later clause of the same section. *United States v. Fidelity Trust Co.*, (1911) 222 U. S. 158, 32 S. Ct. 59, 56 U. S. (L. ed.) 137; *Beer v. Moffatt*, (D. C. N. J. 1912) 192 Fed. 984.

**Limitation of time for refunding.**—The period of limitation prescribed by section 3228 of the Revised Statutes (3 Fed. Stat. Annot. 603) does not apply to applications for refund under this section. *United States v. Shipley*, (C. C. A. 3d Cir. 1912) 197 Fed. 265, where the court said: "It hardly needs argument to support the statement that if the limitation prescribed in section 3228 does not, proprio vigore, apply to claims made under the special Refunding Act of June 27, 1902, it is entirely beyond the power of the Secretary of the Treasury or the Commissioner of Internal Revenue to prescribe such a limitation. To hold otherwise would bring us to the absurd conclusion that the secretary, in the guise of a regulation, could curtail or diminish the right which Congress, by lawful enactment, had conferred upon a designated class of persons. If he could by any regulation have adopted the two years period of section 3228, he could likewise have

prescribed any longer or shorter period. It follows, then, that if the period of limitation ordained in section 3228 applies to this act, it is because it applies to any and all acts, special or otherwise, by which for any reason Congress directs money to be refunded or paid to a particular class of persons. We have already stated reasons for our conclusion that this Refunding Act is quite independent of the general system of revenue laws, of which the sections of the Revised Statutes above referred to are a part. Section 3228 applies, as contended for by the defendant in error, only to claims based on applications arising out of errors or illegalities in the assessment or collection of such taxes as are provided for and imposed under the general system of the revenue laws, of which said section is a part. But the Refunding Act is not part of the revenue system, but a distinct and special enactment in no wise concerning the levying or collecting of the tax, but creating an obligation to pay money to certain claimants."

**Ministerial duty.**—The duty imposed upon the Secretary of the Treasury under the section is ministerial, and not executive or quasi judicial. *United States v. Shipley*, (C. C. A. 3d Cir. 1912) 197 Fed. 265.

### Vol. III, p. 805, sec. 3465.

**Rights of sureties.**—The act of 1833, here referred to, was an act providing for the collection of debts due by or to the government, and in said act there is a provision defining and fixing the rights of sureties who were compelled to pay the debt of their principal. The act of 1864 makes no provision for the

protection of sureties, and hence the rights of sureties not being fixed by the act, denying to them the right of subrogation, their rights must be determined by the common law. *Lewis' Adm'r v. United States Fidelity & Guaranty Co.*, (1911) 144 Ky. 425, 138 S. W. 305, Ann. Cas. 1913A 564.

**1909 Supp., p. 250. [Act of June 21, 1906.]**

R. S. sec. 3240 as amended is cited in *People v. Lalonde*, (1912) 171 Mich. 286, 137 N. W. 74.

**1909 Supp., p. 253. [Act of Feb. 4, 1909.]**

**Bay rum.**—This act is not a declaration by Congress that bay rum was not subject to a tax under prior statutes, but a more explicit expression of the purposes of such statutes. *Jordan v. Roche*, (1913) 228 U. S. 436, 33 S. Ct. 573, 57 U. S. (L. ed.) 908.

**1909 Supp., p. 826, sec. 33.**

**Lottery.**—In *United States v. One Box of Tobacco, "Foot Prints"* (C. C. A. 4th Cir. 1911) 190 Fed. 731, the court construing the word "lottery" as used in this statute, said: "In our view it will not do to limit the definition of a lottery to a scheme whereby the value of the certificate is dependent upon lot or chance. It does and should equally include a scheme whereby the possession and enjoyment of the prize is made to depend on lot or chance however compassed. The rule

of construction in such cases, while properly strict, should not be such as to emasculate the true meaning of the provision, and we are entirely sure that the prohibition was aimed against the use in connection with the packing of tobacco of any device for the distribution of prizes, to be effected by the aid of lot or chance, and was entirely indifferent to the particular means used to accomplish the result."

**1909 Supp., p. 829, sec. 38.**

**Construction.**—This act, levying, as it does, a tax upon the citizen, must be strictly construed; it cannot be enlarged by construction to cover matters not clearly within its purport. The question is not what Congress might have done or should have done, but what it actually did do. When this is ascertained the duty of the court is accomplished. *Mutual Benefit Life Ins. Co. v. Herold*, (D. C. N. J. 1912) 198 Fed. 199; *Pennsylvania Steel Co. v. New York City R. Co.*, (C. C. A. 2d Cir. 1912) 198 Fed. 774.

"A reference to the language of the act is sufficient to show that it does not in terms impose a tax upon corporate property or franchises as such, nor upon the income arising from the conduct of business unless it be carried on by the corporation. Nor does it in terms impose any duty upon the receivers of corporations or of corporate property, with respect to paying taxes upon the income arising from their management of the corporate assets, or with respect to making any return of such income." *United States v. Whitridge*, (1913) 231 U. S. 144, 34 S. Ct. 24.

**Building and loan association.**—In *Pacific Building & Loan Ass'n v. Hartson*, (W. D. Wash. 1913) 201 Fed. 1011, a building and loan association was held under the facts shown to be subject to a tax under this section. The court said: "In view of the provisions for the loaning of the funds of the corporation to nonmembers, for issuing preferred or guaranteed interest-paying stock, and that allowing the directors, upon finding that the income of the association cannot be loaned profitably, to 'cancel any outstanding certificates of general stock not borrowed upon,' paying the holder the book value of the stock so canceled, thereby being authorized to retire any and all stock in their discretion, it

is clear that the complainant cannot be said to be 'organized . . . exclusively for the mutual benefit of the members, no part of the net income of which inures to the benefit of any private stockholders or individuals.'" See also *Parkview Building & Loan Ass'n v. Herold*, (D. C. N. J. 1913) 203 Fed. 876.

The act is inapplicable to receivers. *Pennsylvania Steel Co. v. New York City R. Co.*, (C. C. A. 2d Cir. 1912) 198 Fed. 774.

**Not an income tax.**—The tax provided for by this section was not intended to be and was not in any proper sense an income tax law. *United States v. Whitridge*, (1913) 231 U. S. 144, 34 S. Ct. 24; *Stratton's Independence v. Howbert*, (1913) 231 U. S. 399, 34 S. Ct. 136. In the latter case the court said: "This court had decided in the *Pollock Case* [157 U. S. 429, 15 S. Ct. 673, 39 U. S. (L. ed.) 759, 158 U. S. 601, 15 S. Ct. 912] that the income tax law of 1894 amounted in effect to a direct tax upon property, and was invalid because not apportioned according to population as prescribed by the Constitution. The act of 1909 avoided this difficulty by imposing not an income tax, but an excise tax upon the conduct of business in a corporate capacity, measuring, however, the amount of tax by the income of the corporation, with certain qualifications prescribed by the act itself."

**"Income."**—In *Sargent Land Co. v. Von Baumbach*, (D. C. Minn. 1913) 207 Fed. 423, the court said: "What does the word 'income' mean? In ordinary speech people recognize a difference between capital and income. I believe that the ordinary meaning attached to income, when it is not derived from personal exertion, is that it is something produced by capital without impairing that capital, and which leaves the property intact, and that nothing can be called in-

come, for the purpose of this act, which takes away from the property itself. If it does, then it ceases to be income and amounts to a sale of capital assets."

Proceeds of ores mined by a corporation on its own premises are "income" within the meaning of the section. *Stratton's Independence v. Howbert*, (1913) 231 U. S. 399, 34 S. Ct. 136, wherein the court said: "As to what should be deemed 'income' within the meaning of § 38, it of course need not be such an income as would have been taxable as such, for at that time (the Sixteenth Amendment not having been as yet ratified) income was not taxable as such by Congress without apportionment according to population, and this tax was not so apportioned. Evidently Congress adopted the income as the measure of the tax to be imposed with respect to the doing of business in corporate form because it desired that the excise should be imposed, approximately at least, with regard to the amount of benefit presumably derived by such corporations from the current operations of the government. In *Flint v. Stone Tracy Co.*, (1911) 220 U. S. 107, 165, it was held that Congress in exercising the right to tax a legitimate subject of taxation as a franchise or privilege was not debarred by the Constitution from measuring the taxation by the total income, although derived in part from property which, considered by itself, was not taxable. It was reasonable that Congress should fix upon gross income, without distinction as to source, as a convenient and sufficiently accurate index of the importance of the business transacted. And from this point of view, it makes little difference that the income may arise from a business that theoretically or practically involves a wasting of a capital."

So called "dividends" awarded annually to policy holders in an insurance company have been held not to form a part of the company's "net income . . . received by it . . . during such year." *Herold v. Mutual Benefit Life Ins. Co.*, (C. C. A. 3d Cir. 1913) 201 Fed. 918, *affirming* (D. C. N. Y. 1912) 198 Fed. 199.

**Income realized from assets of bankrupt corporation.**—Congress did not intend by this section to impose a tax upon the income realized from the assets of a bankrupt corporation, whose property had been taken over by a court, through its officers, to be marshaled and distributed. *Pennsylvania Steel Co. v. New York City Ry. Co.*, (S. D. N. Y. 1912) 193 Fed. 286.

**Doing business.**—The tax is imposed not upon the franchises of the corporation irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate business. *McCoach v. Minehill & S. H. R. Co.*, (1913) 228 U. S. 295, 33 S. Ct. 419, 57 U. S. (L. ed.) 842. See also *Sargent Land Co. v. Von Baumbach*, (D. C. Minn. 1913) 207 Fed. 423.

The corporation subject to the tax must be organized for the purpose of doing business, and, in addition thereto, must be actually engaged in such activities. *Emery, Bird,*

*Thayer Realty Co. v. United States*, (W. D. Mo. 1912) 198 Fed. 242.

Where it appeared that certain members of a department store firm, who individually owned the real estate rented to the firm, organized a corporation for the purpose of holding title to such real estate, such corporation having power at first to buy, sell, rent and exchange property and to do a general merchandise business, but in fact never exercised such powers, except to hold title to and rent the real estate in question and distribute the proceeds of the rent in the form of dividends, and later amended its charter so as to limit its corporate powers merely to the ownership and rental of the property, with distribution of proceeds, it was held that the corporation was not "doing business" within the meaning of that term as used in this law. *Abrast Realty Co. v. Maxwell*, (E. D. N. Y. 1913) 206 Fed. 333.

A railroad company is not doing business so as to make it liable for a corporate tax if its road has been leased, and its only duties are to receive rent and pay dividends. *McCoach v. Minehill & S. H. R. Co.*, (1913) 228 U. S. 295, 33 S. Ct. 419, 57 U. S. (L. ed.) 842.

A corporation organized under the laws of a state for the purpose of owning the stock of a Canadian corporation, and having practically no other assets, and doing no business except receiving the dividends from the Canadian corporation and distributing them as dividends among its own stockholders, is not "carrying on or doing business" within the meaning of this section. *United States v. Nipissing Mines Co.*, (C. C. A. 2d Cir. 1913) 206 Fed. 431.

**"Depreciation."**—A mining corporation is not entitled to deduct the value of ore in place and before it is mined as "depreciation" within the meaning of the section. *Stratton's Independence v. Howbert*, (1913) 231 U. S. 399, 34 S. Ct. 136.

"The ordinary definition of 'depreciation' is the lessening of value. As applied to mining properties, the word carries with it, as in the case of any other business, the idea of deterioration in visible improvements, such as mills and other surface structures and perhaps the underground improvements so far as they are put in by the hand of man, and therefore, speaking popularly, when we think of depreciation in mining properties, we think of a lessening in value by time, or perhaps by accident, of those physical elements which go to develop and to improve the property. Now, does this meaning, commonly entertained and accepted and which is common to every class of corporations, become enlarged in case of mining companies so as to make the extraction of ore likewise an element of depreciation? The court's view is that it does not. This conclusion is in part induced by the reasons which have been above discussed in connection with the term 'net income' and in part by the peculiar nature of the mining business. This latter is *sui generis*. It lives by dying. It is a business that is intrinsically uncertain. The

segregation of part of a stock of goods is a definite detraction from the whole. The excavation of a body of ore, however, may reveal other bodies and result in immeasurable increment. The taking out of ore, while in a sense depreciation from the body, very often leads to the revealing of still larger bodies, and thus results, not in a lessening of the value of the claim, but in a great increase in such value. Mining excavation, when properly conducted, is very often more a development than a waste or a detraction. As applied to this class of corporation, having as its purpose to exhaust—it may be a year hence or a hundred years hence—the body of ore for profit, the mere fact that ore may be extracted does not in my judgment make the value of such ore an element to be classed and deducted as a depreciation of the property." *Stratton's Independence v. Howbert*, (D. C. Colo. 1912) 207 Fed. 419.

**Reasonable allowances for depreciation of property.**—"This statute provides for a deduction of all losses actually sustained within the year, including reasonable allowances for depreciation of property, if any. That is within the second subdivision of section 38. The circumstance that in the third subdivision of section 38, where the form of making the return is provided for, the same words are repeated with a slight modification requiring a separate statement of any amounts allowed for depreciation of property, does not in my opinion change the meaning of the words used in the second subdivision of the paragraph. The word 'allowed' refers to an allowance by the Commissioner of Internal Revenue, and his allowance or disallowance ends the matter unless some case is made out, upon the strength of which a party may come into court to test the reasonableness of the allowance or disallowance by the commissioner. The suggestion that there can be no allowance for depreciation unless such depreciation is entered in the books of the company, recorded from time to time, seems to me without force. The books may be very badly kept, kept in such a way as will in the end bring them into trouble and difficulty; but this act does not provide any penalty for bad bookkeeping. It simply provides that 1 per cent. of the net profit of the various corporations shall be turned over to the government, and provides that in finding out that net profit there shall be a reasonable allowance for depreciation." *United States v. Nipissing Mines Co.*, (S. D. N. Y. 1914) 202 Fed. 803.

**Injunction to restrain payment of tax.**—An injunction will not be granted against the officers of a corporation to restrain them from paying the corporation tax provided for in this section, as its effect, if sufficient to justify a resistance to collection, would be to restrain the collection of taxes, contrary to the provisions of the Revised Statutes of the United States, § 3224, 3 Fed. St. Ann. 600. *Straus v. Abrast Realty Co.*, (E. D. N. Y. 1912) 200 Fed. 327.

**Suit for taxes wrongfully assessed.**—In *Emery, Bird, Thayer Realty Co. v. United*

*States*, (W. D. Mo. 1912) 198 Fed. 242, one of the questions in dispute was as follows: Can the plaintiff bring suit to recover taxes, alleged to have been wrongfully assessed and collected under the Corporation Tax Law, directly against the United States under the Tucker Act, other requirements of law having been complied with, or is its remedy against the Collector of Internal Revenue by whom the assessment and collection were made? The court answered the question in the affirmative, saying: "The first question is no longer an open one in this jurisdiction. The precise question was before the Court of Appeals for this circuit in *Christie-Street Commission Co. v. United States*, 136 Fed. 326, 69 C. C. A. 464. It was there held: 'A claim to recover back internal revenue taxes illegally exacted under a misconstruction of the war revenue law of 1898 is a claim founded upon a law of Congress, within the meaning of the act of March 3, 1887, and it may be enforced by an action directly against the United States under that act, after it has been presented to the commissioner of internal revenue, whether it has received his approval or not, and whether it is an action on a contract or an action sounding in tort.' In the opinion Sanborn, J., said: 'The acts of 1855 and 1887 here under consideration mark a rational and gratifying advance in civilization and public policy, and they should be liberally construed to accomplish the benign purpose of their enactment. The theory that a nation or its government should refuse to submit its controversies with its citizens to the adjudication of impartial tribunals is but the fast receding echo of the rule that the king can do no wrong. There are few more grievous wrongs than the denial by a nation of a hearing and trial of the just claims which its citizens may have against it. There is no reason why a government should not submit its controversies with its subjects to adjudication, or why it should not itself practice that justice whose administration is the great purpose of its existence. Justice demands, and a wise public policy requires, that nations should submit themselves to the judgments of impartial tribunals, to the enforcement of their contracts and to satisfaction of their wrongs as universally as individuals. The decisions of the Supreme Court upon the specific question before us evidence a constantly increasing tendency to adopt this view.' All the decisions of the Supreme Court of the United States now urged by counsel for the government, which have any bearing upon the matter in dispute, were urged upon the attention of the Circuit Court of Appeals by the writer of this opinion, then counsel for the United States, and received full consideration. To seek a decision in conflict with the doctrine announced in *Christie-Street Commission Co. v. United States*, *supra*, is to ask this court to disregard the deliberate judgment of a superior court of controlling authority. Apart from all other considerations, such a policy would lead to instability and endless confusion, and

is indefensible from every point of view. Furthermore, the doctrine announced in that case commends itself to my judgment. I am unable to perceive either justice or advantage in the procedure upon which the government insists."

**Payment under protest.**—In *Abrast Realty Co. v. Maxwell*, (E. D. N. Y. 1913) 206 Fed. 333, it appeared that a corporation tax was assessed, under the provisions of this section, and, not being paid, a writ of distraint was issued by the collector. Notification having been given the corporation that the tax would be collected by levy, sufficient funds were in the hands of a representative of the corporation, so that the deputy collector was able to count out and take the amount necessary to cover the tax. It was held that there was a sufficient protest to enable the corporation to recover the tax from the collector on proof that the corporation was not liable to pay a tax.

**"Organized for profit."** In *Sargent Land Co. v. Von Baumbach*, (D. C. Minn. 1913) 207 Fed. 423, the court said: "It is said that no company comes within the operation of this act unless it is organized for profit. I do not know that it is necessary to decide exactly what that means in this case, although my present opinion is that the words 'organized for profit' are used to distinguish these corporations from charitable corporations; that any corporation organized by private persons for their own advantage and interest, and not for social, charitable, or beneficent purposes, is organized for profit; and that a company organized as these companies were, to acquire title to an estate for the purpose of liquidating it and dividing the proceeds among the owners, is organized for

'profit,' as that term is used in the act in question."

**Dissolution.**—In *United States v. General Inspection & Loading Co.*, (D. C. N. J. 1911) 192 Fed. 223, it was held that dissolution prior to the time when the amount of the tax is ascertained, pursuant to the statute, did not, under the circumstances of that case, enable the corporation to escape liability.

**Returns required from all business corporations.**—This statute explicitly requires returns from all business corporations, whether or not they had any net incomes during the year. Manifestly corporations which had no net incomes could not be required to pay an income tax. Nevertheless, the law expressly required a return. *United States v. Military Const. Co.*, (W. D. Mo. 1913) 204 Fed. 153; *United States v. Acorn Roofing Co.*, (E. D. N. Y. 1912) 204 Fed. 157.

**Mining corporations** are within the general description of this section, which comprises "every corporation, joint stock company or association organized for profit and having a capital stock represented by shares, . . . and engaged in business in any state or territory of the United States." The act specifies those classes of corporations that are to be exempt from its operation, and mining corporations are not among them. Those exempted are labor, agricultural or horticultural organizations, fraternal beneficiary societies, orders or associations operating under the lodge system, domestic building and loan associations, corporations and associations organized and operated for religious, charitable, or educational purposes, etc. *Stratton's Independence v. Howbert*, (1913) 231 U. S. 399, 34 S. Ct. 136.

## 1909 Supp., p. 832, sec. 38, cl. fifth.

This clause is considered in *United States v. General Inspection & Loading Co.*, (D. C. N. J. 1913) 204 Fed. 657.

# INTERSTATE COMMERCE.

## Vol. III, p. 809, sec. 1.

The power of Congress to regulate commerce among the several states is supreme and plenary. It is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. The conviction of its necessity sprang from the disastrous experiences under the Confederation when the states vied in discriminatory measures against each other. In order to end these evils, the grant in the Constitution conferred upon Congress an authority at all times adequate to secure the freedom

of interstate commercial intercourse from state control and to provide effective regulation of that intercourse as the national interest may demand. *Minnesota Rate Cases*, (1913) 230 U. S. 352, 398, 33 S. Ct. 729, 57 U. S. (L. ed.) 1511, 48 L.R.A. (N.S.) 1151.

**Effect on state statutes.**—State statutes in conflict with the Interstate Commerce Act are invalid. *Loomis v. Lehigh Valley R. Co.*, (1913) 208 N. Y. 312, 101 N. E. 907; *Cleveland, C., C. & St. L. Ry. Co. v. Hayes*, (Ind. 1913) 102 N. E. 34; *Ford v. Chicago, R. I. & P. Ry. Co.*, (1913) 123 Minn. 87, 143 N.

W. 249; Chicago, R. I. & P. R. Co. v. Beatty, (1912) 34 Okla. 321, 126 Pac. 736, 42 L.R.A. (N.S.) 984; St. Louis & S. F. R. Co. v. Zickafoose, (1913) 39 Okla. 302, 135 Pac. 406.

But interstate commerce only is affected by this act, and states may legislate in relation to intrastate commerce. Southern Pac. Co. v. Campbell, (C. C. Ore. 1911) 189 Fed. 696.

The elementary and long settled doctrine is that there can be no divided authority over interstate commerce and that the regulations of Congress on that subject are supreme. It results, therefore, that in a case where from the particular nature of certain subjects the state may exert authority until Congress acts, under the assumption that Congress by inaction has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field and renders the state impotent to deal with a subject over which it had no inherent but only permissive power. Chicago, R. I. & P. R. Co. v. Hardwick Farmers Elevator Co., (1913) 226 U. S. 426, 33 S. Ct. 174, 57 U. S. (L. ed.) 284, 46 L.R.A. (N.S.) 203.

Congressional legislation on the subject of interstate commerce which occupies the field of regulation, although not directly inhibitive, excludes action by the state. Southern R. Co. v. Reid, (1912) 222 U. S. 424, 444, 32 S. Ct. 140, 145, 56 U. S. (L. ed.) 257, 263.

The state cannot, under cover of exerting its police power, directly regulate or burden interstate commerce, but a police regulation which has real relation to the proper protection of the people, and is reasonable in its terms, and does not conflict with any valid act of Congress, is not unconstitutional because it may incidentally affect interstate commerce. Sligh v. Kirkwood, (Fla. 1913) 61 So. 185.

In Southern Ry. Co. v. Railroad Commission, (Ind. 1913) 100 N. E. 337, the court said: "There are some general propositions that may be regarded as settled:

"First. That the power of regulating commerce 'among the states' is in Congress, and the subject of exclusive federal control.

"Second. That when Congress does act, and its action covers the subject-matter, its action is exclusive as to interference.

"Third. Until and unless Congress does act, and its action covers the subject-matter, the states may act.

"Fourth. That so long as the action of the states is not repugnant to, or does not interfere with, or place burdens upon, or undertake to regulate, interstate commerce, or are mere police regulations, their action, though in aid, or if in aid, of interstate commerce, is not invalid, unless it is a direct interference.

"Fifth. That it is not enough to render the state law invalid that it is similar to the federal act upon the same subject. It must in operation interfere directly or substantially with interstate commerce, and not be an incidental or casual interference or remotely affect it hurtfully.

"Sixth. That where both the acts of Congress and of the state make a definite act an offense, the commission of the act may be an offense against each, and punishable by each."

Congress has by the Interstate Commerce Act covered the entire field of rates and rate making as to interstate commerce, and superseded state legislation on that subject; hence no others can be prescribed by or controlled by the state, nor can contracts with respect to such rates be the subject of state legislation, but there may be limited liability contracts under the federal acts. Wabash R. Co. v. Priddy, (Ind. 1913) 101 N. E. 724.

A state statute regulating demurrage charges by railroads engaged in interstate commerce is unconstitutional. Sargent v. Rutland R. Co., (1913) 86 Vt. 328, 85 Atl. 654.

A state statute requiring railroads to furnish cars upon application of shipper and forbidding discrimination between shippers in furnishing such cars, if construed to regulate the furnishing of cars for interstate shipments, is invalid by reason of the provisions of this section; but if construed to mean no more than that there shall be no discrimination against demands for cars for interstate shipments, it is valid. Hampton v. St. Louis, I. M. & S. R. Co., (1913) 227 U. S. 456, 33 S. Ct. 263, 57 U. S. (L. ed.) 596.

The proviso is a mere disclaimer of any intention on the part of Congress, in enacting the act to regulate commerce, to exceed its constitutional power. This construction gives consistent and appropriate meaning to those provisions of the first section which define the scope and application of the entire enactment. It sustains the act as a comprehensive scheme of regulation, designed to include all interstate transportation wholly by railroad, or partly by railroad and partly by water, when both are under a common arrangement, and to exempt only that intrastate transportation which is not within the power of Congress to regulate. Texas & P. Ry. Co. v. United States, (Com. C. 1913) 205 Fed. 380.

"Railroad" as used in the section does not include a street railroad. Omaha & C. B. St. R. Co. v. Interstate Commerce Commission, (1913) 230 U. S. 324, 33 S. Ct. 890, 57 U. S. (L. ed.) 1501, 46 L.R.A. (N.S.) 385, wherein the court by Mr. Justice Lamar said: "Street railroads not being guilty of the mischief sought to be corrected, the remedial provisions of the statute not being applicable to them, commands upon every railroad 'subject to the act' being such that they could not be obeyed by street railroads because of the nature of their business and character and location of their tracks, it is evident that the case is within that large line of authorities which hold that under such a statute the word 'railroad' cannot be construed to include street railroad. But it is said that since 1887, when the act was passed, a new type of interurban railroad has been developed which, with electricity as



a motive power, uses larger cars and runs through the country from town to town, enabling the carrier to haul passengers, freight, express and the mail for long distance at high speed. We are not dealing with such a case, but with a company chartered as a street railroad, doing a street railroad business and hauling no freight. It is contended, however, that the amendment of June 18, 1910, 36 Stat. 539, 553, c. 309, 1912 Supp. Fed. Stat. Annot. p. 112, sec. 7., shows that Congress considered that street railroads were under the jurisdiction of the Commission inasmuch as it then provided that 'the Commission shall not establish any through route, classification or rate between street electric passenger railways not engaged in . . . transporting freight . . . and railroads of a different character.' It is contended on the other hand that in that statute Congress distinctly recognized that a street electric road was a 'different character of railroad,' and apprehending that the broad language of the amendment of 1910 might be construed to take in street railroads, this provision was inserted out of abundant caution to prevent that result, as in the case of establishing routes wholly by water, which certainly were not within the terms of the original Act. This section of the act of 1910, however, having been passed after the order was made by the Commissioner, Nov. 27, 1909, is not before us for construction and, manifestly, cannot be given a retrospective operation."

**Ferries.**—The federal power over interstate ferriage by virtue of this section is supreme. *New York Cent. & H. R. R. Co. v. Board of Chosen Freeholders of Hudson County*, (1913) 227 U. S. 248, 33 S. Ct. 260, 57 U. S. (L. ed.) 499, wherein the court said: "We think the argument by which it is sought to limit the operation of the Act of Congress to certain elements only of the interstate commerce embraced in the business of ferriage from state to state is wanting in merit. In the absence of an express exclusion of some of the elements of interstate commerce entering into the ferriage, the assertion of power on the part of Congress must be treated as being coterminous

with the authority over the subject as to which the purpose of Congress to take control was manifested. Indeed, this conclusion is inevitable since the assumption of a purpose on the part of Congress to divide its authority over the elements of interstate commerce intermingled in the movement of the regulated interstate ferriage would be to render the national authority inefficacious by the confusion and conflict which would result. The conception of the operation at one and the same time of both the power of Congress and the power of the states over a matter of interstate commerce is inconceivable, since the exertion of the greater power necessarily takes possession of the field, and leaves nothing upon which the lesser power may operate. To concede that the right of a state to regulate interstate ferriage exists 'only in the absence of federal legislation' and at the same time to assert that the state and federal power over such subject is concurrent is a contradiction in terms."

A shipment of goods may be ascribed to interstate or foreign commerce when the goods have actually started for their destination in another state or to a foreign country, or delivered to a carrier for transportation. *Texas & N. O. R. Co. v. Sabine Tram Co.*, (1913) 227 U. S. 111, 33 S. Ct. 229, 57 U. S. (L. ed.) 442.

Shipments destined for export are interstate shipments though local bills of lading are issued from the point of starting to another point in the same state. *Texas & N. O. R. Co. v. Sabine Tram Co.*, (1913) 227 U. S. 111, 33 S. Ct. 229, 57 U. S. (L. ed.) 442.

**Agreement between shipper and carrier affecting time for bringing action for damages.**—There is nothing in the policy of the Interstate Commerce Act and its amendments prohibiting an agreement by the shipper and carrier as to the time within which an action must be begun by the shipper to recover damages for injuries to property transported, and if the time fixed in the agreement is reasonable the agreement will be enforced. *Watt v. Missouri, K. & T. Ry. Co.*, (1913) 90 Kan. 466, 135 Pac. 600.

## Vol. III, p. 813, sec. 2.

**Common law changed by section.**—Prior to the passage of the Act to Regulate Commerce, carriers fixed their interstate rates free from the actual exertion of federal control; and under that act, as it stood until the amendment of June 29, 1906, 34 Stat. 584, c. 3591, 1909 Supp. p. 255, sec. 1 et seq., the Interstate Commerce Commission had no power to prescribe interstate rates. *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. Ry. Co.*, (1897) 167 U. S. 479, 511, 17 S. Ct. 896, 42 U. S. (L. ed.) 243. The states, however, had long exercised the power to establish maximum rates for intrastate transportation. *Minnesota Rate Cases*,

(1913) 230 U. S. 352, 397, 33 S. Ct. 729, 57 U. S. (L. ed.) 1511, 48 L.R.A. (N.S.) 1151.

**Purpose is to prevent discrimination between shippers.**—It was the purpose of the section to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor. These words are given more precision by the declaration "that the phrase, 'under substantially similar circumstances and conditions,' as found in section 2, refers to matters of carriage, and does not include competition." Inter-

state Commerce Commission v. Baltimore & O. R. Co., (1912) 225 U. S. 326, 32 S. Ct. 742, 56 U. S. (L. ed.) 1107.

By § 2 the carrier is guilty of unjust discrimination, which is prohibited and declared unlawful, if by any rebate or other device it charges one person less for any service rendered in the transportation of property than it does another for a like service. *United States v. Union Stock Yard & Transit Co. of Chicago*, (1912) 226 U. S. 286, 33 S. Ct. 83, 57 U. S. (L. ed.) 226.

**Rebate defined.**—It is true, the word "rebate" has an etymological or dictionary meaning, which includes any discount or deduction from a stipulated payment, charge, or rate not taken out in advance of payment, but handed back to the payer after he has paid the stipulated sum, even when such discount or deduction is equally applied to all from whom such payment is demandable. It is perfectly apparent, however, that in the Commerce Act the word is used in an offensive sense, and refers only to such discount, deduction or drawback as is the basis of a discrimination in favor of a particular person and against other persons in a like situation, and destroys that equality of treatment in rates to which the public are entitled and which it is the great purpose of the law to enforce. An indiscriminating rebate is not a criminal offense, nor in any way interdicted or denounced by the law. *American Sugar Refining Co. v. Delaware, L. & W. R. Co.*, (C. C. A. 3d Cir. 1913) 207 Fed. 733.

**Allowance for cartage to depot.**—An allowance by a carrier to a shipper for the cost of carting goods from the shipper's plant to the railroad is an illegal rebate. *American Sugar Refining Co. v. Delaware, L. & W. R. Co.*, (D. C. N. J. 1912) 200 Fed. 652.

**Allowance to shipper who is owner of terminal.**—Terminal charges paid by a railroad to a partnership which is the owner of a terminal and also a shipper from the terminal do not amount to a rebate on the goods of such partnership if the arrangement is not merely intended as a scheme for obtaining a rebate. *Baltimore & O. R. Co. v. United States*, (Com. C. 1912) 200 Fed. 779.

Companies may not charge a different rate for the transportation of fuel coal to a given point than for the transportation of commercial coal to the same point. *Interstate Commerce Commission v. Baltimore & O. R. Co.*, (1912) 225 U. S. 326, 32 S. Ct. 742, 56 U. S. (L. ed.) 1107.

**Purchase of land by rebating part of freight rate.**—Carriers, whether saw-mill companies or railroads or both combined, cannot purchase land by rebating to the grantor a part of the freight rate on interstate shipments over the road built on the right of way, even though the amount of such rebate was much less than the value of the land

thus acquired. The Commerce Act prohibits the payment of rebates, and its command cannot be evaded by calling them differentials or concessions, nor by taking the money from the railroad itself or from a company that is proved to be the same as the railroad. Otherwise nothing would be easier than for lumber companies to charter a railroad, collect freight as a railroad, but pay it out as a lumber company to shippers. *Fourche River Lumber Co. v. Bryant Lumber Co.*, (1913) 230 U. S. 316, 33 S. Ct. 887, 57 U. S. (L. ed.) 1498.

**Reduced rate for materials and men in connection with improvement of railroad.**—In dealing with transportation over its own road, in connection with construction or improvement, a railroad company is not acting in the performance of its duty as a common carrier, and the arrangement for free or reduced rate carriage for the necessary materials and men used in the work, when it is a part of the contract, entered into in good faith and not as a subterfuge, is not obnoxious to the provisions of law prohibiting departures from the published tariffs, for the reason that such an agreement lies outside the policy of these provisions. *Santa Fé, P. & P. R. Co. v. Grant Bros. Const. Co.*, (1913) 228 U. S. 177, 33 S. Ct. 474, 57 U. S. (L. ed.) 787.

**Carrier and passenger.**—Neither a carrier nor a passenger can make a lawful contract which violates the provisions of the federal law demanding equal accommodations and equal privileges and equal rates to all; but the mistaken issuance of a ticket, in its terms not conforming to the true, the lawful, contract, does not make an unlawful contract; for the ticket as between the passenger and the carrier is not the sole evidence of the contract. *Illinois Cent. R. Co. v. Fleming*, (1912) 148 Ky. 473, 146 S. W. 1110.

**Through shipment by land and sea, there being no contractual relation between carriers.**—In *St. Louis, S. F. & T. Ry. Co. v. Birge-Forbes Co.*, (Tex. 1911) 139 S. W. 3, it appeared that a contract entered into between a shipper of cotton and a railroad stipulated for a through rate and through shipment of the cotton in question from Sherman, Tex., and Ada, Okl., to domestic seaports, and thence to foreign seaports, the railroad having no contractual relation whatever with the ocean carrier. It was held that this being true, the contract was entirely legal, even though the rate paid by the shipper for the ocean voyage reduced the inland rate to less than the tariff rate from the point of origin to the domestic seaport, as the contract was not within the provisions of the Interstate Commerce Act. This case distinguished *Armour Packing Co. v. United States*, (1908) 209 U. S. 56, 28 S. Ct. 428, 52 U. S. (L. ed.) 681.

## Vol. III, p. 816, sec. 3.

**Applicability to interstate rates exclusively.**—In *Minnesota Rate Cases*, (1913)

230 U. S. 352, 33 S. Ct. 729, 57 U. S. (L. ed.) 1511, 48 L.R.A.(N.S.) 1151, it was con-

tended that this section applied to unreasonable discrimination between localities in different states, as well when arising from an intrastate rate as compared with an interstate rate, as when due to interstate rates exclusively. On this question, Mr. Justice Hughes, writing the opinion of the court, said: "If it be assumed that the statutes should be so construed, and it is not necessary now to decide the point, it would inevitably follow that the controlling principle governing the enforcement of the act should be applied to such cases as might thereby be brought within its purview; and the question whether the carrier, in such a case, was giving an undue or unreasonable preference or advantage to one locality as against another, or subjecting any locality to an undue or unreasonable prejudice or disadvantage, would be primarily for the investigation and determination of the Interstate Commerce Commission and not for the courts. The dominating purpose of the statute was to secure conformity to the prescribed standards through the examination and appreciation of the complex facts of transportation by the body created for that purpose; and, as this court has repeatedly held, it would be destructive of the system of regulation defined by the statute if the court without the preliminary action of the Commission were to undertake to pass upon the administrative question which the statute has primarily confided to it. In the present case, there has been no finding by the Interstate Commerce Commission of unjust discrimination violative of the act; and no action of that body is before us for review."

The jurisdiction of the state courts of an action by a shipper against a common carrier for damages resulting from unlawful discrimination against him in rates is not affected by the provisions of the federal Interstate Commerce Act where the shipments involved are within points within the state and the transportation is wholly therein; and where such appears from the complaint a demurrer for lack of jurisdiction by rea-

son of such act should be overruled, especially where there is no suggestion in the complaint that the defendant was ever engaged in interstate commerce, or that its road is so situated as to enable it to engage therein. *Sullivan v. Minneapolis & R. R. Co.*, (1913) 121 Minn. 488, 142 N. W. 3, 45 L.R.A.(N.S.) 612.

#### WHAT CONSTITUTES UNDUE PREFERENCE OR ADVANTAGE.

**Competition between rival carriers.**—To the same effect as the original note, see *Louisville & N. R. Co. v. United States*, (Com. Ct. 1912) 197 Fed. 58.

**Re-shipping privilege.**—Evidence considered and held to show that the re-shipping privilege given the shippers at a particular city did not constitute a preference within the prohibition of this section. *Louisville & N. R. Co. v. United States*, (Com. C. 1912) 197 Fed. 58.

**Allotment of cars.**—The prohibitions of § 3 of the Commerce Act require that cars shall be fairly allotted to shippers without unjust discrimination or unfair preference. But the statute does not define what is the proper method of distribution in case of car shortage, and a question as to the reasonableness of a rule of car distribution is administrative in its character and calls for the exercise of the powers and discretion conferred by Congress upon the Interstate Commerce Commission. *Morrisdale Coal Co. v. Pennsylvania R. Co.*, (1913) 230 U. S. 304, 33 S. Ct. 938, 57 U. S. (L. ed.) 1404.

**Supplying cars to shipper.**—A contract by a common carrier to supply to a particular interstate shipper a specified number of cars on certain dates, to be used in such shipment, is not a violation of this section, unless it appear that the contract, if performed, will in fact extend to that shipper an undue or unreasonable preference over other shippers. *W. H. Ferrell & Co. v. Great Northern R. Co.*, (1912) 119 Minn. 302, 138 N. W. 284.

#### Vol. III, p. 827, sec. 6.

**In general.**—Section 6 lays upon every carrier subject to the provisions of the act the duty of filing with the Commission and publishing schedules of the rates to be charged for the transportation of property over its road, provides for changing and superseding such rates by new schedules so filed and published, and makes it unlawful for such a carrier to depart from any rate so established and in force at the time. It also requires connecting carriers, agreeing upon joint through rates, to file schedules with the Commission, makes similar provision for changing and superseding rates so established, and likewise any deviation from an established joint rate while remaining in force. Other sections contain provisions against unreasonable rates, unjust discrimination, undue preferences and the like. The chief purpose of

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the act was to secure uniformity of treatment to all, to suppress unjust discrimination and undue preferences, and to prevent special and secret agreements, in respect of rates for interstate transportation, and to that end to require that such rates be established in a manner calculated to give them publicity, to make them inflexible while in force, and to cause them to be unalterable save in the mode prescribed. In every substantial sense local rates and joint through rates are placed on the same level. Both are required to be openly established and uniformly applied. True, the carriers are obliged to establish local rates and are left free to agree upon joint through rates, or not, as they choose; but if they do agree thereon, the rates can become legally operative only by being established as prescribed in the act. *Kansas*

City Southern R. Co. v. C. H. Albers Commission Co., (1912) 223 U. S. 573, 32 S. Ct. 316, 56 U. S. (L. ed.) 556.

**Contents of schedule.**—Under this section the carrier is required to give notice of every charge it would make against the shipper. But the section is not construed to compel a railroad to publish what free cartage or accessorial service it will furnish, nor what sums it will pay shippers for transportation service rendered by them, to the carrier. *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, (1913) 230 U. S. 247, 33 S. Ct. 916, 57 U. S. (L. ed.) 1472.

**Posting of rate schedule** is not essential to make rates legally operative, but is required only as a means of affording special facilities to the public for ascertaining the rates actually in force. *Kansas City Southern R. Co. v. C. H. Albers Commission Co.*, (1912) 223 U. S. 573, 32 S. Ct. 316, 56 U. S. (L. ed.) 556. See also *United States v. Miller*, (1912) 223 U. S. 599, 32 S. Ct. 323, 56 U. S. (L. ed.) 568.

The posting of the schedules of rates is not a condition precedent to their taking effect. *Northern Alabama R. Co. v. Wilson Mercantile Co.*, (1913) 9 Ala. App. 269, 63 So. 34.

**Effect of publication of schedule.**—The rate when published becomes established by law. It can be varied only by law, and not

by act of the parties. The regulation by Congress of interstate commerce rates takes that subject out of the realm of ordinary contract in some respects, and places it upon the rigidity of a quasi statutory enactment. The public policy thus declared supersedes the ordinary doctrine of estoppel, so far as that would interfere with the accomplishment of the dominant purpose of the act. It does not permit that inequality of rates to arise indirectly through the application of estoppel, which it was the aim of the act to suppress directly. *New York, N. H. & H. R. Co. v. York & Whitney Co.*, (1913) 215 Mass. 36, 102 N. E. 366, wherein the court said: "The railroad and the shipper are bound inexorably to follow the rate published. No excuse which operates as an evasion of that rate has any standing as matter of law in defense of a proved violation of such rate. Mistake, inadvertence, honest agreement and good faith are alike unavailing."

It is the purpose of the act to impose the duty upon carriers of establishing schedules of rates, and, when a schedule has been established, it is rendered unlawful for the carrier to depart from it, except in the manner provided for revising the schedule. *Chicago, B. & Q. R. Co. v. Feintuch*, (C. C. A. 9th Cir. 1911) 191 Fed. 483.

## Vol. III, p. 833, sec. 8.

**Damage caused by failure to deliver goods** is in no way traceable to a violation of the statute, and is not, therefore, within the provision of §§ 8 and 9 of the act to regulate commerce. *Galveston, H. & S. A. R. Co. v. Wallace*, (1912) 223 U. S. 481, 32 S. Ct. 205, 56 U. S. (L. ed.) 516.

A claim for damages caused by injury to goods in transit is not covered and controlled by the provision of section 8. *Olcovich v. Grand Trunk R. Co. of Canada*, (1912) 20 Cal. App. 349, 129 Pac. 290.

If a carrier unlawfully refunds to a shipper any part of the tariff rate on goods shipped by him, it thereby violates the Interstate Commerce Act, but another shipper not so favored cannot recover damages from the carrier for the violation, unless he can establish that actual injury thereby resulted to him. This is not shown by the fact merely that he did not receive a rebate whereas the first shipper did; and his damages are not measured by the amount of the rebate. *Pennsylvania R. Co. v. International Coal Min. Co.*, (1913) 230 U. S. 184, 33 S. Ct. 893, 57

U. S. (L. ed.) 1446; *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, (1913) 230 U. S. 247, 33 S. Ct. 916, 57 U. S. (L. ed.) 1472.

**Damages caused by failure of carrier to comply with section 6.**—To give full effect to section 8, it is necessary to hold that the party injured and damaged by the failure of a carrier to comply with the plain requirements of section 6 as to advising the public of established rates should be allowed to recover his actual damages, although thereby may follow incidentally—not to say remotely—a quasi reduction from a high and unreasonable and unpublished, though established, rate which the carrier foisted on the shipper. *St. Louis Southwestern Ry. Co. of Texas v. Lewellen*, (C. C. A. 5th Cir. 1911) 192 Fed. 540.

**Jurisdiction of federal courts.**—It is well settled that the federal courts have exclusive jurisdiction of all suits arising out of a violation of the provisions of section 8. *Olcovich v. Grand Trunk R. Co. of Canada*, (1912) 20 Cal. App. 349, 129 Pac. 290.

## Vol. III, p. 833, sec. 9.

**Application of section to action founded on section 20.**—The provisions of section 9, which designate the forum in which claims arising out of a violation of the provisions of section 8 may be litigated, have no application to an action for damages founded upon the provisions of the amendment to

section 20 of the act. (See Fed. Stat. Annot. Supp. 1909, p. 271, sec. 7.) *Olcovich v. Grand Trunk R. Co. of Canada*, (1912) 20 Cal. App. 349, 129 Pac. 290.

**Condition precedent to maintenance of suit.**—A suit for damages occasioned by rebating may be maintained without pre-

liminary action by the Interstate Commerce Commission because the courts can apply the law prohibiting a departure from the tariff to the facts of the case. *Pennsylvania R. Co. v. International Coal Min. Co.*, (1913) 230 U. S. 184, 33 S. Ct. 893, 57 U. S. (L. ed.) 1446; *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, (1913) 230 U. S. 247, 33 S. Ct. 916, 57 U. S. (L. ed.) 1472. But where the suit is based upon unreasonable charges or unreasonable practices there is no law fixing what is unreasonable and therefore prohibited. In such cases the whole scope of the statute shows that it was intended that the Commission and not the courts should pass upon that administrative question. When such order is made it is as though the law for that particular practice had been fixed, and the courts could then apply that order, not to one case, but to every case,—thereby giving every shipper equal rights and preserving uniformity of practice. Section 9 gives the plaintiff the option of going before the Commission or the courts for damages occasioned by a violation of the statute. But since the Commission is charged with the duty of determining whether the practice was so unreasonable as to be a violation of the law, the plaintiff must, as a condition to his right to succeed, produce an order from the Commission that the practice or the rate was thus unreasonable and therefore illegal and prohibited. *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, (1913) 230 U. S. 247, 33 S. Ct. 916, 57 U. S. (L. ed.) 1472. See to the same effect *Morrisdale Coal Co. v. Pennsylvania R. Co.*, (1913) 230 U. S. 304, 33 S. Ct. 938, 57 U. S. (L. ed.) 1494 (involving a question as to the reasonableness of a rule of car distribution). See further on this subject *Langdon v. Pennsylvania R. Co.*, (E. D. Pa. 1912) 194 Fed. 486; *National Pole Co. v. Chicago & N. W. R. Co.*, (E. D. Wis. 1912) 200 Fed. 185.

**Jurisdiction of federal courts.**—Only a

District or Circuit Court of the United States has jurisdiction of a cause of action by a shipper for damages occasioned by the payment by a railroad company of rebates to competing shippers. *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, (1913) 230 U. S. 247, 33 S. Ct. 916, 57 U. S. (L. ed.) 1472.

The federal courts have exclusive jurisdiction of all claims for overcharges on interstate shipments, whether they grow out of an excessive rate or out of misroutings. *Siggins v. Chicago & N. W. R. Co.*, (1913) 153 Wis. 122, 140 N. W. 1128.

**Jurisdiction of state courts.**—A state court has jurisdiction of a cause of action for the collection of a balance due on interstate freight rates as the action is not founded upon an alleged violation of the Interstate Commerce Act. *Baltimore & O. S. R. Co. v. New Albany Box & Basket Co.*, (1911) 48 Ind. App. 647, 94 N. E. 906, 96 N. E. 28.

**Limitation of actions.**—An action under this section to recover damages alleged to have been sustained through excessive freight charges is subject to the limitation stated in section 16 of this act as amended by the Act of June 28, 1906, Fed. Stat. Annot. 1909 Supp. p. 268. *A. J. Phillips Co. v. Grand Trunk Western Ry. Co.*, (C. C. A. 6th Cir. 1912) 195 Fed. 12.

**Parties—Who may recover for excessive freight charge.**—The party who pays the freight or who is liable for its payment, whether he be the millowner, manufacturer, shipper, or consignee, is the one injured by an excessive freight charge and in him alone is vested the right to recover because of the illegal exaction. *Davis v. Mobile & O. R. Co.*, (C. C. A. 5th Cir. 1912) 194 Fed. 374.

**Action by personal representatives.**—The liability under this section is not strictly a penalty and hence the cause of action survives to the personal representatives of a shipper. *Langdon v. Pennsylvania R. Co.*, (E. D. Pa. 1912) 194 Fed. 486.

## Vol. III, p. 835, sec. 10.

A joint stock company engaged in the express business is subject to the provisions of this section. *United States v. American Express Co.*, (W. D. N. Y. 1912) 199 Fed. 321.

**Undervaluation.**—The section is directed against and covers every device or means which a shipper may adopt to obtain an advantage over other shippers or the carrier. But it does not expressly prohibit undervaluation. *Visanaka v. Southern Exp. Co.*, (1912) 92 S. C. 573, 75 S. E. 962.

It does, however, prohibit a shipper from obtaining the transportation of property at

less than the regular rates then established and in force by fraudulent representatives as to the value, and makes such fraud a misdemeanor and imposes a penalty therefor. This though does not prevent the shipper from recovering, if the goods are lost, their apparent value according to the fraudulent representations made. *Adams Exp. Co. v. Green*, (1911) 112 Va. 527, 72 S. E. 102.

The fixing of a value on goods lower than their real value is not in violation of section 10, where all shippers are affected by the same valuation.

## Vol. III, p. 842, sec. 13.

**Effect of Commission's decision.**—When the Commission proceeds of its own motion under this section and declares certain al-

lowances in a tariff illegal as rebates, such allowances are eliminated from the tariffs, although no corrected tariffs are filed, and

consequently a shipper cannot maintain an action thereafter against the carrier to recover such allowances. *American Sugar Refining Co. v. Delaware, L. & W. R. Co.*, (D. C. N. J. 1912) 200 Fed. 652, wherein the court said: "The effect of the Commission's decision was to eliminate such allowances from the filed tariffs. No co-operation by the defendants was required to bring about such result. They were as much bound to refrain from making such rebates from the time of such decision until it should be reversed, or its operation suspended, as if the tariffs had never contained such allowances. To do otherwise would subject the defendants to the penalties of the Commerce Act. Such

decision was equally binding upon the shippers. That the plaintiff was not an actual party to such inquisition before the Commission is immaterial. It would in all probability have been permitted to intervene in such proceedings before final determination; or it could have applied to such Commission at any time after the corrected tariffs went into effect, which, as here determined, was upon the rendition of such decision, to pass upon the reasonableness of the flat rate then being enforced. Neither of these steps, however, was taken by the plaintiff. Therefore it is not in a position to question the correctness of such decision directly, and it cannot do so collaterally."

### Vol. III, p. 843, sec. 14.

Undoubtedly, this provision makes the decisions of the Commission, as so published, admissible in evidence without other proof of their genuineness, but it does not require that they be judicially noticed or relieve litigants from offering them in evidence as they would any other competent evidence intended to be relied upon. Its purpose is to relieve litigants from the inconvenience and expense of obtaining certified copies of the decisions by authorizing the use of the published copies, but it does not otherwise change the rules of evidence. *Robinson v. Baltimore & O. R. Co.*, (1912) 222 U. S. 506, 32 S. Ct. 114, 56 U. S. (L. ed.) 288.

"The orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law so that an order regular on its face may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. "The findings of the Commission are made by law *prima facie* true, and this court has ascribed to them the strength due

to the judgments of a tribunal appointed by law and informed by experience." *Illinois Cent. R. Co. v. Interstate Commerce Commission*, (1907) 206 U. S. 441, 27 S. Ct. 700, 51 U. S. (L. ed.) 1128. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order." *Interstate Commerce Commission v. Union Pac. R. Co.*, (1912) 222 U. S. 541, 32 S. Ct. 108, 56 U. S. (L. ed.) 308.

It is extremely doubtful whether, at common law, one shipper had a cause of action because the carrier paid another shipper more than the market value of transportation services rendered to the carrier. But if any such right existed it was abrogated or forbidden by the Commerce Act, and one was given which, as a condition of the right to recover, required a finding by the Commission that the allowance was unreasonable and operated as an unjust discrimination or as undue preference. Such orders so far as they are administrative are conclusive, whether they relate to past or present rates, and can be given general and uniform operation, since all shippers, who have been or may be affected by the rate, can take advantage of the ruling and avail themselves of the reparation order. They are quasi-judicial and only *prima facie* correct in so far as they determine the fact and amount of damage—as to which, since it involves the payment of money and taking of property, the carrier is by § 16 of the act given its day in court and the right to a judicial hearing. *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, (1913) 230 U. S. 247, 33 S. Ct. 916, 57 U. S. (L. ed.) 1472.

### Vol. III, p. 844, sec. 16.

The provision relating to an attorney's fee is constitutional. *Chicago, B. & Q. R. Co. v. Feintuch*, (C. C. A. 9th Cir. 1911) 191 Fed. 483.

Vol. III, p. 850, sec. 20.

**Uniform system of accounts.**—Congress had power to vest in the Interstate Commerce Commission in the manner set forth in this section, authority to establish a uniform system of accounts, and to require annual

reports with a uniform balance sheet, and to determine the classification and form of such accounts, we have no doubt. *Kansas City Southern Ry. Co. v. United States*, (Com. C. 1913) 204 Fed. 641.

Vol. III, p. 851, sec. 22.

By virtue of the provision that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies," a common-law action may be maintained in a state court by a shipper against an interstate carrier to recover overcharges. *Hardaway v. Southern R. Co.*, (1912) 90 S. C. 475, 73 S. E. 1020, Ann. Cas. 1913D 266, wherein the court said: "To hold that the state courts have no jurisdiction of actions like this will result in so much inconvenience and be so injurious in its consequences to the citizens of the states, and will place them so completely at the mercy of interstate carriers with regard to the settlement of such claims, that the argument in favor of that conclusion should be more cogent and convincing than it is to induce its adoption. The practical result of requiring shippers to go before the Interstate Commerce Commission or into the federal courts to collect these small claims will be to compel the abandonment of them altogether. We feel sure that

Congress did not contemplate or intend any such result, and in the absence of such intent, plainly expressed in or necessarily to be inferred from the provisions of the act, we are not inclined to adopt a construction which will lead to that result."

By virtue of the same provision a common carrier of interstate commerce is not exempted from the common-law liability for damages for refusing to receive and transport a shipment properly tendered. *Aldrich v. Southern Ry. Co.*, (S. C. 1913) 79 S. E. 316.

Also by virtue of the same provision a state court has been held to have jurisdiction of an action of trespass brought by a coal operating company against a common carrier to recover damages for a failure to furnish it an adequate and sufficient supply of cars under ordinary trade conditions. *Sonman Shaft Coal Co. v. Pennsylvania R. Co.*, (1913) 241 Pa. St. 487, 88 Atl. 746; *Stine-man Coal Min. Co. v. Pennsylvania R. Co.*, (1913) 241 Pa. St. 509, 88 Atl. 761.

Vol. III, p. 852, sec. 10.

**Construction.**—This section not only requires that there must be some violation of the act to regulate commerce, but the violation must be one which prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged or upon terms and conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper. In other words, the violation of the act to regulate commerce on the part of the carrier must be such a violation as will amount to discrimination. *United States v. Louisville & N. R. Co.*, (Com. Ct. 1912) 195 Fed. 88.

**Refusal to transport merchandise** is such a discrimination as is contemplated by this section. *United States v. Louisville & N. R. Co.*, (Com. Ct. 1912) 195 Fed. 88, wherein the court said: "It is objected that we may not issue writ or writs of mandamus in this case, for the reason that the refusal to transport the coals of petitioners at all is not such a discrimination as is contemplated by the language of section 23, and that in order to come within the purview of said section the carrier must be actually transporting in-

terstate traffic, but not upon terms or conditions as favorable to one shipper as are given to another shipper for like traffic under similar conditions. We believe that this is placing too narrow a construction upon said section. We believe that if respondents are carrying the coals of other shippers from the immediate territory adjoining the petitioners' mines to southeastern territory, and at the same time are refusing to carry the coals of the petitioners at all, they have not only violated the provisions of the Interstate Commerce Act, but such violation prevents the petitioners from having their interstate traffic moved by respondents upon terms or conditions as favorable as those given by said respondents for like traffic under similar conditions to other shippers. It would lead to an absurd result if the court should be obliged to hold that discrimination might exist if respondents were charging the other shippers 50 cents a ton for the transportation to southeastern territory and at the same time were charging petitioners \$1 a ton for the same service, and yet there would not be discrimination if respondents refused to transport the coal of petitioners at all, for any price."

Vol. III, p. 853. [*Act of Aug. 8, 1890.*]

**History, constitutionality and construction.**—This legislation was enacted to minimize or remove the effects of a decision of the Supreme Court of the United States theretofore recently rendered to the effect that, under the commerce clause of the Federal Constitution, a vendor could not only import whisky from one state to another, notwithstanding the prohibition laws of the latter state, but could sell it there in the original package. The statute has been declared a constitutional enactment with the limitation that it does not operate to restrain or affect a continuous shipment of whisky from a vendor in one state to a vendee in another, and there delivered to such vendee in the original package; this being the case now presented for consideration. *State v. Allen*, (1912) 161 N. C. 228, 75 S. E. 1082.

"After the adoption of the prohibition and local option laws by many of the states of the Union, unscrupulous persons sought to take an improper advantage of the interstate commerce clause of the Constitution of the United States, and under the authority thereof would ship into such states for the use of the consumer, intoxicating liquors in what was known as the 'original package,' and thereby violate the spirit, if not the letter, of said prohibition and local option laws. Under that status of the law, neither the courts of justice nor other state officials had sufficient authority to effectively remedy the many abuses before suggested. The courts, when confronted with that condition of things, frequently suggested that relief from that situation might be granted by an act of Congress. Interested parties grasping the suggestion urged upon Congress the importance and necessity of such an act. In consequence thereof the Wilson act was duly enacted. From this brief history of that act, it must be apparent that Congress never designed thereby to authorize the legislature of a state to enact laws materially interfering with interstate commerce, but only intended to remove the shield under which the state laws were being violated by those designing persons, with impunity; or, in other words, the clear intention of Congress was to subject intoxicating liquor shipped from one state into another to the laws of the state to which it was shipped, and thereby subject both foreign and domestic liquors to the same law, but nothing more." *State v. Parker Distilling Co.*, (1911) 237 Mo. 103, 139 S. W. 453.

By this act the liquor traffic was expressly eliminated as one of the subjects of interstate commerce, and is therefore not within the protection of the Federal Constitution. In construing the act, the state courts of those jurisdictions where the question has been raised, and the Supreme Court of the United States, have held that it means, as its language will be found, upon examination, to plainly imply, that a state may, in the exercise of its police powers, and without offending the commerce clause of the Federal Constitution, regulate or control the traffic in intoxicating liquors, within its own borders, to the extent either of regulating or altogether preventing the business of soliciting proposals in such state for the purchase of such liquors, which proposals are to be consummated outside of the state, and the liquors to which such proposals relate are also situated outside the state. *Ex parte Anixter*, (1913) 22 Cal. App. 117, 134 Pac. 193.

**Applicability of statute to foreign shipments.**—In reason it is certain that the purpose which led to the enactment of the law was to give the several states power to deal with all liquors coming from outside their limits upon arrival and before sale, thus rendering the state police authority more complete and efficacious on the subject; a purpose which would be plainly set at naught by exempting liquors brought into a state from a foreign country from the operation of the statute. *DeBary v. State of Louisiana*, (1913) 227 U. S. 108, 33 S. Ct. 239, 57 U. S. (L. ed.) 441.

This act does not apply before actual delivery to the consignee where the shipment is interstate. *Louisville & N. R. Co. v. F. W. Cook Brewing Co.*, (1912) 223 U. S. 70, 32 S. Ct. 189, 56 U. S. (L. ed.) 355.

A state statute providing for a license tax on persons engaged in the business of disposing of alcoholic liquors in less quantities than five gallons is applicable to persons selling liquor from a warehouse in unbroken packages of three gallons each, and being a police regulation is not invalidated by the Wilson Act. *State v. Frederick De Bary & Co.*, (1912) 130 La. 1090, 58 So. 892. See also *State v. Pabst Brewing Co.*, (1911) 128 La. 770, 55 So. 349.

This section is cited in *Logan v. Brown*, (1911) 125 Tenn. 209, 141 S. W. 751.

## Vol. X, p. 170, sec. 1.

The Elkins Act makes it an offense for any person or corporation to give or receive any rebate, concession or discrimination in respect to the transportation of property in interstate commerce whereby any such property shall be transported at a rate less than that named in the published tariff or whereby any other advantage is given or discrimi-

nation is practiced. *United States v. Union Stock Yard & Transit Co. of Chicago*, (1912) 226 U. S. 286, 33 S. Ct. 83, 57 U. S. (L. ed.) 226.

It is the object of the Interstate Commerce Law and the Elkins Act to prevent favoritism by any means or device whatsoever and to prohibit practices which run counter to the



purpose of the act to place all shippers upon equal terms. *United States v. Union Stock Yard & Transit Co. of Chicago*, (1912) 226 U. S. 286, 33 S. Ct. 83, 57 U. S. (L. ed.) 226.

The crime of accepting a concession from the lawful rate is not completed until there is a consummation by payment of the lower rate, but a single payment of a multitude of different shipments does not prevent there being as many offenses as there were shipments. *United States v. Standard Oil Co.*, (W. D. N. Y. 1911) 192 Fed. 438.

Validity of contract determined as of what time.—The time of the performance of services under a contract and not the time of its execution determines its validity under the Elkins Act. *Elwood Grain Co. v. St. Joseph & G. I. Ry. Co.*, (C. C. A. 8th Cir. 1913) 202 Fed. 845.

An advantage accorded by special agreement which affects the value of the service to the shipper and its cost to the carrier should be published in the tariffs, and for a breach of such contract, relief will be denied, because its allowance without such publication is a violation of the act. It is also illegal because it is an undue advantage in that it is not one open to all others in the same situation. *Chicago & A. R. Co. v. Kirby*, (1912) 225 U. S. 155, 32 S. Ct. 648, 56 U. S. (L. ed.) 1033. See also *St. Louis, I. M. & S. Ry. Co. v. West*, (Tex. 1913) 159 S. W. 142.

A special contract whereby the carrier agrees to furnish to one of its shippers, free storage for his goods for an indefinite period, dependent upon the plaintiff's convenience in removing the goods from the defendant's warehouse, is in violation of this section. *Central of Georgia R. Co. v. Patterson*, (1912) 6 Ala. App. 494, 60 So. 465, wherein the court said: "Granting a special storage privilege as part of the service covered by the rate charged for carriage may be a matter of considerable consequence to the shipper, and to the extent of its value each such privilege lessens the aggregate compensation paid by the shipper to the carrier for transportation and terminal services."

Expediting shipment.—A common carrier engaged in interstate commerce has no right to grant special favors to anybody. To agree with a particular shipper to expedite a shipment at regular rates, even where no rate has been established for special expediting, is a discrimination, and as such a violation of the Elkins Act. A carrier cannot legally contract with a particular shipper for an unusual service unless he make and publish

a rate for such service equally open to all. Discrimination is forbidden. *Chicago & Alton Ry. Co. v. Kirby*, (1912) 225 U. S. 155, 32 Sup. Ct. 648, 56 U. S. (L. ed.) 1033; *Clegg v. St. Louis & S. F. R. Co.*, (C. C. A. 8th Cir. 1913) 203 Fed. 971; *Johnson v. New York, N. H. & H. R. Co.*, (Me. 1913) 88 Atl. 988.

An undertaking to carry one shipper's cattle by special train at the same rate or tariff exacted from another routed on schedule time would be violative of this section. *Siemonsma v. Chicago, M. & St. P. Ry. Co.*, (Ia. 1913) 139 N. W. 1077, following *Chicago & A. R. Co. v. Kirby*, (1912) 225 U. S. 155, 32 S. Ct. 648, 56 U. S. (L. ed.) 1033.

Undervaluation.—When the carrier graduates its rates by value and has filed its tariffs showing two rates applicable to a particular commodity or class of articles, based upon a difference in valuation, the shipper must take notice, for the valuation automatically determines which of the rates is the lawful rate. If he knowingly declares an undervaluation for the purpose of obtaining the lower of two published rates, he thereby obtains an advantage and causes a discrimination forbidden and made unlawful by the first section of the Elkins Act of February 19, 1903. *Missouri, K. & T. R. Co. v. Harri-man*, (1913) 227 U. S. 657, 33 S. Ct. 397, 57 U. S. (L. ed.) 690.

A shipper who accepts credit from a carrier for freight charges which other shippers of the same commodity, from the same points and under substantially the same conditions and manner of transportation, do not receive, is guilty of accepting or receiving a "discrimination in respect of the transportation" of any property in interstate commerce within the prohibition of this section. *United States v. Sunday Creek Co.*, (N. D. Ohio 1911) 194 Fed. 252, wherein the court said: "The word 'discrimination,' as used in the Elkins act, is employed in its common sense, as well as with whatever enlarged or more definite meaning the context of the amendment of 1906 gives to it. Thus a shipper who is permitted to settle his charges by paying a 'less or different compensation' to the carrier is accepting or receiving a 'discrimination.'"

A failure to observe tariffs relating to demurrage constitutes a misdemeanor. *Lehigh Valley R. Co. v. United States*, (C. C. A. 3d Cir. 1911) 188 Fed. 879.

A conviction of a transportation company for granting rebates was affirmed in *Merchants' & Miners' Transp. Co. v. United States*, (C. C. A. 5th Cir. 1912) 199 Fed. 902.

## Vol. X, p. 173, sec. 1.

This statute does not grant immunity from a prosecution which has nothing to do with the anti-trust act and is concerned only with certain frauds in connection with the weigh-

ing of dutiable goods whereby the government was deprived of duties which it should have received. *Heike v. United States*, (C. C. A. 2d Cir. 1911) 192 Fed. 83.

## 1909 Supp., p. 255, sec. 1.

**Carriers affected by Act.**—*Interstate street railways* are "railroads" within the meaning of this section. *Omaha & C. B. St. Ry. Co. v. Interstate Commerce Commission*, (Com. C. 1911) 191 Fed. 40.

**Telegraph companies** are included in the category of common carriers and an agreement by them to issue a personal telegraph blank, though enforceable when made, cannot be enforced by virtue of this section. *Clark v. New Jersey Postal Telegraph Co.*, (N. J. 1913) 87 Atl. 640.

**Sleeping car companies** are by virtue of this section "common carriers" and sleeping cars owned by them and used in interstate commerce cannot be attached under state laws. *Pullman Co. v. Linke*, (S. D. Ohio 1913) 203 Fed. 1017, wherein the court said: "A sleeping car company, it is true, by furnishing sleeping cars under a contract with a railroad company to be used by the traveling public, does not thereby assume or acquire the status of a common carrier of goods or passengers (*Lemon v. Palace Car Co.* [C. C.] 52 Fed. 262; *Elliott, Railroads*, § 1616; *Beale, Innkeepers & Hotels*, § 342; *Hutchinson, Carriers*, § 1130; 25 *Am. & Eng. Ency. Law*, 1110, 1111), unless declared to be such by some constitutional or statutory provision. It merely furnishes accommodations to the passengers of another company and performs only an auxiliary function in their transportation; but it is nevertheless engaged in a public calling. 6 *Cyc.* 656; *Elliott, Railroads*, § 1618. Section 1 of the interstate commerce act as amended June 29, 1906, 34 Stat. L. 584, provides that the term 'common carrier' as used in that act shall include sleeping car companies. By virtue of this statutory provision, the plaintiff's status at the time of the seizure of the car was in legal contemplation the same as that of an interstate carrier."

**Express companies.**—"It will be observed that section 1 in terms provides that the act applies to any corporation, or any person or persons, engaged in transporting property between the states, holding them to be common carriers; and that paragraph 2 of the same section includes express companies and sleeping car companies in the term 'common carriers.' Prior to such enactment, the act applied to common carriers without the particular inclusion of corporations, and express and sleeping car companies. In short, under the original act, corporations were immune, and express companies were not specifically included. In this situation, in 1903, the *Elkins* act clearly and definitely extended the liability to corporations; and subsequently, in 1906, the *Hepburn* act enlarged and extended the scope of the original act, not only in relation to the nature of the transportation to which it applied, but also to liability for infraction of the statute by express companies and sleeping car companies. By this inclusion Congress seems to have recognized the incompleteness of the term 'common car-

riers' and its applicability to express companies." *United States v. American Express Co.*, (W. D. N. Y. 1912) 199 Fed. 321.

"Express companies" as used in the statutes includes those organized as joint stock associations. *United States v. Adams Exp. Co.*, (1913) 229 U. S. 381, 33 S. Ct. 878, 57 U. S. (L. ed.) 1237, wherein the court said: "It has been notorious for many years that some of the great express companies are organized as joint stock associations, and the reason for the amendment hardly could be seen unless it was intended to bring those associations under the act."

**Carriers partly by railroad and partly by water.**—The first section makes the act apply alike to common carriers engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water under an arrangement for a continuous carriage or shipment. Carriers partly by railroad and partly by water under a common arrangement for a continuous carriage or shipment are as specifically within the terms of the act as any other carrier named therein. *Interstate Commerce Commission v. Goodrich Transit Co.*, (1912) 224 U. S. 194, 32 S. Ct. 430, 56 U. S. (L. ed.) 729.

A "common carrier" does not include a corporation owning the entire stock of a common carrier. *United States v. Union Stockyard & Transit Co. of Chicago*, (Com. C. 1911) 192 Fed. 330.

**"Lateral branch line of railroad."**—A road is or is not a lateral branch railroad, according to the relation which it bears to the line with which a switch connection is asked. And this relation is one of road to road, and not of shippers or territory. A road, in other words, does not have the character of a branch or lateral road as to some shippers and territory, and not have it as to others. There is no such dividing up or limiting it, nor can it be of that shifting kind. Looking to the purpose of the law, a road is a lateral branch road when it is tributary to and dependent on another for an outlet; that is to say, where it is essentially a feeder, contributing traffic, and capable of interchanging it therewith. It is not such where it is in effect an independent and competing line. Nor is this any less the case because it may not compete as to a portion of the territory involved. It is the general effect which decides. *Baltimore & Ohio S. W. R. Co. v. United States*, (Com. C. 1912) 195 Fed. 962.

**Constitutionality of commodities clause.**—In *Delaware, L. & W. R. Co. v. United States*, (1913) 231 U. S. 363, 34 S. Ct. 65, the court had under consideration the constitutionality of the commodities clause, it being insisted by the plaintiff in error that the commodities clause violated the Fifth Amendment, deprived the company of a right to contract, and prevented it from carrying its own property needed in a legitimate intrastate business, conducted under authority of a charter

granted by the state of Pennsylvania, many years before the adoption of the Hepburn bill. The court said: "This contention must be overruled on the authority of *United States v. Delaware & H. Co.*, (1909) 213 U. S. 366, 416. It is true that the decision in that case related to shipments of coal from mine to market, while here the merchandise was transported from market to mine. But the statute relates to 'all commodities, except lumber, owned by the company' and includes inbound as well as outbound shipments. Both classes of transportation are within the purview of the evil to be corrected and, therefore, subject to the power of Congress to regulate interstate commerce. The exercise of that power is, of course, limited by the provisions of the Fifth Amendment. (*Monongahela Nav. Co. v. United States*, (1893) 148 U. S. 312, 336; *McCray v. United States*, (1904) 195 U. S. 27; *Union Bridge Co. v. United States*, (1907) 204 U. S. 364), but the commodities clause does not take property nor does it arbitrarily deprive the company of a right of property. The statute deals with railroad companies as public carriers, and the fact that they may also be engaged in a private business does not compel Congress to legislate concerning them as carriers so as not to interfere with them as miners or merchants. If such carrier hauls for the public and also for its own private purposes, there is an opportunity to discriminate in favor of itself against other shippers in the rate charged, the facility furnished or the quality of the service rendered. The commodities clause was not an unreasonable and arbitrary prohibition against a railroad company transporting its own useful property, but a constitutional exercise of a governmental power intended to cure or prevent the evils that might result if, in hauling goods in or out, the company occupied the dual and inconsistent position of public carrier and private shipper. . . . The statute is general and applies not only to those particular instances in which the carrier did use its power to the prejudice of the shipper, but to all shipments which, however innocent in themselves, come within the scope and probability of the evil to be prevented."

What constitutes interstate commerce.—The Interstate Commerce Act, as amended by the Hepburn Act, applies to common carriers engaged in the transportation of persons or property from state to state wholly by railroad, and the term railroad is defined to include "all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property;" and transportation is defined to include "cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing,

storage, and handling of property transported."

That the service is performed wholly in one state can make no difference if it is a part of interstate carriage. And so the fact that the performance of the service is distributed among different corporations having common ownership in a holding company which controls an interstate system is held to make no difference, where the service to be performed is a part of the carriage of freight by railroad in interstate commerce. Nor does it make any difference that the corporations do not issue through bills of lading. It is the character of the service rendered, not the manner in which the goods are billed, which determines the interstate character of service. *United States v. Union Stock Yard & Transit Co. of Chicago*, (1912) 226 U. S. 286, 33 S. Ct. 83, 57 U. S. (L. ed.) 226.

The interstate commerce begins with the shipment of the article in one state directed and destined to another state. It ends only with the delivery at destination. All common carriers by railroad which participate in its actual transportation from the time of shipment to the time of delivery are engaged in the transportation of property from one state to another, whether their services be performed wholly within one state or in more than one state, whether such services be primary, and called "carriage," or incidental, and called "switching," whether the carrier be paid a flat sum per car or a percentage of the through rate, and whether such payment be made directly by the shipper or consignee on the one hand, or by the initial or final carrier on the other hand. *United States v. Union Stockyard & Transit Co. of Chicago*, (Com. C. 1912) 192 Fed. 330.

The first proviso does not except from the operation of this act the rates of a carrier between points within a state on freight brought into the state by another carrier and carried to its destination by the interstate carrier as a continuous shipment. *Denver & R. G. R. Co. v. Interstate Com. Commission*, (Com. C. 1912) 195 Fed. 968, wherein the court said: "Section 1 not only subjects to the act, first, certain carriers, but also, second, certain transportation. The proviso relates, not to the carriers, but to the transportation, and is therefore to be read in connection with the second clause of the section, and not with the first. Summarized, the first clause relates to carriers engaged in transportation (a) wholly by rail, or (b) partly by rail and partly by water under a common arrangement, from (c) state to state, or (d) from the United States to or through an adjacent foreign country. For example, carriers transporting traffic by rail from Albany to New York for shipment to Europe would not come under this definition, whether or not there were a common arrangement for rail and water transportation; but carriers engaged in moving traffic from Albany to New York by rail and thence by water to New Orleans, or from Albany to Buffalo by rail and thence by water to Toronto, would come within the definition, if there were a

common arrangement. It was interstate rail transportation that was primarily sought to be regulated, not interstate water transportation, and not the rail part, within a single state, of rail and water interstate transportation, unless the rail carrier and the water carrier were under a common control management or arrangement.

"But as to transportation to a foreign country, unless wholly by water from point of origin to final destination, Congress had a different and definite purpose. Even though in that case there were no common arrangement between the rail and water carrier, even though no regulation of the ocean carrier or the entirely independent lake or river carrier was intended, nevertheless Congress deemed it important to subject to the act, and therefore by the second clause did subject, that part of such transportation which was conducted within this country, although confined to a single state and conducted by a line that had no connection of any kind with an ocean carrier or with any interstate traffic. Then, out of abundant caution, as it seems, and by way of disclaimer of any authority over a carrier that confined its business to one state, and was not engaged in such interstate business as would bring it within the first clause, the proviso was added. The intended effect of this proviso was to exclude from the operation of the act such transportation, whether of persons or property, as was carried on wholly within one state, other than that going to or coming from a foreign country. Having given jurisdiction over certain transportation that could be conducted either in more than one or in only one state—that is, the inland transportation of commerce to or from foreign lands—it disclaimed jurisdiction over domestic traffic confined strictly and wholly to a single state. This disclaimer naturally contained the limiting clause, 'not shipped to or from a foreign country' to avoid any possible conflict with what immediately preceded, and to prevent an interpretation which would exclude the Albany-New York part of the Albany-New York-Europe transportation in the example above given. The proviso, therefore, must be regarded as a disclaimer, and not as an exception. It could not, of course, be an exception to the second grant of jurisdiction over certain transportation, and it does not in any way refer to the first grant of jurisdiction over certain carriers, either by way of disclaimer or by way of exception. It results that rail carriers engaged in such transportation of admittedly interstate commerce as is here considered were intended to be made subject to the act and are included in the classes of carriers to which the act applies."

Transportation means not only the physical instrumentalities, but all services in connection with receipt, delivery and handling of property transported. *Southern R. Co. v. Reid*, (1912) 222 U. S. 424, 32 S. Ct. 140, 56 U. S. (L. ed.) 257.

By the language of the act transportation is defined to include terminal charges, and demurrage, being a charge for the de-

tention of a car because of the use of the car and track until unloaded, is a terminal charge. *Lehigh Valley R. Co. v. United States*, (C. C. A. 3d Cir. 1911) 188 Fed. 879.

"Territory of the United States" as used in this section includes Alaska. *Interstate Commerce Commission v. Humboldt Steamship Co.*, (1912) 224 U. S. 474, 32 S. Ct. 556, 56 U. S. (L. ed.) 849.

State statutes.—On account of the passage of the act of Congress of June 29, 1906, the state, under its police power, has ceased to have the authority to pass acts relative to contracts made by carriers pertaining to interstate shipments. *St. Louis & S. F. R. Co. v. Cox*, (Okla. 1914) 138 Pac. 144; *St. Louis & S. F. R. Co. v. Bilby*, (Okla. 1913) 130 Pac. 1089.

State statutes regulating the delivery of cars engaged in interstate commerce are invalid by virtue of this section which deals with the same subject. *Chicago, R. I. & P. R. Co. v. Hardwick Farmers Elevator Co.*, (1913) 226 U. S. 426, 33 S. Ct. 174, 57 U. S. (L. ed.) 284, 46 L.R.A. (N.S.) 203, wherein the court said: "In the original act to regulate commerce the term 'transportation' was declared to embrace all instrumentalities of shipment or carriage. By the Hepburn Act it was declared that the term transportation (italics ours) 'shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto.'"

"The purpose of Congress to specifically impose a duty upon a carrier in respect to the furnishing of cars for interstate traffic is of course by these provisions clearly declared. That Congress was specially concerning itself with that subject is further shown by a proviso inserted to supplement section 1 of the original act imposing the duty under certain circumstances to furnish switch connections for interstate traffic, whereby it is specifically declared that the common carrier making such connections 'shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper.' Not only is there then a specific duty imposed to furnish cars for interstate traffic upon reasonable request therefor, but other applicable sections of the act to regulate commerce give remedies for the violation of that duty. Thus, by section 8 it is provided 'that in case any common carrier subject to the provisions of this act . . . shall omit to do any act, matter or thing in this act required to be done, such common carrier shall be liable to the person or persons injured

thereby for the full amount of damage sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.'

"Further by sec. 9 an election is given to either make complaint to the Interstate Commerce Commission or to bring, in a designated court, an action for the recovery of damages, and by section 10 it is made a criminal offense for an employee of a corporation carrier to 'wilfully omit or fail to do any act, matter, or thing in this act required to be done.'

"As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate commerce regulation, even if such subject was embraced within that class of powers concerning which the state had a right to exert its authority in the absence of legislation by Congress, it must follow in consequence of the action of Congress to which we have referred that the power of the state over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all-embracing authority over the subject." See to the same effect, *Yazoo & M. V. R. Co. v. Greenwood Grocery Co.*, (1913) 227 U. S. 1, 33 S. Ct. 213, 57 U. S. (L. ed.) 389; *St. Louis, I. M. & S. R. Co. v. Edwards*, (1913) 227 U. S. 265, 33 S. Ct. 262, 57 U. S. (L. ed.) 506.

A state statute is invalid which requires agents and officers of railroads and other transportation companies to receive freight for transportation whenever tendered at a regular station, and every loaded car tendered at a side track or any warehouse connected with the railroad by a siding, and forward the same by a route selected by the person tendering the same. *Southern R. Co. v. Reid*, (1912) 222 U. S. 424, 444, 32 S. Ct. 140, 145, 56 U. S. (L. ed.) 257, 263.

In *Atchison, T. & S. F. R. Co. v. State*, (1912) 31 Okla. 767, 123 Pac. 1065, it was held that an order of a state corporation commission providing that ten days free storage should be allowed on less than carload shipments, when destined to consignees who lived at interior points, five miles or more from the railroad station, in so far as it applied to interstate commerce was void, for the reason that it was in conflict with and was superseded by sections 1 and 2 of the Act of June 29, 1906, and for the further reason that it interfered with and imposed upon interstate commerce an unreasonable burden.

The act of the legislature of Oklahoma Territory of 1905 (section 2, art. 2, c. 10, Laws 1905), imposing upon railroad companies a penalty of \$1 per day for failure to furnish cars under the circumstances therein stated, is not in conflict with this section which requires cars to be furnished upon reasonable request. *Chicago, R. I. & P. R.*

*Co. v. Beatty*, (1912) 34 Okla. 321, 126 Pac. 736, 42 L.R.A. (N.S.) 981.

The state of Georgia cannot, as an exercise of its governmental power, prescribe rates of freight for interstate shipments by the Western & Atlantic Railroad Company. In view of the act of Congress to regulate interstate commerce the legislature can neither do this directly nor through the State Railroad Commission. *State v. Western & A. R. Co.*, (1912) 138 Ga. 835, 76 S. E. 577.

The purpose of the act was to fix the liability of interstate carriers and in so doing to put an end to the diversity of regulation under state laws on the subject. The act of Congress is paramount upon the subject with which it purports to deal and supersedes all state laws upon the same subject. It follows that, where suit is brought for loss of or damage to goods transported in interstate commerce, the rule of liability as prescribed by the federal act is applicable whether the suit be brought against the initial carrier or against one of the succeeding carriers. *Atlantic Coast Line R. Co. v. Thomasville Live Stock Co.*, (1913) 13 Ga. App. 102, 78 S. E. 1019.

**Fixing rates.**—Under this act the Interstate Commerce Commission has power to prescribe interstate but not intrastate commerce rates. *Minnesota Rate Cases*, (1913) 230 U. S. 352, 33 S. Ct. 729, 57 U. S. (L. ed.) 1511, 48 L.R.A. (N.S.) 1151.

**Free passes.**—The provision of this section forbidding common carriers engaged in interstate commerce to issue directly or indirectly, any interstate free pass, except to attorneys, etc., only purports to apply to interstate transportation and does not invalidate state legislation affecting free passes for intrastate transportation. *Schulz v. Parker*, (Ia. 1912) 139 N. W. 173.

No contract inconsistent with the provisions of this act is enforceable, and therefore a contract providing for the issuance of an annual pass cannot be enforced. *Cowley v. Northern Pac. R. Co.*, (1912) 68 Wash. 558, 123 Pac. 998, 41 L.R.A. (N.S.) 559.

A contract by which a railroad company agrees to issue an annual pass in consideration of the transfer of land to it, is unenforceable by virtue of this section. *Louisville & N. R. Co. v. Crowe*, (1913) 156 Ky. 27, 160 S. W. 759, 49 L.R.A. (N.S.) 848.

As a general rule, a stipulation in a free pass given by a carrier, to the effect that the person who accepts it assumes all risks of injury in transportation, is enforceable; and as to a passenger who has accepted transportation under such a pass a carrier is liable only for injuries resulting from wantonness or wilful negligence; but an exception to this rule is presented in the provision of this Act which permits a railroad company to issue free transportation to its employees and members of their families. As between such employees and the railroad company which employs them, the privilege and benefit of being afforded transportation without cost may be regarded as a part of the consideration paid for the services of the employee and

may be treated as an element of value within the contemplation of both parties at the time of entering into the contract of employment. *Charleston & W. C. Ry. Co. v. Thompson*, (1913) 13 Ga. App. 528, 80 S. E. 1097, affirming 13 Ga. App. 541, 79 S. E. 242.

A person injured while a gratuitous passenger on the road of an interstate carrier is not thereby precluded from recovering damages for the injury although he was transported in violation of the anti-pass provision of the Hepburn Act. *Southern Pac. Co. v. Schuyler*, (1913) 227 U. S. 601, 33 S. Ct. 277, 57 U. S. (L. ed.) 662, 43 L.R.A. (N.S.) 901.

**Special services prohibited.**—A contract between a carrier and shipper by which the former agrees to render special services to the latter, is unenforceable. *Louisville & N. R. Co. v. Jones*, (1912) 6 Ala. App. 617, 60 So. 945.

The provision relating to pipe line companies is exhaustively considered in *Prairie Oil & Gas Co. v. United States*, (Com. C. 1913) 204 Fed. 798.

**Unlawful discrimination.**—The interstate commerce act does not attempt, any more than does the common law, to define what particular acts shall constitute unlawful discrimination, but commits that to the Interstate Commerce Commission; and when this Commission has by its orders declared any particular practice or regulation observed by an interstate corporation as unreasonably discriminating, it is as though Congress had specially legislated with respect thereto, and such circumstance draws exclusive jurisdiction of the offense to the federal tribunal; except as to the thing the Commission has defined and denounced as undue discrimination, the discrimination complained of may be adjudged by the state courts according to their own statute or the common law, as the case may be. *Puritan Coal Min. Co. v. Pennsylvania R. Co.*, (1912) 237 Pa. St. 420, 85 Atl. 426. See also *Walnut Coal Co. v. Pennsylvania R. Co.*, (1912) 237 Pa. St. 410, 85 Atl. 440.

Under this act a common carrier cannot accept anything but money in payment of freight and other transportation charges.

Nevertheless, if in the course of the transportation the carrier has damaged the goods, and has delivered them without requiring payment of the charges at the time, and brings an action against the shipper for the recovery of the charges, there is nothing in the letter or the spirit of the act of Congress which prevents the defendant from filing a plea of recoupment, alleging the damages done to the shipment, and setting them off against the plaintiff's recovery of the freight charges, and, if the damages exceed the freight charges, recovering a judgment against the carrier for the excess. *Battle v. Atkinson*, (1911) 9 Ga. App. 488, 71 S. E. 775.

**Furnishing shippers with cars.**—Under the common law, as well as the federal statute, which is merely declaratory thereof, a common carrier is under a legal duty, subject to exceptions, not only to provide itself with but to furnish to shippers, when seasonably requested, sufficient cars and equipment to carry all of the freight that may be offered to it and that it holds itself out as a carrier of. The duty thus imposed upon common carriers, and especially railroads, they should be required to fully perform, except when relieved by extraordinary conditions that render such performance impracticable, and for the failure to perform this duty it is well settled that the carrier is liable in damages to the shipper who has suffered injury in consequence thereof. One of the causes that will exempt the carrier from the full performance of its legal duty in respect to furnishing facilities for the carriage of freight is the existence of a strike that prevents it from handling the business that it had fully equipped itself to handle, and another arises when there is such an unprecedented and unusual demand on its equipment and capacity that it could not reasonably be expected to anticipate or prepare for it. *Illinois Cent. R. Co. v. River & Rail Coal & Coke Co.*, (1912) 150 Ky. 489, 150 S. W. 641, 44 L.R.A. (N.S.) 643.

This act is cited in *Riverside Milling & Power Co. v. Seaboard Air-Line Ry.*, (1912) 10 Ga. App. 303, 73 S. E. 606.

## 1909 Supp., p. 260, sec. 2.

This section makes it a misdemeanor for any person to offer, grant, or give, or solicit, accept, or receive, any rebate, concession or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to the act regulating interstate commerce and acts amendatory thereof, whereby any such property shall, by any device whatever, be transported at a less rate than that named in the tariffs published and filed by the carrier, as required by the act to regulate commerce and acts amendatory thereof, or whereby any advantage is given or discrimination practiced. But although such practices upon the part of consignors of freight to be moved

by a carrier from one state into another are made penal, that fact will not prevent a consignor from recovering damages on the common-law liability of the carrier for loss of freight resulting from a violation of its duties as a carrier. *Adams Express Co. v. Chamberlin-Johnson-Du Bose Co.*, (1912) 138 Ga. 455, 75 S. E. 601.

The giving of marine insurance by the railroad company is a rebate, facility or concession connected with transportation within the meaning of the act. *Duplan Silk Co. v. American & Foreign Marine Ins. Co.*, (C. C. A. 2d Cir. 1913) 205 Fed. 724.

If a carrier of interstate freight permits a shipper to occupy any of its land, as a

means of either reducing or absorbing its published rates in such shipper's favor, the transaction is clearly violative of this section. *Cleveland, C. C. & St. L. Ry. Co. v. Hirsch*, (C. C. A. 6th Cir. 1913) 204 Fed. 849.

**A variation in rate or liability on account of the difference in value** is not inhibited by this section. *Fielder v. Adams Exp. Co.*, (1911) 69 W. Va. 138, 71 S. E. 99.

**Demurrage** is one of the "other charges" authorized by section 2. *Gault Lumber Co. v. Atchison, T. & S. F. R. Co.*, (1913) 37 Okla. 24, 130 Pac. 291.

It follows that demurrage charges must be filed with the commission. *Lehigh Valley R. Co. v. United States*, (C. C. A. 3d Cir. 1911) 188 Fed. 879.

**Extension of credit to shipper.**—A carrier practices a discrimination in respect to transportation, as forbidden by this section, in favor of one shipper and against others of the same class, shipping the same commodity, from the same points and under substantially the same conditions as to time of shipment, destinations, connections, and manner of transportation, and other details identifying the similarity of transactions, by the device of extending credit to such favored shipper for the freight charges on such shipments by it, while exacting and collecting cash compensation for such substantially similar shipments from the other shippers in question. *United States v. Hocking Valley Ry. Co.*, (N. D. Ohio 1911) 194 Fed. 234, wherein the court said: "The count, then, is substantially in the words of the statute, and the court's task is to determine whether the extension of credit pleaded here is, under the circumstances pleaded, an unlawful discrimination. That the act is in respect to transportation there seems no reason to doubt, even if we construe the word no more liberally than do defendant's counsel. The credit is with reference to freight charges for transportation, and therefore is with respect thereto, notwithstanding the elaborate argument to the contrary. The court in construing a statute is not called upon to refine its words to an extreme nicety of thought, nor to apply microscopic distinctions in the meanings of words. The analysis of neither a criminal statute nor an indictment thereunder is an excursion in dialectics. The underlying purpose of the statute is to be observed in construing its words and phrases, which are to be given their ordinary acceptation, unless the latter is clearly modified by usage or definition peculiar to the statute; and the attempt to predicate on the facts alleged an offense is to be considered reasonably by applying those inferences and conclusions which apparently flow naturally from such facts, and which appeal to men of average intelligence as the proper deductions therefrom. The time for keenly analytical reasoning in an effort to discover, in either a statute or an indictment, loopholes of escape by engaging in finely spun discriminations of meaning or by offering turns of thought of which the language is found capable only after

deep cogitation, disappeared in criminal practice with the passing of the extreme punishments anciently visited on slight offenses. Paying freight charges in common and reasonable acceptation is doing something in respect to that transportation which authorizes the imposition of such charges, especially as the term is used in a statute which makes it obligatory upon a carrier to put a charge upon his act of transporting. Transportation and a charge therefor to be collected by the carrier are concomitant, inseparable. One cannot exist legally without the other.

"The first impression one gets from the statement of the facts is that the Sunday Creek Company was substantially favored by the device in question; that it was given, by the defendant, a decided advantage over its fellows in business at Nelsonville; and further study of the situation tends in no wise to weaken that early feeling. Discrimination in ordinary understanding and definition is the act of treating differently; it is the antithesis of advantage; one who enjoys an advantage over another at the hands of him with whom they have common dealing has his fellow within a corresponding discrimination; the positive measures the extent of the negative."

**Accepting promissory notes for freight.**—A carrier subject to this act may not publish its rates for services in terms of money and then receive promissory notes as payment to it for such services, without violating that portion of section 2 which provides that no carrier shall charge or demand or collect or receive a greater or less or different compensation for its services subject to the act "than the rates, fares, and charges which are specified in the tariff filed and in effect at the time." *United States v. Hocking Valley Ry. Co.*, (N. D. Ohio 1911) 194 Fed. 234, wherein the court said: "Considering what is to be accomplished by the law respecting rates and their collection, if there is room in it for favor to one shipper over another by the extension of credit, the law fails, for there still is clear opportunity to the carrier to determine whether it will receive from the favored shipper a less or different compensation than the rates applicable to the case. The exercise of judgment in the carrier in giving credit which the law then would uphold is the same which the law would sustain respecting the continuance and extent of credit, and the advisability of attempting collection at any time in whole or part. The option remains with the carrier to collect in the credit and get full rates with perhaps interest, or to carry the credit and so increase the line, or defer the collection until it is impossible to obtain full rates. Once it is conceded that credit may be given, as defendant claims the right here, with that concession runs the right of the creditor to compromise, adjust, or even forgive the debt. The opportunity in such a construction for evading the law is so obvious that, if it is the proper one, the law is an absurdity.

"The court is not required to determine

whether the extension of credit is the acceptance of a less or different compensation, or whether it is the extension of a privilege or facility not specified in the tariffs, in order to conclude that in it, as a favor to one shipper, the law is violated. The fact that the statute points out four classifications of acts of commission which are held unlawful does not mean that acts of omission are not equally so. The statute, to be effective, must put it out of the power of the carrier to treat differently shippers making contemporaneous shipments of the same class, and it seems clear to the court that an implication is necessary and obvious, both in the letter and spirit of the act, that collection of the published rates is to be either contemporaneous with the service or made in advance. The court may take judicial notice not only of the prevalent custom to this effect, but of the business consideration which makes the custom necessary, that the carrier may retain the means to best serve the general public, and we may construe the law in the assumption that Congress legislated with reference to such custom and business consideration." To the same effect see *United States v. Sunday Creek Co.*, (N. D. Ohio 1911) 194 Fed. 252.

**Filing schedule.**—This section of the interstate commerce act imposes a positive duty on common carriers subject thereto in respect to the filing of tariffs and other documents. *United States v. Union Stockyard & Transit Co. of Chicago*, (Com. C. 1912) 192 Fed. 330; *Wabash R. Co. v. Priddy*, (Ind. 1913) 101 N. E. 724; *Cleveland, C. C. & St. L. Ry. Co. v. Hayes*, (Ind. 1913) 102 N. E. 34.

In *Southern R. Co. v. Reid*, (1912) 222 U. S. 424, 32 S. Ct. 140, 56 U. S. (L. ed.) 257, the court said: "We cannot assume that it was without consideration of its necessity that Congress enacted § 2 of the Hepburn Act. It was no doubt the adaptation of experience to the exigencies of a practical problem, Congress coming to believe that the most effective way to prevent preferences in charges by carriers was to forbid them to 'engage or participate in the transportation of passengers or property' until they 'had fixed and proclaimed the rate to be charged therefor—a rate that would be not only for one shipper or shipment, but for all shippers and shipments; not for one time only, but for all times. The power of Congress to so provide cannot be doubted."

**Publishing schedules.**—Not only must the carrier file with the commissioner a schedule of rates, but it must publish it. *Oregon R. & Nav. Co. v. Thisler*, (1913) 90 Kan. 5, 133 Pac. 539.

The object of requiring tariffs to be published is not only to impose upon the carrier the duty of equality in service and rates, but also to enable shippers to protect themselves in that behalf. *Cleveland, C. C. & St. L. Ry. Co. v. Hirsch*, (C. C. A. 6th Cir. 1913) 204 Fed. 849.

"Publication" is a step in establishing rates, and publication means "promulgating and distributing the tariff in printed form."

*Hunter v. St. Louis & S. F. R. Co.*, (1912) 167 Mo. App. 624, 150 S. W. 733.

A tariff is published in the sense in which the act uses that term although printed copies are not "kept posted in two public and conspicuous places in every depot." Publication and posting in the sense of the act are essentially distinct. This is the import of the provision that the requirements relating to "publishing, posting and filing" may be modified by the commission in special circumstances, for if publishing included posting, mention of the latter was unnecessary. And from all the provision on the subject it is evident that the publication intended consists in promulgating and distributing the tariff in printed form preparatory to putting it into effect, while the posting is a continuing act enjoined upon the carrier, while the tariff remains operative, as a means of affording special facilities to the public for ascertaining the rates in force thereunder. In other words, publication is a step in establishing rates, while posting is a duty arising out of the fact that they have been established. Obviously, therefore, posting is not a condition to the making a tariff legally operative. Neither is it a condition to the continued existence of a tariff once legally established. If it were, the inadvertent or mischievous destruction or removal of one of the posted copies from a depot would disestablish or suspend the rates, a result which evidently is not intended by the act, for it provides that rates once lawfully established shall not be changed otherwise than in the mode prescribed. *United States v. Miller*, (1912) 223 U. S. 599, 32 S. Ct. 323, 56 U. S. (L. ed.) 568.

The purpose of the Interstate Commerce Act, in requiring copies of the schedule of rates to be kept on file in all depots and open to the inspection of the public, is to advise shippers of the rates which the companies are authorized to charge, and a prospective shipper would naturally go to the depot to consult the agent relative to his shipment. The provision of the law to the effect that these schedules should be posted in two public and conspicuous places in every depot, station, or office of such carrier where freight is received for transportation, was calculated to bring such tariff schedule directly under the notice of the shipper, where he would have every opportunity to advise himself fully as to the rates. While it is the duty of the railroad company to post in two conspicuous places in each of its depots copies of the tariff of rates filed in its schedule with the Interstate Commerce Commission, its failure to do does not have the effect of invalidating the rates that were established, for such copies are but evidence of the fact to the public that such rates have already been established. *Louisville & N. R. Co. v. Allen*, (1913) 152 Ky. 145, 153 S. W. 198.

The Interstate Commerce Act deprives carriers and shippers of the power to make individual contracts by substituting one uniform contract filed with the Commission.



All that any agent of a carrier can do is to give information as to what that contract is; and the posting of copies of the tariff rates in railroad offices is for no other purpose, and is not a condition precedent to putting the rates in effect. *St. Louis Southern R. Co. of Texas v. Spring River Stone Co.*, (1913) 169 Mo. App. 109, 154 S. W. 465.

But to prove the establishing of a rate for a particular station, it must be shown that the printed schedule had been furnished to that station, or to the agent in charge thereof. *Hunter v. St. Louis & S. F. R. Co.*, (1912) 167 Mo. App. 624, 150 S. W. 733.

**Contents of schedule.**—The carrier must give notice in the tariff of free cartage, light-erage, ferriage, or any other accessorial service that will be furnished, as well as of any allowance that will be made to shippers who furnish transportation facilities or service. *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, (1913) 230 U. S. 247, 33 S. Ct. 916, 57 U. S. (L. ed.) 1472.

**Conclusiveness of published schedules.**—When schedules are once filed with the Commission, by its consent, and posted for the purpose of notice to all shippers, as required by the act, they may not in any respect be changed, altered, or modified, except in the manner prescribed in the act. Until so changed, every shipper delivers his goods for transportation to the carrier, subject to the terms imposed by such schedules, and until so changed, the carrier is under a contractual obligation to abide thereby. *American Sugar Refining Co. v. Delaware, L. & W. R. Co.*, (C. C. A. 3d Cir. 1913) 207 Fed. 733. See also *Wabash R. Co. v. Priddy*, (Ind. 1913) 101 N. E. 724, wherein the court said: "The sole power and authority is vested in the Commission to determine when they are just and reasonable, and, when they have been fixed, filed with the Commission, approved, and published, the question is no longer an open one as to what is a reasonable or just rate; and the rate must stand until and unless, upon application to the Commission, the rate is changed. This proposition we think is also settled."

Rates duly published and filed with and approved by the Interstate Commerce Commission are conclusive on the parties and not the subject of contract between them. And, indeed, though it appears the carrier has contracted to transport the goods for a lesser rate, through mistake or otherwise, the shipper may be required to pay an additional sum in accordance with the rate duly established under the interstate commerce law before he is entitled to the possession of his goods. One object and purpose of the interstate commerce law is to prevent discriminations and undue preferences, and, were the rule of decision otherwise, no doubt many evasions of the act would be accomplished through alleged mistakes in rates. *Dunne v. St. Louis & S. W. R. Co.*, (1912) 166 Mo. App. 372, 148 S. W. 997. See also *Wabash R. Co. v. Priddy*, (Ind. 1913) 101 N. E. 724; *Louisville & N.*

*R. Co. v. Coquillard Wagon Works' Assignees*, (1912) 147 Ky. 530, 144 S. W. 1080; *Louisville & N. R. Co. v. Allen*, (1913) 152 Ky. 145, 153 S. W. 198; *Ford v. Chicago, R. I. & P. Ry. Co.*, (1913) 123 Minn. 87, 143 N. W. 249; *St. Louis Southern R. Co. of Texas v. Spring River Stone Co.*, (1913) 169 Mo. App. 109, 154 S. W. 465; *American Silver Mfg. Co. v. Wabash R. Co.*, (1913) 174 Mo. App. 184, 156 S. W. 830. And see *Louisville & N. R. Co. v. Dickerson*, (C. C. A. 6th Cir. 1911) 191 Fed. 705, wherein the court said: "The cardinal purpose of the provisions for the public establishment of tariff rates is to secure uniformity, reasonableness, and certainty of charges for services. A rate once regularly published is no longer merely the rate imposed by the carrier, but becomes the rate imposed by law; and routes and rates once so established become matter of public right and forbid private contract inconsistent therewith. It results that, under the commerce act, a stipulation in a bill of lading for a rate greater or less than the published tariff is void."

That an agreement whereby a carrier accepts from the shipper less than the established and published rate violates the interstate commerce act and is wholly illegal is clear. *E. E. Taenzer & Co. v. Chicago, R. I. & P. Ry. Co.*, (C. C. A. 6th Cir. 1911) 191 Fed. 543. But if no rate has been published or posted a carrier is bound by a rate quoted to a shipper. *Freeman v. Kemendo*, (Tex. 1912) 148 S. W. 605.

A contract for stop-over privileges not previously incorporated in the railway tariff sheets and published in accordance with this section is illegal and void. *Bergin v. Missouri, K. & T. Ry. Co.* (Tex. 1912) 150 S. W. 1184, wherein the court said: "Any service which a carrier may render to a shipper in the transportation of his freight, or any privilege which it may accord in connection therewith which confers a benefit on the shipper, must under the law be available to all shippers upon the same terms and conditions. Whatever privilege is given by carriers which falls within that class must also be incorporated in the published railway tariffs and filed with the Interstate Commerce Commission, in order that all shippers may be apprised of their rates and the terms upon which they may be obtained. Until this is done, a grant of such a privilege is unlawful, and a contract to perform the service required is void."

"Where a commodity rate is named in a tariff upon a commodity and between specified points, such commodity rate is the lawful rate and the only rate that can be used with relation to that traffic between those points, even though a class rate or some combination may make a lower rate. The naming of a commodity rate on any article or character of traffic takes such article or traffic entirely out of the classification and out of the class rates between the points to which such commodity rate applies." *Pecos & N. T. Ry. Co. v. Porter*, (Tex. 1913) 156 S. W. 267.

In *Atchison, T. & S. F. R. Co. v. Bell*, (1912) 31 Okla. 238, 120 Pac. 987, 38 L.R.A. (N.S.) 351, the facts were as follows: The agent of an interstate railway and carrier contracted with a shipper to transport certain shipments of live stock from a point in Arkansas to a point in Oklahoma. Said shipments had to pass over the lines of the initial carrier and of one other interstate carrier. The junction point of these railways was in Kansas. No through rate had ever been filed with the Interstate Commerce Commission and published as required by law, but the initial carrier had on file and published at the time an interstate rate on shipments from the point of origin of the shipments involved to its junction point with the delivering carrier, and the delivering carrier had on file and published at said time a rate from the junction point to point of

destination. The through rate contracted for by the initial carrier was less than the sum of the combined rates of the two carriers. It was held that, by reason of section 6 of the Act as amended by this section the special contract was void; and that the delivering carrier who on delivery of the consignment to it by the initial carrier had paid to the initial carrier its freight charges in accordance with its tariff on file regulating rates from the point of origin to the junction was entitled upon delivery of the shipments to the consignee to collect and receive from the consignee the freight charges so paid to the initial carrier and its freight charges in accordance with the tariff of the delivering carrier on file, prescribing the rate from the point of junction to the point of destination.

### 1909 Supp., p. 264, sec. 3.

Section 14, as amended by the Act of 1906, relieved the commission of the duty of stating specifically the findings of fact on which it based its conclusions in cases where damages were not awarded, and it is simply required to make a report, which shall state the conclusions of the Commission, together with its decision, order or requirement in

the premises. The District Court, as a court of equity, will consider the order it is asked to enforce as valid, when it appears to have been made in the course of a regular hearing and to be founded upon evidence and facts proved. *Lehigh Valley R. Co. v. Clark*, (C. C. A. 3d Cir. 1913) 207 Fed. 717.

### 1909 Supp., p. 265, sec. 4.

**Primary jurisdiction of commission.**—“Under this section, the commission has primary jurisdiction (1) where it is alleged that the rates or charges are unjust or unreasonable; (2) where it is alleged that any regulations or practices affecting such rates are unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial; (3) where it is claimed that any regulations or practices affecting rates are otherwise in violation of any provisions of the act. Under this section the commission is required to investigate (1) rates or charges; (2) regulations or practices, for the purposes of ascertaining how these existing rates or charges, regulations, or practices affect shippers when the matter is brought to its attention, as provided by section 13 of the act. It is very evident from the language of this section that it was the intention of Congress that the commission should have exclusive primary jurisdiction to investigate regulations and practices of railroads which are known to be applicable to all shippers alike, such as rates and charges, which are required to be formulated into schedules and posted for the use of the general public, and all regulations and practices pertaining to the management of a railroad which are promulgated by the management as general orders and well-known regulations, such as the distribution of cars, time of detention, allowance for demurrage, icing of refrigerator cars, and all other matters of regulation and practice which can be said to be of a general

character. And there is very good reason for requiring shippers who claim to be injured by these general regulations applicable to all to proceed before the commission. This tribunal has administrative powers and is authorized to pass upon the fairness of the regulation, and the question as to whether or not the regulation or practice works injuriously to some of the shippers and therein found to be discriminatory. It can, by general order, in accordance with the provisions of section 15, direct a modification of the regulation or practice by the railroad, and thereafter the entire shipping public to be affected by such regulation and practice will have equal and similar treatment. The courts hold that it would be impossible for juries in the various circuit courts of the country to work out any uniformity in a practice complained of if shippers be permitted to institute suits for alleged injuries resulting from general regulations and practices of railroads in the United States courts, and in order that the plain intention of Congress, as now appears in section 15, may be fully carried into effect, it is necessary to hold that section 9 is impliedly repealed, to the extent only, however, of preventing individuals from instituting actions in court to recover for alleged discriminatory practices resulting from rates and charges, regulations, or grievances which are of a general character, and the repeal is distinctly stated to extend no further, and the independent right of an individual originally to maintain an action in

court to obtain pecuniary redress for violations of the act conferred by the ninth section must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by the courts without previous action by the commission." *Langdon v. Pennsylvania R. Co.*, (E. D. Pa. 1912) 194 Fed. 486.

The original Interstate Commerce Act did not confer upon the Interstate Commerce Commission the legislative power to prescribe rates either maximum, minimum or absolute. But the amended act does and it is applicable to Alaska. *Interstate Commerce Commission v. Humboldt Steamship Co.*, (1912) 224 U. S. 474, 32 S. Ct. 556, 56 U. S. (L. ed.) 849.

**Hearing.**—The section provides for a full hearing and that confers on the carrier the privilege of introducing testimony, and thus imposes on the Commission the duty of deciding in accordance with the facts proved; a finding without evidence is beyond the power of the Commission. *Interstate Commerce Commission v. Louisville & N. R. Co.*, (1913) 227 U. S. 88, 33 S. Ct. 185, 57 U. S. (L. ed.) 431.

"By the plain language of the law the power of the commission to prescribe a rate for the future cannot be exercised unless after full hearing on complaint made it shall be of the opinion that any of the rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of the act, for the transportation of persons or property as defined in the first section of the act, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of the provisions of the act. The word 'opinion' must be interpreted with reference to the connection in which it is used in the law. It is only after full hearing upon complaint made that the law gives any weight or significance to the opinion of the commission; that is, it is only when the opinion results from the full hearing that it can be used as the basis of further action by the commission. It is true that in making up the opinion of the commission its members may and it is their duty to call to their aid their knowledge and experience, but, if Congress had intended that the commission could make up its opinion from the knowledge and experience of its members independent of any evidence in the particular case, then it was idle to provide for a full hearing, as an opinion of the commission could be formed as well without as with the full hearing. A full hearing not only means an opportunity to be heard by the carrier, but an investigation by the commission itself of the lawfulness of the rate in question." *Atlantic Coast Line R. Co. v. Interstate Commerce Commission* (Com. C. 1911) 194 Fed. 449.

**Conclusiveness of commissioners' findings.**—The Interstate Commerce Commission has power to determine the reasonableness of rates, and likewise it is authorized to award reparation, and in both respects, where the reparation arises from a re-establishment of

rates, its conclusions, being administrative, are final and conclusive, unless the Commission has in some particular material to the controversy exceeded its prescribed functions. *Fidelity Lumber Co. v. Great Northern Ry. Co.*, (C. C. A. 9th Cir. 1912) 193 Fed. 924.

"It is not for us to say whether the Commission has properly attached great or little weight to evidence adduced upon a given point, or whether the conclusion reached by the Commission upon testimony as to facts alone shows mistake as to some particular fact not essential or vital to the proceeding, or inadvertency, or is not such a conclusion as this court might have reached. If the particular matter in issue and inquired into was one of fact and a full hearing was afforded, and the conclusion reached is supported by substantial evidence, it will not be nullified by the courts." *Norfolk & W. Ry. Co. v. United States*, (Com. C. 1912) 195 Fed. 953.

**Determination of reasonable rate.**—The authority granted the commission to prescribe reasonable rates when it shall be of the opinion that the rates fixed by the carrier are unreasonable does not confer absolute or arbitrary power to act on any considerations which the commission may deem best for the public, the shipper, and the carrier. Its order must be based on transportation considerations. While it may give weight to all factors bearing either on the cost or the value of the transportation services, it must disregard as well the demand of the shipper for protection from legitimate competition, domestic or foreign, for unlimited markets, or for the enforcement of equitable estoppels arising from a justifiable expectation that past rates will be maintained, as the demand of the carrier for the maximum rate under which the traffic will move freely. *Atchison, T. & S. F. Ry. Co. v. Interstate Commerce Commission*, (Com. C. 1911) 190 Fed. 591.

A voluntary rate, established to meet competition, is not to be taken as the measure of what is reasonable. And the fact that advances made in rates on certain claims of goods will be severely felt by certain shippers is not a sufficient reason for holding that they are not what they ought to be. Moreover the mere fact that a rate is higher one way between the same points than it is the other does not prove that the higher rate is unreasonable. This is particularly true where there is a preponderance of empty cars moving in the one direction. *Louisville & N. R. Co. v. Interstate C. Commission*, (Com. C. 1912) 195 Fed. 541.

**Determination of unjustness of existing rates as condition precedent to fixing new rate.**—Before going on to prescribe future rates, the Commission must reach the conclusion that the existing rates established by the carrier are unjust and unreasonable. It is the duty and the privilege of the carrier in the first instance to fix the rates to be charged, and it is only where after due notice and a full hearing—whether on complaint of a shipper or upon investigation by

the Commission of its own motion—it is made to appear that the rate is unjust and unreasonable that the Commission is empowered to fix another. The hearing which is so provided for is not a perfunctory one. The carrier is entitled to know and to rely on what is adduced at it, either for or against the existing rate, and the Commission is not authorized to disregard it and reach a conclusion not at all justified by it. If the rate attacked is shown to be unjust, it may be abrogated and a new one established. But, if that is not the outcome of the hearing, and, on the contrary, it is clearly shown that the rate is not unjust, the evidence as to this cannot be put aside, and if it is, and the Commission without reference to it proceeds to condemn the rate and to fix another, its action is invalid. *Louisville & N. R. Co. v. Interstate C. Commission*, (Com. C. 1912) 195 Fed. 541.

**Duty of Commission to establish through rate.**—This section does not require the Commission in all instances to establish a through route or to fix a joint rate. *Baer Bros. Mercantile Co. v. Denver & R. G. R. Co.*, (D. C. Colo. 1912) 200 Fed. 614, wherein the court said: "The very terms of section 15, above quoted, are permissive, being to the effect that 'the Commission *may* also, after hearing on a complaint, establish through routes and joint rates,' and this only when 'it may be necessary to give effect to any provision of this act.' By section 6 of the act, as amended, each carrier is to promulgate rates upon three bases: (a) Between different points on its own route; (b) between points on its own route and points on the route of any other carrier when a through route and joint rate have been established; and (c), if there be a through route, but no joint rate, then 'the separately established rates, fares and charges applied to the through transportation.' As we understand the present situation, both from the pleadings and the opinions of the administrative and the judicial tribunals which have dealt with the matter, the rate with which the Commission was dealing was one of the third class; i. e., 'separately established rates' of the two carriers, which combined constituted the charges 'applied to the through transportation.' We are of opinion that under such circumstances it was proper for the Commission to ignore one of the 'separately established' rates—i. e., that of the Missouri Pacific Railroad—that being concededly reasonable and unobjectionable, and to apply its corrective hand to the second of the 'separately established' rates—i. e., that of the defendant—that being found to be unreasonable. Of course, the Commission dealt with this latter not as a local rate between Pueblo and Leadville, for that would have been to attempt a regulation of an intrastate rate, but as a segment of an interstate rate made up of the combination of the two local rates. To do this was to act within the law, and does not render the order sued on void. Neither did the form of order deprive the defendant of any right allowed by statute.

While it is true that section 15, as above pointed out, provides that, in case of the establishment of a joint rate by the Commission, it is to apportion such rate where the carriers fail to agree, and then by a supplemental order, that provision has no application here, for the Commission here established no joint rate, but expressly declined to do so. It simply in dealing with the interstate movement left one of the separately established rates where it found it and ordered that the second be reduced to conform to reason."

**Undue preference between cities.**—Under the provisions of this section ample power is vested in the Commission in a proceeding before it to extend the scope of its examination far enough to arrive at the true situation with respect to all matters which properly tend to show whether or not under section 3 undue preference or advantage is given to one city over the other. *Southern Ry. Co. v. United States*, (Com. C. 1913) 204 Fed. 465.

"The services rendered by an owner referred to in section 15 are services which it has scheduled in its tariff rates and published in accordance with section 6 of the interstate commerce act and applicable to all shippers similarly circumstanced, and, when so published, if a shipper objects to the payment of the amount set forth in the published tariff, he will be required to establish its injurious and discriminatory effect upon him by applying to the commission to have it corrected. It does not follow that the amount so scheduled would be regarded as a lawful and reasonable payment. The commission might regard it as excessive, but shippers who did not receive it or who did not receive as fair treatment as others would have notice of its existence, and could defend against any discriminatory effect in its payment. But, where there is no publication made of the allowance, the section does not apply. It is not contended that the placing of such an allowance on the published tariffs would determine the legality or illegality of the payment. It would simply determine the tribunal to which an injured party would be compelled to apply to redress his wrongs, to wit, to the Interstate Commerce Commission; but where, as in this case, there was a secret allowance to some shippers not mentioned or published in the schedule, there would be no notice to other shippers. They could not know what allowances were being made, and there would be no regulation or practice to correct, so far as the general rules of the company or the published rates informed the shipper." *Langdon v. Pennsylvania R. Co.*, (E. D. Pa. 1912) 194 Fed. 486.

**Effect upon power of court to pass upon reasonableness of rates.**—A circuit court of the United States is without jurisdiction to enjoin the enforcement by a railroad company of an interstate rate, on the ground that it is unreasonable or discriminatory, in advance of action thereon by the Interstate Commerce Commission. *Atchison, T. & S. F.*

R. Co. v. Foster Lumber Co., (1912) 31 Okla. 661, 122 Pac. 139.

A shipper seeking reparation predicated upon the reasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable. *L. Starks Co. v. Grand Rapids & I. R. Co.*, (1911) 165 Mich. 642, 131 N. W. 143, *following Texas & P. R. Co. v. Abilene Cotton Oil Co.*, (1907) 204

U. S. 426, 27 S. Ct. 350, 51 U. S. (L. ed.) 553, 9 Ann. Cas. 1075.

A suit for the recovery of an overcharge of freight does not involve the reasonableness of a rate, and therefore a state court has jurisdiction of the same, an application to the Interstate Commerce Commission being unnecessary as would be the case if it related to an unreasonable rate. *Kansas City Southern R. Co. v. Tonn*, (1912) 102 Ark. 20, 143 S. W. 577.

This section is cited in *American Sugar Refining Co. v. Delaware, L. & W. R. Co.*, (C. C. A. 3d Cir. 1913) 207 Fed. 733.

## 1909 Supp., p. 268, sec. 5.

Judicial inquiry covering rates fixed by commission.—To the same effect as the original note, see *Baer Bros. Mercantile Co. v. Denver & R. G. R. Co.*, (D. C. Colo. 1912) 200 Fed. 614.

Right of commission to award damages in cases not involving rates.—The Interstate Commerce Commission has jurisdiction to award damages in actions based upon discriminatory regulations and practices as well as in actions based upon discrimination in rates. *Jacoby v. Penn. R. Co.*, (E. D. Pa. 1912) 200 Fed. 989.

Accrual of cause of action for damage.—The word "accrues" in the provision of the statute that "all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues" has reference, in the case of a cause of action based on an excessive rate charge, to the time when the plaintiff's property is transported under the rate. *Arkansas Fertilizer Co. v. United States*, (Com. C. 1911) 193 Fed. 667.

In view of the fact that all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action occurs, an action for damages for alleged discrimination in the distribution of cars, brought more than two years after the alleged discrimination, will not be stayed to permit the plaintiff to apply to the Interstate Commerce Commission to determine the reasonableness of the rule under which the distribution of cars was made. *Morrisdale Coal Co. v. Pennsylvania R. Co.*, (1913) 230 U. S. 304, 33 S. Ct. 938, 57 U. S. (L. ed.) 1494.

In *Louisville & N. R. Co. v. Dickerson*, (C. C. A. 6th Cir. 1911) 191 Fed. 705, it was held that under this section any claim accruing before or after August 28, 1906, might be presented within two years from the time it accrued, and that claims accruing before August 28, 1906, might be presented within one year from that date, even though accruing more than two years previous to the date named.

A statutory proceeding to enforce an order of reparation is one sounding in tort for damages. *Naylor & Co. v. Lehigh Valley R. Co.*, (S. E. D. Pa. 1911) 188 Fed. 860.

Nature of suit for damages—*In general.*

"A suit brought by one in whose favor the Commission has made an award of damages by way of reparation, under the authority of [this section] is not a suit on the award, *qua* award, to recover the amount of the same, but a plenary suit for damages actually incurred by the plaintiff, by reason of the violation of the act by the defendant as conclusively found by the Commission. In the prosecution of such a suit, plaintiff may avail himself, without further proof, of the conclusive administrative finding or order of the Commission that the defendant was guilty of the violation of the act complained of, but must prove the actual damages incurred by him by reason of such violation and for which damages alone the Act makes the defendant carrier liable. In addition to this advantage given to the plaintiff in the prosecution of such a suit, plaintiff need not examine witnesses or offer other proof, in the first instance, of the facts stated in the findings or order of the Commission, such findings or order being made *prima facie* evidence thereof. Such suit is expressly required by the Act to be proceeded in 'like other civil suits for damages,' which can mean nothing less than that the 'parties are entitled to an impartial trial by jury, so conducted as to accord to them in full measure the enjoyment of their constitutional right.' This essential right is not invalidated or impaired by the qualification of the rules of evidence, to the effect that 'the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated.' By reason of this qualification, the plaintiff may now avail himself of a new method to get these facts before the jury, and that method is this: There must be found somewhere and in some form sufficiently clear and sufficiently definite findings of the Commission, in which the needful facts are stated and by which the defendant is thus given due notice of the facts to be urged against him, so that he may, if he can, controvert their *prima facie* effect. It does not necessarily follow, from a finding by the Commission that a given tariff rate established by the defendant is unreasonable and that a lower rate fixed by the Commission is reasonable, that plaintiff has suffered pecuniary damage, by reason of the exaction by defend-

ant of the former rate, or, if any such damage has been suffered, that the difference between the rate abrogated and the lower rate established is the measure of such damage. If any damage is shown, it may be either greater or less than such difference. The authorization of a suit for damages by one claiming to be injured by a specific violation of the Act by a carrier, is not the imposition of a penalty in addition to the fines imposed and made payable to the government for every specific violation of a requirement of the Act, but a remedy for the recovery of damages actually incurred by a private person because of the wrongful act of the carrier." *Lehigh Valley R. Co. v. Clark*, (C. C. A. 3d Cir. 1913) 207 Fed. 717.

*Condition precedent to suit for damages.*—Where the claim of a shipper for damages is based upon alleged unreasonableness of rates either then existing or rates which have been altered or upon any question as to rates, regulations, and practices as to which it is essential that there shall be uniformity of decision, the courts are without primary jurisdiction to entertain the action. *Franklin v. Philadelphia & R. Ry. Co.*, (E. D. Pa. 1913) 203 Fed. 134.

It follows that, where proceedings have been had by complaint before the Commission, a suit for the recovery of damages must be based upon an order of the Commission for the payment of money. *Franklin v. Philadelphia & R. Ry. Co.*, (E. D. Pa. 1913) 203 Fed. 134.

*Petition.*—In a petition in an action to enforce payment of reparation awarded by the Interstate Commerce Commission, the grounds presented to the Commission must be reiterative and tender an issue upon which testimony can be taken pro and con, subject only to the provision of law that the "findings and orders of the Commission shall be prima facie evidence of the fact therein stated." *Baer Bros. Mercantile Co. v. Denver & R. G. R. Co.*, (D. C. Colo. 1912) 200 Fed. 614, wherein the court said: "The statute (section 4 of Act June 29, 1906, amending section 15 of Act Feb. 4, 1887) provides that it shall be within the power of the Commission, where rates or charges are 'unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this act,' to determine and prescribe what will be the just and reasonable rate or rates, etc. It is further provided by section 5 of Act June 29, 1906, substituting section 16 of the former act, that, where it is necessary to have recourse to the courts of the United States for the enforcement of the order of the Commission, there shall be filed 'a petition setting forth briefly the causes for which the complainant claims damages and the order of the Commission in the premises.' It will be noted from this that the petition must set forth 'the causes for which the petitioner claims damages.' Since, as we have seen by the quotation from section 4, above, these causes under the law are that the rates are unjust or unreasonable or un-

justly discriminatory or unduly preferential or prejudicial or otherwise in violation of any of the provisions of law, it follows that, to make the petition complete, it must set forth one or the other of these causes. It is not sufficient to set forth the proceedings of the Commission alleging these causes. While these by way of recital show the grounds upon which the Commission proceeded, they do not afford any basis upon which the court may proceed. A long line of authorities show that the functions of the court are not simply to execute the orders of the Commission, but to afford a judicial inquiry surrounded by all the proper judicial safeguards as to whether the orders of the Commission should have been made. Upon questions of fact it is true the finding of the Commission is, under section 5 of Act June 29, 1906, prima facie evidence of the facts at the trial of the cause, but this is a mere matter of evidence, and has no relation to the pleadings. The pleadings must tender an issue as to whether the rates are unreasonable, discriminatory, or otherwise violative of law, and a petition such as this, which does not tender this issue, affords no basis upon which the court may proceed to a judicial determination with the assistance of the jury as to whether the rates were in fact illegal."

Service of the order of the Commission in the terms of this section is a condition precedent to any action thereon and consequently the petition should directly aver service as required by the section in terms so clear as to permit an issue of fact. *Baer Bros. Mercantile Co. v. Denver & R. G. R. Co.*, (D. C. Colo. 1912) 200 Fed. 614.

As to what constitutes a sufficient petition see *Louisville & N. R. Co. v. Dickerson*, (C. C. A. 6th Cir. 1911) 191 Fed. 705.

*Report of Commission as evidence.*—The act provides that the report of the commission shall include the findings of fact only in cases in which awards for damages are made and that such findings of fact and orders of the commission shall be prima facie evidence of the facts therein stated upon the trial of a suit in the United States Circuit Court brought to recover such awarded damages. The act does not make the mere legal opinions, arguments or reasons of the commission prima facie evidence or evidence of any kind in any judicial proceedings. Nor does the awarding of reparation necessarily follow where the commission finds that a rate is excessive and unreasonable, and as a consequence orders its reduction. *Darnell-Taenzer Lumber Co. v. Southern Pac. Co.*, (W. D. Tenn. 1911) 190 Fed. 659.

The plain question presented in every application for reparation is whether the rate which has been charged is reasonable or unreasonable; and, if unreasonable, the extent to which it is so. On this both the shipper and the carrier are entitled to an explicit finding; this, if found in favor of the shipper, being the foundation of his cause of action. Except possibly to determine the shipments to which the rate which is condemned applies, and the number of tons or pounds, or

however the freight is measured, in order to get at the gross overpayment and award damages accordingly, the duty of the Commission ends with this finding. It can add nothing to the case which is so made out nor detract anything from it. The prima-facie right of the shipper to reparation at the hands of the carrier, with those facts found in the shipper's favor, is thereby established, and the rest is for the courts, in case the order of the Commission is not accepted and complied with. It is not for the Commission to consider and pass upon other questions which may arise, by which the ultimate right to recover may be affected. It does not try out the case on its merits, but only the one particular phase of it. (*Russe v. Interstate Commerce Commission*, (Com. C. 1912) 193 Fed. 678.)

The fact that the certificate of the secre-

tary of the Interstate Commerce Commission is made prima facie evidence of the correctness of the rates certified implies that the rate may be proved in some other manner and by some other evidence. *Aldrich v. Southern Ry. Co.*, (S. C. 1913) 79 S. E. 316.

Attorney's fees provided for in this section are only allowed where there is unlawful discrimination by the carrier to the injury of the shipper. It does not, by its terms or by necessary implication, extend to or include actions to recover damages arising from the carrier's negligence. *Blair v. Wells, Fargo & Co.*, (1912) 155 Ia. 190, 135 N. W. 615.

The provision for attorney's fees applies only to cases before the Interstate Commerce Commission. It has no relation to actions in court. *Missouri Pac. Ry. Co. v. Harper Bros.*, (C. C. A. 7th Cir. 1912) 201 Fed. 671, 1909 Supp., p. 271, sec. 7.

## 1909 Supp., p. 271, sec. 7.

### I. ANNUAL REPORTS AND UNIFORM SYSTEM OF ACCOUNTING.

**Constitutionality of provisions.**—Congress has authorized the Commission to require annual reports. The act itself prescribes in detail what those reports shall contain. The Commission is permitted, in its discretion, to require a uniform system of accounting, and to prohibit other methods of accounting than those which the Commission may prescribe. In other words, Congress has laid down general rules for the guidance of the Commission, leaving to it merely the carrying out of the details in the exercise of the power so conferred. This is not a delegation of legislative authority. *Interstate Commerce Commission v. Goodrich Transit Co.*, (1912) 224 U. S. 194, 32 S. Ct. 436, 56 U. S. (L. ed.) 729.

The provision giving the Interstate Commerce Commission authority to regulate the method of keeping accounts by common carriers is constitutional. *Kansas City Southern Ry. Co. v. United States*, (1913) 231 U. S. 423, 34 S. Ct. 125.

**Reason for requiring reports and uniform accounts.**—Congress has authorized the Commission to inquire as to the business which the carrier does and to require the keeping of uniform accounts, in order that the Commission may know just how the business is carried on with a view to regulating that which is confessedly within its power. *Interstate Commerce Commission v. Goodrich Transit Co.*, (1912) 224 U. S. 194, 32 S. Ct. 436, 56 U. S. (L. ed.) 729.

One of the manifest objects of Congress in authorizing the supervision and standardization of carriers' accounts, was to enable the commissioners to intelligently perform their duties respecting the regulation of carriers' rates for the services performed. *Kansas City Southern Ry. Co. v. United States*, (1913) 231 U. S. 423, 34 S. Ct. 125.

**Only interstate commerce affected.**—This section merely authorizes the commission to require reports from common carriers and

owners of railroads engaged in interstate commerce. *United States v. Union Stockyard & Transit Co. of Chicago*, (Com. C. 1912) 192 Fed. 330; *Railroad Commission v. Texas & P. Ry. Co.*, (Tex. 1911) 140 S. W. 829; *Texas & P. Ry. Co. v. Railroad Commission*, (Tex. 1912) 150 S. W. 878.

But a carrier engaged in intrastate and interstate business may be required to keep accounts of all his business both intrastate and interstate. *Interstate Commerce Commission v. Goodrich Transit Co.*, (1912) 224 U. S. 194, 32 S. Ct. 436, 56 U. S. (L. ed.) 729.

**Report by "owner" of railroad.**—By the amendment the commission was authorized, under section 20, to require annual reports, not only "from all common carriers subject to the provisions of this act," but also "from the owners of all railroads engaged in interstate commerce as defined in this act." This is the only section of the act that refers to the owners of the railroad as distinguished from the common carrier. The evident purpose of Congress was to enable the Commission to enable certain information which the lessee operator might be unable to give, but which the owner of a railroad, either operated by a common carrier engaged in interstate commerce as defined in the act or which is a highway of interstate commerce, could furnish. *United States v. Union Stockyard & Transit Co. of Chicago*, (Com. C. 1912), 192 Fed. 330.

### II. CARMACK AMENDMENT.

**Constitutionality.**—*Galveston, H. & S. A. R. Co. v. Wallace*, (1912) 223 U. S. 481, 32 S. Ct. 205, 56 U. S. (L. ed.) 516; *Norfolk & W. R. Co. v. Dixie Tobacco Co.*, (1913) 228 U. S. 593, 33 S. Ct. 609, 57 U. S. (L. ed.) 980; *Cleveland, C., C. & St. L. Ry. Co. v. Hayes*, (Ind. 1913) 102 N. E. 34; *Sturges v. Detroit, G. H. & M. R. Co.*, (1911) 166 Mich. 231, 131 N. W. 706.

That the constitutional power of Congress to regulate commerce among the states and

with foreign nations comprehends power to regulate contracts between the shipper and the carrier of an interstate shipment by defining the liability of the carrier for loss, delay, injury or damage to such property, needs neither argument nor citation of authority. But it is equally well settled that until Congress has legislated upon the subject, the liability of such carrier, exercising its calling within a particular state, although engaged in the business of interstate commerce, for loss or damage to such property may be regulated by the law of the state. Such regulations would fall within that large class of regulations which it is competent for a state to make in the absence of legislation by Congress, growing out of the territorial jurisdiction of the state over such carriers and its duty and power to safeguard the general public against acts of misfeasance and nonfeasance committed within its limits, although interstate commerce may be indirectly affected. *Adams Exp. Co. v. Croninger*, (1913) 226 U. S. 491, 33 S. Ct. 148, 57 U. S. (L. ed.) 314, 44 L.R.A.(N.S.) 257.

The significant and dominating features of the Carmack amendment are these: First: It affirmatively requires the initial carrier to issue "a receipt or bill of lading therefor," when it receives "property for transportation from a point in one state to a point in another." Second: Such initial carrier is made "liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it." Third: It is also made liable for any loss, damages or injury to such property caused by "any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass." Fourth: It affirmatively declares that "no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed." *Adams Exp. Co. v. Croninger*, (1913) 226 U. S. 491, 33 S. Ct. 148, 57 U. S. (L. ed.) 314, 44 L.R.A.(N.S.) 257.

Effect on state statutes.—Congress having, by the Carmack Amendment, legislated directly upon a carrier's liability for loss or damage to interstate shipments, such legislation superseded all regulations and policies of any particular state upon the same subject. *Adams Exp. Co. v. Croninger*, (1913) 226 U. S. 491, 33 S. Ct. 148, 57 U. S. (L. ed.) 314, 44 L.R.A.(N.S.) 257; *Chicago, B. & Q. R. Co. v. Miller*, (1913) 226 U. S. 513, 33 S. Ct. 155, 57 U. S. (L. ed.) 323; *Chicago, St. P., M. & O. R. Co. v. Latta*, (1913) 26 U. S. 519, 33 S. Ct. 155, 57 U. S. (L. ed.) 328; *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, (1913) 153 Ky. 730, 156 S. W. 400, 45 L.R.A.(N.S.) 529; *Joseph v. Chicago, B. & Q. R. Co.*, (1913) 175 Mo. App. 18, 157 S. W. 837; *St. Louis & S. F. R. Co. v. Woodruff Mills*, (Miss. 1913) 62 So. 171, following *Adams Exp. Co. v. Croninger*, (1913) 226 U. S. 491, 33 S. Ct. 148, 57 U. S. (L. ed.) 314, 44 L.R.A.(N.S.) 257; *Meetze v. Southern Exp. Co.*, (1912) 91 S. C. 379, 74 S. E. 823.

Until Congress legislated on the matter, liability for loss of property, on interstate as well as intrastate shipments, was subject to state regulation. Some states allowed an exemption by contract from all or a part of the common law liability, others allowed no exemption. These differences in the applicable laws created inequalities with respect to interstate transportation, but each state exercised the power inherent in its territorial jurisdiction, and the remedy for the resulting diversity lay with Congress, which was free to substitute its own regulations; and this was done in the passage of the Carmack Amendment. *Minnesota Rate Cases*, (1913) 230 U. S. 352, 409, 33 S. Ct. 729, 57 U. S. (L. ed.) 1511, 48 L.R.A.(N.S.) 1151.

That amendment undoubtedly manifested the purpose of Congress to bring contracts for interstate shipments under one uniform rule or law, and therefore withdraw them from the influence of state regulation. *Kansas City Southern R. Co. v. Carl*, (1913) 227 U. S. 639, 33 S. Ct. 391, 57 U. S. (L. ed.) 683.

Congress having manifested its purpose through the enactment of the Interstate Commerce Act to take possession of the subject of the liability of carriers by railroad on account of interstate shipments, as appears by reference to the Interstate Commerce Act and its amendments, and especially bills of lading and shipping contracts through what is known as the Carmack amendment, such legislation and the decisions of the Supreme Court of the United States expounding it supersede all state regulations and rules of decision on the subject. The federal statutes touching this matter and the decisions of the Supreme Court of the United States construing them afford an exclusive rule for the determination of controversies pertaining to the subject. This is true, too, notwithstanding the provisions of the Carmack amendment to the effect that the enactment shall not deprive any holder of a bill of lading of any remedy or right of action that he had under the existing law, for this is construed to refer alone to existing federal law. *American Silver Mfg. Co. v. Wabash R. Co.*, (1913) 174 Mo. App. 184, 156 S. W. 830.

The intent of Congress to take possession of the subject of the liability of a carrier under contracts for interstate shipment, and to supersede all state regulations with reference to that subject, so clearly appears from the Carmack Amendment, as to invalidate, as applied to interstate shipments, the provisions of any state law nullifying contracts limiting the liability of a carrier for loss or damage to the agreed or declared value. *Harrison Granite Co. v. Grand Trunk R. System*, (1913) 175 Mich. 144, 141 N. W. 642, following *Adams Exp. Co. v. Croninger*, (1913) 226 U. S. 491, 33 S. Ct. 148, 57 U. S. (L. ed.) 314, 44 L.R.A.(N.S.) 257.

The amendment invalidates the provisions of any state law nullifying contracts limiting the liability of a carrier for loss or damage to the agreed or declared value. The



amendment is silent about evidence. *National Rice Milling Co. v. New Orleans & N. E. R. Co.*, (1913) 132 La. 615, 61 So. 708.

A state statute prohibiting railway companies and other common carriers of goods, wares, and merchandise from limiting or restricting their liability as it exists at common law, by inserting exceptions in the bill of lading given upon the receipt of the goods for transportation, applies only to such carriers as are engaged in carrying goods, wares, and merchandise for hire within the state, and does not prohibit carriers of interstate commerce from limiting their common-law liability. *Gulf, C. & S. F. Ry. Co. v. Brackett-Fielder Mill & Grain Co.*, (Tex. 1914) 162 S. W. 1191. But in *Louisville & N. R. Co. v. Miller*, (1914) 156 Ky. 677, 162 S. W. 73, it was held that as to interstate shipments, the Carmack Amendment superseded the Kentucky doctrine, announced under section 196 of the Kentucky Constitution, that the shipper is not bound by a recital of value in his contract of shipment, but may show and recover his full loss.

In *St. Louis, I. M. & S. R. Co. v. Carlile*, (1912) 35 Okla. 118, 128 Pac. 690, it appeared that the shipment was made from a point in the Indian Territory to Chicago prior to the passage of the Carmack Amendment. It was held that, in the absence of any agreement constituting the carriers partners or joint undertakers, and in the absence of any special agreement by the initial carrier assuming liability for the shipment over the entire route, the initial carrier was liable only for the loss or injury occurring on its own line.

A state statute penalizing the failure of carriers to perform a common-law duty, namely, the duty to make reasonably prompt settlement of the claims of shippers for loss or damage to property while in their possession, is not in conflict with the Carmack Amendment and is valid. *Varnville Furniture Co. v. Charleston & W. C. Ry. Co.*, (S. C. 1913) 79 S. E. 700, wherein the court said "The performance, or the failure of performance, of that duty has nothing whatever to do with the liability of the carrier under the contract of shipment. The statute does not attempt to impose, increase, or diminish that liability, or to affect it in any way whatever. It merely says that, assuming the liability to exist, the carrier should discharge it with reasonable promptness, and penalizes his failure to do so. With as much reason could it be said that a statute which imposes the costs of the action upon the losing party imposes or affects in any way the liability upon which the action is predicated. The two things are separate and distinct. The payments of costs is imposed as a penalty for failure to pay the debt without suit, and the payment of the penalty is imposed for a like reason—the failure to pay a just claim within a reasonable time, without compelling the shipper to resort to the courts to collect it. Where no liability exists, no penalty can be recovered; and, unless the shipper recovers the full amount which he

has claimed, he cannot recover the penalty. The carrier is therefore protected against being penalized for the failure to pay unjust or exorbitant claims.

"We look in vain through the legislation of Congress to find any rule or regulation on the subject of the prompt settlement of such claims. By no sort of implication can that subject be brought within the provisions of the Carmack amendment." See to the same effect, *Du Pre v. Columbia, N. & L. R. Co.* (S. C. 1913) 79 S. E. 310; *Stukes v. Southern Express Co.*, (S. C. 1914) 80 S. E. 612.

Reason for amendment.—When goods were shipped at a great distance over connecting lines, the rule which required a shipper sustaining loss to prove on which line it occurred oftentimes resulted in great hardship, and sometimes in a failure to recover, simply because the shipper could not produce evidence to show where the loss occurred. It may in some instances be burdensome to the initial carrier to be held responsible for loss, damage, or injury to the property caused by some other carrier to whom it is delivered, or over whose line it passes, but it cannot be denied that the initial carrier can generally protect itself far better than a shipper can, and it might easily have happened under the former rule that a shipper would be prevented from collecting a just claim by reason of the great expense incurred, and inconvenience sustained, in an effort to establish it in a distant court. On the other hand, if the holder of the bill of lading was now required to sue the initial carrier alone, and was not permitted to sue the terminal or some other carrier, great injustice might be done in that way, and hence probably for that, as well as other reasons, the proviso was added, "that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he had under existing law." The Carmack Amendment was therefore evidently intended to be cumulative, and not to furnish an exclusive remedy. *Baltimore, C. & A. R. Co. v. William Sperber & Co.*, (1912) 117 Md. 595, 84 Atl. 72.

The shipper was not himself in possession of the information as to when and where his property had been lost or damaged and had no access to the records of the connecting carrier, who in turn had participated in some part of the transportation. He was compelled in many instances to make such settlement as should be proposed. This burdensome situation of the shipping public in reference to interstate shipments over routes including separate lines of carriers was the matter which Congress undertook to regulate. *Pecos & N. T. Ry. Co. v. Meyer*, (Tex. 1913) 155 S. W. 309.

It was not the purpose of Congress to lessen in the slightest degree the previously existing liability of the initial carrier or any connecting carrier. On the contrary, the manifest purpose of the enactment was to continue the previously existing liability of both the initial and connecting carrier, and in addition thereto to impose upon the initial

carrier, in certain cases, the liability that had theretofore existed on the part of the connecting carrier alone. In other words, if the case is one where the connecting carrier was liable before the enactment of the statute in question, then, under and by virtue of the provision of that act, the initial carrier is likewise liable. *Cincinnati, N. O. & T. P. R. Co. v. Rankin*, (1913) 153 Ky. 730, 156 S. W. 400, 45 L.R.A.(N.S.) 529.

The act should be construed so as to carry out its purposes, and not to defeat the legislative intention in its enactment as shown by the act as a whole. Read in this way, the act makes the initial carrier responsible for the delivery, elevation, ventilation, icing, storing, or handling of the property transported by any of its connecting lines. *Nashville, C. & St. L. R. Co. v. Dreyfuss-Weil Co.*, (1912) 150 Ky. 333, 150 S. W. 321.

Prior to that amendment the rule of carrier's liability for an interstate shipment of property, as enforced in both federal and state courts, was either that of the general common law as declared by this court and enforced in the federal courts throughout the United States, or that determined by the supposed public policy of a particular state, or that prescribed by statute law of a particular state. *Adams Exp. Co. v. Croninger*, (1913) 226 U. S. 491, 33 S. Ct. 148, 57 U. S. (L. ed.) 314, 44 L.R.A.(N.S.) 257.

Baggage is "property" within the meaning of the word as used in the Carmack Amendment. *Louisville & N. R. Co. v. Miller*, (1914) 156 Ky. 677, 162 S. W. 73.

Therefore an initial carrier is liable for baggage received by it for transportation into another state over its line and that of a connecting carrier. *House v. Chicago & N. W. R. Co.*, (1912) 30 S. D. 321, 138 N. W. 809.

The term "lawful holder," as used in the act, comprehends the owner of the property transported, or the one beneficially entitled to recover for the loss or injury, and we hold that manual possession of the bill of lading is not a prerequisite to the right to sue. *Pecos & N. T. Ry. Co. v. Meyer*, (Tex. 1913) 155 S. W. 309.

**Liability of initial carrier.**—By this act the initial carrier must give a receipt or bill of lading for the property, and shall be liable to the holder for any loss of the property caused by it or by any railroad or transportation company to which the property may be delivered. *Nashville, C. & St. L. R. Co. v. Dreyfuss-Weil Co.*, (1912) 150 Ky. 333, 150 S. W. 321; *St. Louis & S. F. R. Co. v. Zickafoose*, (1913) 39 Okla. 302, 135 Pac. 406.

The Carmack Amendment must be presumed to have been intended by Congress to go as far as Congress had power to regulate the subject, and to make the initial carrier liable for any loss of the property until its interstate shipment was completed. *Nashville C. & St. L. R. Co. v. Dreyfuss-Weil Co.*, (1912) 150 Ky. 333, 150 S. W. 321.

Where an interstate shipment is accepted to be transported over a route selected by

the shipper, which was different from the one the carrier would otherwise have selected, and one as to which the carrier had no established through rate, the primary liability is the same as in case of an established route and rate, and does not offend against the due process of law clause of the Federal Constitution. *Cleveland, C., C. & St. L. Ry. Co. v. Hayes*, (Ind. 1914) 103 N. E. 839, *following* *Norfolk & W. R. Co. v. Dixie Tobacco Co.*, (1913) 228 U. S. 593, 33 S. Ct. 609, 57 U. S. (L. ed.) 980.

The liability imposed is limited to "any loss, injury, or damage caused by it or a succeeding carrier to whom the property may be delivered," and plainly implies a liability for some default in its common-law duty as a common carrier. *Louisville & N. R. Co. v. Brewer*, (Ala. 1913) 62 So. 698.

It was not the purpose of the act to make the initial carrier an outright insurer of the safe delivery of the freight delivered to it for transportation. There must have been some failure to discharge its common-law duty before liability attached. *St. Louis & S. F. R. Co. v. Zickafoose*, (1913) 39 Okla. 302, 135 Pac. 406.

Conceding that the initial carrier must issue a through bill of lading, and becomes liable to the shipper for all damages caused by any connecting line, this liability cannot be extended beyond the contract evidenced by the bill of lading; and that is, to deliver the shipment at the place of destination therein named. *Parker-Bell Lumber Co. v. Great Northern R. Co.*, (1912) 69 Wash. 123, 124 Pac. 389, 41 L.R.A.(N.S.) 1064.

**Recovery against other than initial carrier.**—The Carmack Amendment does not limit the right or remedy of the holder of the bill of lading, in case of loss or damage, to an action against the initial carrier receiving property for interstate transportation. While it says that carrier shall be liable, on the principle that succeeding carriers in the route are its agents, it does not say that it alone shall be liable, or that the holder of the bill of lading shall pursue that carrier only. On the contrary, the act expressly preserves the right of the holder of the bill of lading to pursue the carrier which actually caused the loss or damage, for it says, "Nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law." *Varnville Furniture Co. v. Charleston & W. C. Ry. Co.*, (S. C. 1913) 79 S. E. 700. See also *Trade-well v. Chicago & N. W. R. Co.*, (1912) 150 Wis. 259, 136 N. W. 794, wherein it was held that the Carmack Amendment was not intended to prevent an action against any but the initial carrier and consequently a shipper may at his election bring an action against a connecting carrier on whose road the damage or loss occurred.

Where neither of the defendants is the initial carrier, they are not in this case in any wise affected by the act of Congress called the Hepburn Act with the amendment thereto known as the Carmack Amendment, and

are therefore subject only to the liability imposed upon them by the common law. *New York & B. Transp. Line v. Lewis Baer & Co.*, (1912) 118 Md. 73, 84 Atl. 251.

There is nothing in the act of Congress known as the Hepburn act, as amended by the Carmack amendment, which will prohibit a shipper of goods in interstate commerce over the lines of several carriers from bringing suit, under the provisions of section 2752 of the Georgia Civil Code of 1910, against the last carrier who received the goods as "in good order" for damages sustained on account of loss of or damage to the goods. *Atlantic Coast Line R. Co. v. Thomasville Live Stock Co.*, (1913) 13 Ga. App. 102, 78 S. E. 1019.

**Recovery over by initial carrier.**—Under the Carmack Amendment an initial carrier against whom damages have been recovered has the right of recovery over against other carriers in the event that it is able to prove that the damage proximately resulted from the negligence of such other carriers. *Missouri, K. & T. Ry. Co. v. Jarmon*, (Tex. 1911) 141 S. W. 155.

It was the purpose of the Congress by the Carmack Amendment to the Hepburn Act to make the initial carrier liable for loss caused by it or any connecting carrier, and to give the initial carrier, after it has been required to pay the loss, a remedy over against the particular connecting carrier causing the loss, for the amount paid by the initial carrier as evidenced by "any receipt," etc. The receipt mentioned, in the absence of actual fraud, or such gross negligence on the part of the initial carrier in making the settlement with the shipper as would constitute a legal fraud, would be sufficient evidence to justify a recovery by the initial carrier against the connecting carrier of the amount as shown by the receipt. To be sure, there would have to be a bona fide claim by the initial carrier. But if there is a loss of goods under a contract of affreightment made with the initial carrier, which it in good faith has paid to the owner, it needs no other evidence to establish the amount of such claim against the carrier causing the loss than the amount specified in the receipt which it holds from the owner of the lost goods. The provision was intended to make the remedy of the initial carrier as complete and convenient as possible, and therefore the act provides for the simple, easy and direct method of establishing the amount of the claim by the receipt showing the payment. The amount of the receipt establishes the amount of the claim of the initial carrier, and, in the absence of fraud as explained, is conclusive thereof. The burden would be upon the defendant, if it alleged fraud on the part of the initial carrier in procuring the receipt, to show it. *Kansas City & M. Ry. Co. v. New York Cent. & H. R. R. Co.*, (Ark. 1914) 163 S. W. 171.

**What constitutes a through contract.**—Under the Carmack amendment wherever the carrier voluntarily accepts goods for shipment to a point on another line in another

state, it is conclusively treated as having made a through contract. It thereby elects to treat the connecting carriers as its agents, for all purposes of transportation and delivery. *Galveston, H. & S. A. R. Co. v. Wallace*, (1912) 223 U. S. 481, 32 S. Ct. 205, 56 U. S. (L. ed.) 516.

Where a shipper delivers a loaded car to a carrier with instructions to ship it to a certain place in another state via a certain connecting railroad, and the carrier receives the car without objection to the instructions, and puts a routing tag upon it, the transaction constitutes a contract of interstate transportation. *W. H. Aton Piano Co. v. Chicago, M. & St. P. R. Co.*, (1913) 152 Wis. 156, 139 N. W. 743.

**Who is an interstate carrier.**—A company operating a mere switching railway, transporting cars to and from trunk lines upon the basis of a division of profits, may be an interstate carrier within the meaning of the Carmack Amendment. *W. H. Aton Piano Co. v. Chicago, M. & St. P. R. Co.*, (1913) 152 Wis. 156, 139 N. W. 743.

**Limitations of liability.—In general.**—By the Carmack amendment the initial carrier is made liable to the holder of the bill of lading, required thereby, for any damages caused by it or any other carrier to which it may deliver the property for which the bill of lading is issued or over whose line or lines such property shall pass, and no contract, receipt, rule, or regulation shall exempt the initial common carrier from such liability. This provision is construed to mean that the initial carrier may not by contract, rule, or regulation protect itself from damages resulting from its own negligence or from the negligence of any other carrier into whose possession the property may come by virtue of the issuance of the bill of lading. The provision does not, however, deprive the carrier from making a reasonable contract with the shipper providing for notice of loss or damage or a reasonable limitation upon the time of bringing an action for the recovery thereof. *Ray v. Missouri, K. & T. R. Co.*, (1913) 90 Kan. 244, 133 Pac. 847. See to the same effect *St. Louis & S. F. R. Co. v. Zickafoose*, (1913) 39 Okla. 302, 135 Pac. 406.

The liability imposed by the statute is the liability imposed by the common law upon a common carrier, and may be limited or qualified by special contract with the shipper, provided the limitation or qualification be just and reasonable, and does not exempt from loss or responsibility due to negligence. *Missouri, K. & T. R. Co. v. Harriman*, (1913) 227 U. S. 657, 33 S. Ct. 397, 57 U. S. (L. ed.) 690.

Any provision valid in the initial carrier's contract for its own benefit will therefore inure to the benefit of the connecting carrier. *Atchison, T. & S. F. Ry. Co. v. Word*, (Tex. 1913) 159 S. W. 375.

The carrier under the common law is primarily liable for all damages caused by its failure to feed, water, properly load and unload, and otherwise care for live stock while in its possession, and it cannot under the Carmack Amendment make a valid contract

shifting its liability to the shipper. Chicago, R. I. & G. Ry. Co. v. Scott, (Tex. 1912) 156 S. W. 294, followed in Chicago, R. I. & G. Ry. Co. v. Linger, (Tex. 1913) 156 S. W. 298.

*Stipulation for agreed valuation.*—A carrier may under this section by a fair, open, just and reasonable agreement in the receipt or bill of lading limit the amount receivable by a shipper in case of loss or damage to an agreed value made for the purpose of obtaining the lower of two or more rates of charges proportioned to the amount of the risk, and no state statute is valid which attempts to interfere with this right. Adams Exp. Co. v. Croninger, (1913) 226 U. S. 491, 33 S. Ct. 148, 57 U. S. (L. ed.) 314, 44 L.R.A. (N.S.) 257, followed in Wells, Fargo & Co. v. Neiman-Marcus Co., (1913) 227 U. S. 469, 33 S. Ct. 267, 57 U. S. (L. ed.) 600; Kansas City Southern R. Co. v. Carl, (1913) 227 U. S. 639, 33 S. Ct. 391, 57 U. S. (L. ed.) 683, and Missouri, K. & T. R. Co. v. Harri-man, (1913) 227 U. S. 657, 33 S. Ct. 397, 57 U. S. (L. ed.) 690; Kansas City Southern R. Co. v. Mixon-McClintock Co., (1913) 107 Ark. 48, 154 S. W. 205; Cincinnati, N. O. & T. P. R. Co. v. Rankin, (1913) 163 Ky. 730, 156 S. W. 400, 45 L.R.A. (N.S.) 529; St. Louis & S. F. R. Co. v. Zickafoose, (1913) 39 Okla. 302, 135 Pac. 406; Carpenter v. United States Exp. Co., (1912) 120 Minn. 59, 139 N. W. 154; Chicago, R. I. & G. Ry. Co. v. Rich, (Tex. 1911) 138 S. W. 223; Pacific Exp. Co. v. Krower, (Tex. 1914) 163 S. W. 9; Fielder v. Adams Exp. Co., (1911) 69 W. Va. 138, 71 S. E. 99. Compare St. Louis, I. M. & S. R. Co. v. Pape, (1911) 100 Ark. 269, 140 S. W. 265.

In Missouri Pac. Ry. Co. v. Harper Bros. (C. C. A. 7th Cir. 1912) 201 Fed. 671, the court said: "Liability for loss through negligence is stated in the statute as the rule stood at common law. There can be no exemption from such liability. But full liability for negligence and a fairly made valuation of the property are separate matters; and the statute's adoption of the common-law rule as to liability does not in and of itself indicate a disapproval of the common-law rule as to valuation. If the Congress ever undertakes to eliminate value as a lawful element in rate-making, we have no doubt that the intention will be unmistakably expressed."

*Stipulation limiting time for bringing suit.*—The Carmack Amendment does not prohibit an agreement providing a reasonable time within which the shipper shall present his claim, or give notice of claim for loss or damage, and that the carrier shall not be liable unless such notice is given or claim made within the prescribed time. Post v. Atlantic Coast Line R. Co., (1912) 138 Ga. 763, 76 S. E. 45.

A stipulation in a bill of lading covering an interstate shipment, providing that no suit shall be brought after the lapse of 90 days from the happening of any loss or damage, is valid and enforceable, and state statutes declaring void any contract attempting

to thus shorten the period of limitations are ineffectual inasmuch as all such state laws are superseded by the federal law, in so far as they pertain to or affect interstate shipments. Missouri, K. & T. R. Co. v. Harri-man, (1913) 227 U. S. 657, 33 S. Ct. 397, 57 U. S. (L. ed.) 690.

A stipulation requiring a notice in writing of the damages to be given to the initial carrier within 90 days is sufficiently complied with by giving notice to a connecting carrier. Overton v. Chicago, R. I. & G. Ry. Co., (Tex. 1913) 160 S. W. 111, following Chicago, R. I. & G. Ry. Co. v. Linger, (Tex. 1913) 156 S. W. 298.

A stipulation in a shipping contract relating to interstate commerce requiring suits to be brought before the expiration of two years after the cause of action arose, is valid and binding under the Carmack Amendment. Texas & P. Ry. Co. v. Langbehn, (Tex. 1913) 158 S. W. 244.

A provision is valid which requires written notice of the claim to be given within four months, and that a failure to comply therewith is fatal to a recovery. Joseph v. Chicago, B. & Q. R. Co., (1913) 175 Mo. App. 18, 157 S. W. 837.

In McElvain v. St. Louis & S. F. R. Co., (1913) 176 Mo. App. 379, 158 S. W. 464, a clause in a shipping contract was held valid, which read as follows: "That, as a condition precedent to a recovery for any damages for delay, loss or injury to live stock covered by this contract, the second party will give notice in writing of the claim therefor to some general officer or the nearest station agent of the first party, or to the agent at destination, or some general officer of the delivering line, before such stock is removed from the point of shipment or from the place of destination, and before such stock is mingled with other stock, such written notification to be served within one day after the delivery of such stock at destination, to the end that such claim shall be fully and fairly investigated; and that a failure to fully comply with the provisions of this clause shall be a bar to the recovery of any and all such claims." The court said: "The policy of any state with respect to limitations upon the carrier's common-law liability is no longer a matter of any consequence, in so far as concerns interstate shipments. The Supreme Court of the United States has unmistakably declared that Congress, through the enactment of the Interstate Commerce Act and the amendment thereto, including what is known as the Carmack Amendment, has taken complete possession of the subject of liability of carriers by railroad on account of interstate shipments, and such legislation by Congress, and the rule of decision prevailing in the federal courts with respect to the construction and application thereof, supersede the laws, regulations, and the policy of any state with respect to this subject."

*Stipulation for exemption from liability for negligence.*—A stipulation in a bill of lading that in no event shall the said initial carrier or any connecting line be held liable

for the safe and proper carriage of the goods beyond its own line, is invalid. *Adams Exp. Co. v. Croninger*, (1912) 226 U. S. 491, 33 S. Ct. 148, 57 U. S. (L. ed.) 314, 44 L.R.A. (N.S.) 257; *United States Exp. Co. v. Cohn*, (1913) 108 Ark. 115, 157 S. W. 144; *Pittsburgh, C. & St. L. R. Co. v. Knox*, (1912) 177 Ind. 344, 98 N. E. 295; *Cramer v. Chicago, R. I. & P. R. Co.*, (1911) 153 Ia. 103, 133 N. W. 387; *Missouri, K. & T. Ry. Co. v. Hailey*, (Tex. 1913) 156 S. W. 1119; *Gulf, C. & S. F. Ry. Co. v. Brackett-Fielder Mill & Grain Co.*, (Tex. 1914) 162 S. W. 1191; *Pecos & N. T. Ry. Co. v. Meyer*, (Tex. 1913) 155 S. W. 309; *Pecos & N. T. Ry. Co. v. Crews*, (Tex. 1911) 139 S. W. 1049. Compare *Adams Express Co. v. Mellichamp*, (1912) 138 Ga. 443, 75 S. E. 596, Ann. Cas. 1913D 976.

In *Post v. Atlantic Coast Line R. Co.*, (1912) 138 Ga. 763, 76 S. E. 45, it was held not necessary for the decision of the case to determine whether this paragraph prohibited absolutely any contract by an initial carrier limiting the common-law liability of such carrier, either as an insurer, or for injury or loss resulting from negligence, or whether the purpose of such section of the act was to require the issuance of through bills of lading, and to prevent the limitation of liability of the initial carrier to a loss occurring on its own line. On this subject there are two lines of authority.

"Congress has said that a receiving carrier, in spite of any stipulation to the contrary, shall be deemed, when it receives property in one state to be transported to a point in another, involving the use of a connecting carrier for some part of the way, to have adopted such other carrier as its agent, and to incur carrier's liability throughout the entire route, without right to reimbursement for the loss not due to his own negligence." *Drake v. Nashville, C. & St. L. R. Co.*, (1911) 125 Tenn. 627, 148 S. W. 214.

The contract of the initial carrier is one fixing the liability of the parties executing the contract, as well as that of the connecting carrier. It follows that any contract made, or attempted to be made, by the intermediate carrier has no binding effect with reference to the shipment while in the course of transportation. *Atchison, T. & S. F. Ry. Co. v. Word*, (Tex. 1913) 159 S. W. 375.

In *J. M. Pace Mule Co. v. Seaboard Air Line R. Co.*, (1912) 160 N. C. 215, 76 S. E. 513, it was held that it is the settled policy of North Carolina that a common carrier could not by contract exempt itself from liability, partial or total, caused by negligence, and that the proviso in this paragraph applied to such a case.

**Effect of failure to issue bill of lading.**—When a contract of interstate transportation is made the carrier is required by the Carmack amendment to issue a bill of lading, but the failure of the carrier to obey the law in this respect will not relieve it from the liability imposed by the act. The law was intended to operate in all cases where a carrier receives goods under an agreement,

oral or written, for their transportation to another state. The carrier cannot defeat its effect by violating a mere detail requirement. It seems equally plain that the shipper cannot defeat the law by subsequently obtaining a bill of lading from another carrier. The first transaction has already settled the relation between the owner of the goods and the carrier, and fixed the duties and liabilities of the carrier to such owner. A contract afterwards entered into between the shipper and another carrier manifestly cannot affect these duties and liabilities. *W. H. Aton Piano Co. v. Chicago, M. & St. P. R. Co.*, (1913) 152 Wis. 156, 139 N. W. 743.

In *Saxon Mills v. New York, N. H. & H. R. Co.*, (N. Y. 1913) 101 N. E. 1075, which was an action against a railroad company for the destruction of goods on a connecting railroad, it appeared that the goods were received by the defendant with explicit directions as to their transportation and forwarding, but it changed the route provided for in the directions. It was held that the defendant's failure to issue a bill of lading as required by the Carmack Amendment, could not avail it as a defense. The court said: "Its liability is for its own wrongful act, which made it responsible for the preservation and safe delivery of the goods, and we need not consider whether it is responsible as for conversion or rather as an insurer of the goods."

**Jurisdiction of state courts.**—Causes arising under the Carmack Amendment are cognizable by state courts. *Olcovich v. Grand Trunk R. Co. of Canada*, (1912) 20 Cal. App. 340, 129 Pac. 290; *Ft. Smith & W. R. Co. v. Awberry*, (1913) 39 Okla. 271, 134 Pac. 1117; *Pecos & N. T. Ry. Co. v. Meyer*, (Tex. 1913) 155 S. W. 309.

In *Galveston, H. & S. A. R. Co. v. Wallace*, (1912) 223 U. S. 481, 32 S. Ct. 205, 56 U. S. (L. ed.) 516, the court said: "Statutes have no extra-territorial operation, and the courts of one government cannot enforce the penal laws of another. At one time there was some question both as to the duty and power to try civil cases arising solely under the statutes of another state. But it is now recognized that the jurisdiction of state courts extends to the hearing and determination of any civil and transitory cause of action created by a foreign statute, provided it is not of a character opposed to the public policy of the state in which the suit is brought. Where the statute creating the right provides an exclusive remedy, to be enforced in a particular way, or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right. But jurisdiction is not defeated by implication. And, considering the relation between the federal and the state government, there is no presumption that Congress intended to prevent state courts from exercising the general jurisdiction already possessed by them, and under which they had the power to hear and determine causes of action created by federal statute. On the contrary, the absence of such

provision would be construed as recognizing that where the cause of action was not penal, but civil and transitory, it was to be subject to the principles governing that class of cases, and might be asserted in a state court as well as in those of the United States. This presumption would be strengthened as to a statute like this passed, not only for the purpose of giving a right, but of affording a convenient remedy."

In order to render a corporation amenable to service of process in a foreign jurisdiction it must appear that the corporation is transacting business in that district to such an extent as to subject it to the jurisdiction and laws thereof. This rule applies to a suit brought under the Carmack Amendment against an initial carrier. *St. Louis Southwestern R. Co. of Texas v. Alexander*, (1913) 227 U. S. 218, 33 S. Ct. 245, 57 U. S. (L. ed.) 486, wherein the court said: "The object of the statute was to require the initial carrier receiving freight for transportation in interstate commerce to obligate itself to carry to the point of destination, using the lines of connecting carriers as its agencies, thus securing for the benefit of the shipper unity of transportation and responsibility. The provisions of the amendment had the effect of facilitating the remedy of the shipper by making the initial carrier responsible for the entire carriage, but the amendment was not intended, as we view it, to make foreign corporations through connecting carriers liable to suit in a district where they were not carrying on business in the sense which has heretofore been held necessary to confer jurisdiction."

Notice to one connecting carrier of loss or damage, as notice to all.—The effect of the Carmack Amendment is to abolish the stipulation for separate liability of connecting carriers of interstate freight, and to make any one carrier liable by action brought against it for the negligence of any or all of such carriers over which the shipment upon

which the suit is based passed, and under the provisions of the act notice to either of the connecting carriers of loss or damage to the live stock is notice to all. *Chicago, R. I. & G. Ry. Co. v. Linger*, (Tex. 1913) 156 S. W. 298.

Joinder of parties.—The shipper may join with the initial carrier the connecting carrier, on whose road the damage occurred, and this does not affect his right to recover the whole damages directly against the initial carrier. *Missouri, K. & T. Ry. Co. v. Demere*, (Tex. 1912) 145 S. W. 623.

Naming connecting carriers in pleadings.—Under the Carmack Amendment the petition need not give the names of the defendant's connecting lines over which a shipment was made by the plaintiff, for the effect of the amendment is to make all such connecting carriers the agents of the initial carrier, and appellant may safely be presumed to know the names of its agents. *Pecos & N. T. Ry. Co. v. Meyer*, (Tex. 1913) 155 S. W. 309.

Joint judgments.—The Carmack Act is not to be construed to authorize a joint judgment against the initial and connecting carriers, in the absence of joint or concurrent negligence on their part. The connecting carrier is, of course, not liable for the sole negligence of the initial carrier, and should not be joined in a judgment therefor. The initial carrier should not be joined with the connecting carrier in a judgment for the latter's negligence, for the reason that a joint judgment would be conclusive between the defendants that they were joint tortfeasors and would be a bar to the initial carrier's right, given by each of said statutes, to have indemnity in an action over against the guilty company. *Walker v. St. Louis & S. F. R. Co.*, (1912) 162 Mo. App. 374, 142 S. W. 729.

The Carmack Amendment is cited in *Hudgins v. International & G. N. Ry. Co.*, (Tex. 1914) 162 S. W. 1016; *Pecos & N. T. Ry. Co. v. Cox*, (Tex. 1912) 150 S. W. 265.

## 1912 Supp., p. 112, sec. 7. [*Express and sleeping car companies, etc.*]

Rates for repeated telegraph messages.—Inasmuch as this section which brings telegraph companies within its provisions, expressly provides that messages by telegraph may be classified into day, night, repeated, unrepeatd, letter, commercial, press, government, and such other classes as are just and reasonable, and different rates may be

charged for the different classes of messages, it is apparent that the Interstate Commerce Act expressly recognizes the right of the telegraph company to charge for repeated messages different rates from those charged for unrepeatd messages. *Williams v. Western Union Tel. Co.*, (E. D. Pa. 1913) 203 Fed. 140.

## 1912 Supp., p. 115, sec. 7. [*Switches and cars to be furnished by carriers, etc.*]

The words "lateral, branch line" do not refer to what the applicant may become or be made by order of the Commission but to what it already is when it applies. The power of the Commission does not extend to ordering a connection wherever it sees fit, but is limited to a certain and somewhat narrow class of lines. The most obvious ex-

amples of such lines are those that are dependent upon and incident to the main line—feeders such as may be built from mines or forests to bring coal, ore or lumber to the main line for shipment. *United States v. Baltimore & O. S. R. Co.*, (1912) 226 U. S. 14, 33 S. Ct. 5, 57 U. S. (L. ed.) 104.

**1912 Supp., p. 115, sec. 8.**

**Constitutionality and construction.**—In *Atchison, T. & S. F. Ry. Co. v. United States*, (Com. C. 1911) 191 Fed. 856, the Commerce Court, construing this section, said: "We agree with the Commission that section 4 of the act to regulate commerce, as amended June 18, 1910, is constitutional. The Commission concedes, and we concur therein, that if the first proviso in this section is to be literally construed, and if, under such construction, no limit has been imposed upon and no standard given to guide the exercise of the Commission's discretion in granting authority to depart from the rule forbidding a lesser rate for the long than for the short haul in the same direction and over the same line or route, the proviso would be unconstitutional, as an unlawful delegation of legislative power. We concur, too, in the Commission's view, that, if the proviso were for this reason illegal, the entire section would thereby be

nullified, inasmuch as both the context and the history of the act demonstrate that the proviso is an integral part of the section, and that a hard and fast rule absolutely prohibiting such a lesser rate would not have been enacted. To determine, however, the true meaning of the proviso, the entire act must be examined. In the light of the other sections, and of the legislative and judicial history of the long and short haul clause, we are of the opinion that the guide to the exercise of the Commission's discretion is to be found in the other sections of the act, thereby making the discretion to exempt carriers from the prohibition in fact not unlimited, and imposing upon the Commission, not merely the right, but also the duty, to grant such exemption whenever, on investigation, it shall find that no violation of any section of the act would thereby be involved."

**1912 Supp., p. 117, sec. 10, par. 3.**

**False representations by concealment.**—In a prosecution under this paragraph for obtaining lower rates than the legal rate for the transportation of salt in bags, it appeared that the description of the salt in the shipping order was "coarse salt" with the words "rate 10 cents," when the true description would have been "coarse salt in sacks, rate 14 cents," and the court, on the question of whether this was a false representation within the meaning of the statute, said: "It is doubtless true that ordinarily a misrepresentation must consist of an assertion or statement such as misleads another to his injury, as distinguished from an assertion or statement which obviously is the expression of an opinion, yet it is well settled law that a misrepresentation by reason of which injury results may consist of concealment of truth as well as of positive falsification. If the defendants have intentionally con-

cealed or suppressed in their shipping order a material statement necessary to the transportation, and if the carrier relied thereon, presuming that the facts were not different than as stated, and acted accordingly by charging a lower rate for transporting the commodity than it would have charged if nothing had been concealed or suppressed in the shipping documents, then there is thought to have been as much a fraud or misrepresentation as if the misrepresentation had been of an affirmative character. Knowledge by the carrier of the precise legal rate is unimportant, if in applying the rate the information imparted to it by the shipping order as to the character of the commodity was relied upon." *United States v. Sterling Salt Co.*, (W. D. N. Y. 1912) 200 Fed. 593.

As to the sufficiency of an indictment under this paragraph, see *United States v. Sterling Salt Co.*, (W. D. N. Y. 1912) 200 Fed. 593.

**1912 Supp., p. 121. [Through routes, etc.]**

**Through shipments.**—Under this clause, as there can be no through shipment lawfully undertaken, unless a rate has been established, filed, and published, there can be no through shipment undertaken, even where there are two or more competing lines in some portion of the route, unless there is a rate fixed over each so that the shipper in routing it by one or the other is as fully informed as is the carrier, when the shipment is made, as to the rate, and as the rate in such case must be made by agreement between the carriers, the carrier necessarily chooses his agent in advance, and is in no situation to deny that agency. If a through rate has not been fixed, then the shipper in exercising his common-law right of routing cannot make a through shipment, but must make shipment according to the local rates

of the respective lines over which the carriage may be undertaken. The right of routing, therefore, cannot affect the contractual rights of the carrier; for if it has not contracted with a connecting carrier it cannot be required to accept for through carriage, and if it does accept for through carriage it does so under contract with the connecting carrier. So the right of through routing is purely contractual on the part of the carrier, except as under the act of 1906 there is a power in the Commission to order a through routing to the exclusion of another route. But so long as through shipment can only be undertaken upon agreed and published rates, which the carriers tender to the public, there can be no hardship in the shipper routing the carriage. *Cleveland, C. & St. L. Ry. Co. v. Hayes*, (Ind. 1913) 102 N. E. 34.

The provision as to the shipper's choice of routes has been held not applicable to a shipment taking place in 1907. *Cleveland,*

*C., C. & St. L. Ry. Co. v. Hayes*, (Ind. 1914) 103 N. E. 839.

## 1912 Supp., p. 122. [*Allowance for transportation facilities, etc.*]

The act of Congress in terms contemplates that if the carrier receives services from an owner of property transported, or uses instrumentalities furnished by the latter, he shall pay for them, the only restriction being that he shall pay no more than is reasonable, and the only permissive element being that the Commission may determine the maximum. *United States v. Baltimore & O. R. Co.*, (1913) 231 U. S. 274, 34 S. Ct. 75; *Interstate Commerce Commission v. Dittenbaugh* (1911) 222 U. S. 42, 32 S. Ct. 22, 56 U. S. (L. ed.) 83; *Union Pac. R. Co. v. Updike Grain Co.*, (1911) 222 U. S. 215, 32 S. Ct. 39, 56 U. S. (L. ed.) 171.

The carrier cannot pay one shipper for transportation service and enforce an arbitrary rule which deprives another of compensation for similar service. *Union Pac. R. Co. v. Updike Grain Co.*, (1911) 222 U. S. 215, 32 S. Ct. 39, 56 U. S. (L. ed.) 171.

**Cartage from manufactory to railroad.**—This paragraph does not allow a carrier to make allowances to a shipper for the cost of carting goods from the shipper's plant to the railroad. *American Sugar Refining Co. v. Delaware, L. & W. R. Co.*, (D. C. N. J. 1912) 200 Fed. 652, wherein the court said: "The plaintiff does not contend that transportation begins at the factory, but insists that, while such draying may not be transportation, it is a 'service connected with' transportation, within the meaning of section 15; but the phrase 'service connected with' such transportation, as used in such section, can be given no more comprehensive meaning than the similar phrase 'service in connection with' the receipt of property to be transported, contained in section 1. The ar-

gument that at common law a common carrier, in the promotion of its business, could contract to dray the goods from the factory to its railroad is not helpful in this discussion. Many of the common-law rights of carriers have been taken away; and in the matter of making allowances for services rendered in connection with transportation it is perfectly manifest that the only services of the shipper that can be compensated for by the carrier, under the statute, are such as are rendered by the shipper after the carrier's duty to take and transport the goods has begun. Draying of the kind under consideration necessarily precedes both the receipt and the transportation of the sugars by the railroad company. To hold that a carrier may allow for such draying services is, in effect, a warrant to exact more for the transportation of sugars from a refinery located on the railroad than from one located remote therefrom—a clear discrimination in favor of the shipper with the less favored location. That the allowance was to all shippers of carload lots similarly circumstanced does not make it any less discriminatory. While a classification for the purpose of making differences in freight rates may be permitted, such segregation must be based on rational distinctions; otherwise the main purpose of the act—to enforce equality between shippers—would be frustrated. The discrimination in these allowances arises in the carrier's assumption of a nonexistent duty, and making it the basis for obliterating a disparity not due to the carrier's lack of transportation facilities as compared with its competitors, but to that of the shipper with respect to his competitors."

## 1912 Supp., p. 123, sec. 13.

**Jurisdiction of state courts.**—The right to take cognizance of a claim based upon an award of reparation made by the Commission is not confined solely to an appropriate Circuit Court of the United States, but is equally possessed by the state courts having general jurisdiction. *Darnell v. Illinois Cent. R. Co.*, (1912) 225 U. S. 243, 32 S. Ct. 760, 56 U. S. (L. ed.) 1072.

**Insufficient declaration for damages.**—In *Darnell v. Illinois Cent. R. Co.*, (W. D. Tenn. 1911) 190 Fed. 656, the court held insufficient a declaration sought to be adjudged sufficient under this section. The court said: "The

declaration herein does not disclose such a state of facts as is made necessary by section 16 to confer jurisdiction upon the state courts. The commission has not determined that the plaintiff is entitled to an award of damages under the provisions of the act for a violation thereof, nor has the commission made an order directing the defendants to pay the plaintiff any sum as an award on or before a day named. This must have been done, and, in addition, the carrier must have failed to comply with such order, before the state court would be open to the plaintiff for the institution of this suit therein."

## 1912 Supp., p. 125, sec. 14.

For the failure of carriers to file special reports required by the commission the court has no power to impose a less or different

penalty than is prescribed in the section. *United States v. Yazoo & M. V. R. Co.*, (W. D. Tenn. 1913) 203 Fed. 159.



## JUDICIAL OFFICERS.

### Vol. IV, p. 79, sec. 19.

This section does not repeal or amend by implication the earlier Act of 1876 providing for the taking of depositions by notaries public in the same manner and with the same effect as they were then taken by commissioners of the Circuit Courts, and, as a nec-

essary incident, fixing their fees at the amounts then allowed commissioners of the Circuit Courts for such services. *American Bank Protection Co. v. City Nat. Bank of Johnson City*, (E. D. Tenn. 1913) 203 Fed. 715.

## JUDICIARY.

### Vol. IV, p. 218, sec. 563. [*Jurisdiction.*]

Necessity for pleading jurisdiction.—It will be presumed that a cause is without the jurisdiction of the United States District Court, unless the contrary affirmatively ap-

pears from the record. *Shade v. Northern Pac. Ry. Co.*, (W. D. Wash. 1913) 206 Fed. 353.

### Vol. IV, p. 220. [*Admiralty causes and seizures on land.*]

The services of a watchman, to look after a vessel laid up for repairs, is not a maritime service so as to give jurisdiction to a court of admiralty of an action to recover for such services. *The Fortuna*, (W. D. Wash. 1913) 206 Fed. 573.

Contract to furnish coal to steamships.—A contract whereby the respondent agreed to furnish to the libelant company "all the normal, necessary bunker coals that may be required by the buyers for the use of all the steamers of which they are the registered managing owners except when otherwise bound by charter" was not such a contract as to give reciprocal rights to the parties to sue in admiralty for nonperformance. *Steamship Overdale Co. v. Turner*, (E. D. Pa. 1913) 206 Fed. 339.

Torts—*Locality of injury complained of.*—To the same effect as the original note, see *California-Atlantic Steamship Co. v. Central Door & Lumber Co.*, (C. C. A. 9th Cir. 1913) 206 Fed. 5.

The court will determine cases upon equitable principles. It is never made a point of pleading whether the case rests upon contract or tort. *California-Atlantic Steamship Co. v. Central Door & Lumber Co.*, (C. C. A. 9th Cir. 1913) 206 Fed. 5.

The facts must be pleaded to show jurisdiction as no presumptions arise in favor of the jurisdiction of federal courts. *California-Atlantic Steamship Co. v. Central Door & Lumber Co.*, (C. C. A. 9th Cir. 1913) 206 Fed. 5.

### Vol. IV, p. 236, sec. 566.

A trial in the District Court without a jury, if the case is not one of the excepted ones in this section, is in the nature of a submission to an arbitrator, a mode of trial not contemplated by law, and the court's determination of the issues of fact and of questions of law supposed to arise upon its special finding is not a judicial determination and therefore is not subject to re-examination in an appellate court. *Campbell v. United States*, (1912) 224 U. S. 99, 32 S. Ct. 398, 56 U. S. (L. ed.) 684.

The first provision in respect to trial by jury in admiralty cases is found in the act of Feb. 26, 1845, part of which was retained

in Rev. Stat. § 566. This act originally purported to give the district courts jurisdiction "in matters of contract and tort, arising in, upon or concerning steamboats and other vessels of twenty tons burden and upwards, enrolled and licensed in the coasting trade and employed in the business of commerce and navigation between ports and places in divers states and territories, upon the lakes and navigable waters connecting the same, as is now possessed by the said courts in cases of like steamboats and other vessels employed in navigation and commerce upon the high seas."

At the time this statute was adopted the admiralty jurisdiction was held to extend only to tide waters, so that it could not have been sustained if the admiralty jurisdiction had not been enlarged to apply to all waters navigable in fact, since the constitutional grant of admiralty jurisdiction could not have been extended by Congress. The *Genesee Chief*, 12 How. 443, 13 L. ed. 1058; *The Eagle*, 8 Wall. 15, 19 L. ed. 365. By the latter case the portion of the act of 1845 above quoted was held to have become inoperative as a grant of jurisdiction, because that jurisdiction was granted by the Constitution, and because the constitutional grant would otherwise be narrowed by that statute; but that the portion of the statute providing for a jury trial on request of either party was still in force. This part of the statute was preserved in section 566 of the Revised Statutes, and reads as follows, in its original form as adopted in 1845:

"Saving, however, to the parties the right of trial by jury of all facts put in issue in such suits, where either party shall require it." *The Nyack*, (C. C. A. 7th Cir. 1912) 199 Fed. 383.

**Condemnation cases.**—In *United States v. Beaty*, (W. D. Va. 1912) 198 Fed. 284, the court said: "This statute was enacted originally by the first Congress in 1789. Act Sept. 24, 1789, c. 20, § 9, 1 Stat. p. 77. It reads: 'And the trial of issues of fact, in the District Courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.' The language of sec. 566, R. S., is the same, except that a further exception in bankruptcy proceedings is added. In view of what is said in the opinion in the *Chappell Case*, to which I shall advert later, it is with diffidence that I feel constrained to state that in my opinion this statute was not intended to apply to condemnation cases. It is to be

noted that the statute does not read that all issues of fact in common-law causes shall be tried by jury. And this omission was doubtless intentional. Issues of fact in contempt cases, for instance, were certainly not intended to be included. It is also a fact that issues of fact as to jurisdiction are frequently and permissibly tried by the court without a jury. *Wetmore v. Rymer*, 169 U. S. 115, 121, 18 Sup. Ct. 293, 42 L. ed. 682; *Globe Co. v. Landa Cotton Oil Co.*, 190 U. S. 540, 547, 23 Sup. Ct. 754, 47 L. ed. 1171. Disbarment proceedings are not tried by jury. *Randall v. Brigham*, 7 Wall. 523, 530, 540, 19 L. ed. 285. A motion to set aside a verdict as being contrary to the evidence raises an issue of fact, and many motions for continuance raise issues of fact; but such issues are never tried by jury. Issues of fact may arise in proceedings on habeas corpus, but no jury decides such issues. We know, then, that it was not the intention to require that all issues of fact in common-law causes be tried by the jury, and the conclusion which seems necessary is that the intention of Congress was that only those issues of fact which previous to 1789 had customarily and generally been tried by jury should thenceforth be so tried in the District Courts. So far as the authorities now accessible enable me to learn, it appears that prior to 1789 condemnations by common-law juries were certainly unusual and probably were unknown."

This statute has no application to bankruptcy proceedings wherein a secured creditor intervenes for the purpose of asserting a title or claim to property in the possession of the bankrupt's trustee. *Houghton v. Burden*, (1913) 228 U. S. 161, 33 S. Ct. 491, 57 U. S. (L. ed.) 780.

This section is cited in *Frank v. United States*, (C. C. A. 6th Cir. 1911) 192 Fed. 864.

## Vol. IV, p. 260, sec. 643.

"Revenue law" does not include the reclamation act of June 17, 1902, 7 Fed. Stat. Annot. p. 1098. *Twin Falls Canal Co. v.*

*Foote*, (C. C. Idaho 1911) 192 Fed. 583; *Stanfield v. Umatilla River Water Users' Ass'n*, (C. C. Ore. 1911) 192 Fed. 596.

## Vol. IV, p. 265, sec. 1.

### I. JURISDICTION OF CIRCUIT COURTS IN GENERAL.

The motives of litigants in seeking federal jurisdiction are immaterial. It is sufficient to entitle them to such jurisdiction that their case is brought within the terms of the statute. *Wheeler v. Denver*, (1913) 229 U. S. 342, 33 S. Ct. 842, 57 U. S. (L. ed.) 1219.

### II. SUITS OF A CIVIL NATURE AT COMMON LAW OR EQUITY.

**Defined.**—The phrase "suits at common law and in equity" embraces not only ordinary actions and suits, but includes all the proceedings carried on in the ordinary law

and equity tribunals as distinguished from proceedings in military, admiralty, and ecclesiastical courts. It is a very comprehensive term, and is understood to apply to any proceedings in a court of justice by which an individual pursues a remedy which the law affords. Modes of proceeding may vary, but as it affects the right of removal any civil proceeding in a state tribunal in which a judgment or decree is sought as to the rights of the parties and presented by the pleadings for judicial determination is an action or suit within the meaning of the statute, regardless of the forum or tribunal before which the matter is pending. And the state cannot, by creating special proceedings or special tribunals, deprive the federal court of jurisdiction of such a suit or prevent a

removal. But a proceeding carried on by or before executive or administrative officers in the exercise of their proper functions cannot be regarded as a suit or action, although it may become such on appeal to a court having power to determine questions of law and fact either with or without a jury, and where there are parties litigant to contest the case on one side or the other. In *re Silvies River*, (D. C. Ore. 1912) 199 Fed. 495.

"Suit."—A petition termed under the laws of Louisiana "executory process" praying for the seizure and sale of a steam yacht in satisfaction of a mortgage indebtedness is a "suit." *W. G. Coyle & Co. v. Stern*, (C. C. A. 5th Cir. 1912) 193 Fed. 582.

Where a state statute authorized a city to acquire by condemnation the waterworks located therein when the franchise had expired, and in pursuance of the procedure required by the law the common council had presented a resolution to the supreme court of the state asking for the appointment of three judges to act as a court of condemnation, and immediately after their appointment and organization as a court a petition for removal of the cause was presented, it was held that the proceeding was not then a suit within the meaning of this section of the Judicial Code. *Des Moines Water Co. v. Des Moines*, (C. C. A. 8th Cir. 1913) 206 Fed. 657.

Facts held to show that the proceeding in Drainage Dist. No. 19, Caldwell County, Mo. *v. Chicago, M. & St. P. Ry. Co.*, (W. D. Mo. 1912) 198 Fed. 253, was a "suit."

Effect of state legislation.—It has long been settled, as to controversies between citizens of different states, that the states cannot annul or abridge the jurisdiction of courts of the United States. *Tucker v. Hubbert*, (C. C. A. 6th Cir. 1912) 196 Fed. 849.

In *Schmubach v. Caldwell*, (C. C. A. 4th Cir. 1912) 196 Fed. 16, the court said: "Assuming that the Circuit Court had jurisdiction, because of diverse citizenship of the parties, it is settled that whether the suit is to be at law or in equity is dependent upon familiar principles of federal jurisdiction and procedure. In *Clark v. Smith*, 13 Pet. 195, 10 L. ed. 123, it is said: 'The state legislatures certainly have no authority to prescribe the forms and modes of proceeding in the courts of the United States; but having created a right, and at the same time prescribed a remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the chancery side of the federal courts, no reason exists why it should not be pursued in the same form as it is in the state courts. On the contrary, propriety and convenience suggest that the practice should not materially differ when titles to land are the subjects of investigation.' This rule has been uniformly followed in the federal courts, and has been specifically applied to suits to enforce mechanics' liens."

Proceedings relating to wills.—An action to set aside a will admitted to probate, brought under a New York statute author-

izing such an action, may if there is diverse citizenship be brought in a federal court. *McDermott v. Hannon*, (W. D. N. Y. 1913) 203 Fed. 1015, wherein the court said: "It is suggested by defendants that jurisdiction is expressly given to the Supreme Court of the county where the will was probated, and that this court should not, by assuming jurisdiction, nullify the intention of the legislature that the trial should be had before a jury of the county wherein the will was probated. To yield to this suggestion would do violence to the rights and remedies of citizens of another state, and would operate to deprive them of the enforcement of such rights in the forum granted by the national constitution and laws."

### III. AMOUNT IN CONTROVERSY.

Amount must "exceed" \$2,000.—The Judiciary Act of 1887, as amended in 1888, expressly limits the jurisdiction of the Circuit Courts of the United States, in civil actions based upon diversity of citizenship, to cases where the amount or value of the matter in controversy exceeds, exclusive of interest and costs, the sum of \$2,000. The language of the act, that the value of the matter in controversy must exceed the sum of \$2,000, exclusive of interest and costs, is plain and unambiguous, and it needs no argument or citation of authorities to show that \$2,000 even does not exceed \$2,000. *Royal Ins. Co. v. Stoddard*, (C. C. A. 8th Cir. 1912) 201 Fed. 915.

The joinder of causes of action on two bonds, thereby bringing the amount in controversy above the jurisdictional amount, was held allowable in *Kaus v. American Surety Co.*, (N. D. Ia. 1912) 199 Fed. 972.

Absence of pecuniary value.—A suit by a stockholder to obtain permission to inspect the books, papers, documents, and records of a corporation has no pecuniary value which can be calculated and ascertained in money, and consequently such case cannot be removed to the federal court. *Whitney v. American Shipbuilding Co.*, (N. D. Ohio 1911) 197 Fed. 777.

Aggregate of claims.—When two or more plaintiffs, having separate and distinct demands, unite for convenience and economy in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount. *Troy Bank v. G. A. Whitehead & Co.*, (1911) 222 U. S. 39, 32 S. Ct. 9, 56 U. S. (L. ed.) 81.

In *Carpenter v. Knollwood Cemetery*, (D. C. Mass. 1912) 198 Fed. 297, the bill alleged that the suit was brought by the complainants in behalf of themselves and all other owners of landholders' shares who were similarly situated, seeking, among other things, to protect the interests of the lands of the defendant corporation as against a proposed sale of such lands. It was held that the ag-

gregate interest of the complainants constituted the amount in controversy.

How ascertained.—In an action by a patron of a water company to restrain it from raising or changing rates of service for water supplied to the plaintiff, and from refusing to supply the plaintiff with water at the rate theretofore charged, the amount in controversy is determinable from the plaintiff's petition until the contrary is conclusively shown. *Martin v. City Water Co. of Chillicothe, Mo.* (W. D. Mo. 1912) 197 Fed. 462.

Where a suit involves the asserted right of the complainant to do an interstate business without tax or burden thereon, the jurisdiction is determined by the value of the right to be protected or the extent of the injury to be prevented, and not by the mere amount of the license fee involved. *Jewel Tea Co. v. Lee's Summit*, (W. D. Mo. 1912) 198 Fed. 532.

In *Royal Ins. Co. v. Stoddard*, (C. C. A. 8th Cir. 1912) 201 Fed. 915, it was held that the allegation in plaintiff's complaint that the amount in controversy, exclusive of interest and costs, exceeded the sum of \$2,000 in value, was not controlling as against the statement of fact that the action was based upon a contract of insurance for the payment of \$2,000 even; and the admission by defendant in its answer that the amount in controversy exceeded that sum was not availing, as it was a fundamental proposition that consent of parties alone cannot give the court jurisdiction of the subject-matter.

In *Williams v. Molther*, (C. C. A. 2d Cir. 1912) 198 Fed. 460, the only allegation contained in the complaint as to the amount or value of the matter in dispute was that the act of the defendants constituted an invasion of the complainant's business privileges to his loss and irreparable injury of over (without saying how much it is over) \$1,000. The court said: "The act requires that the matter in dispute should exceed, exclusive of interest and costs, the sum or value of \$2,000. As the complainant is a layman and without counsel and the defendants have not taken any objection on this ground in the Circuit Court, and that court has decided the question of law which the parties agreed to submit to it, we are not disposed to suggest this objection. If the complainant were to ask leave to amend, we would certainly grant it. And there is authority for our holding that we may infer that unliquidated damages alleged to be in excess of \$1,000 are not less than \$2,000, exclusive of interest and costs, because of the conduct of the parties."

The amount in controversy in a suit to enjoin the collection of a tax levied against the plaintiff, the ground of the suit being that its charter exempted it from taxation during its life as a corporation, is not the amount of that particular tax, because the contest relates to the right to levy taxes in succeeding years and the amount is measured by the value of the right to be protected. *Berryman v. Board of Trustees of Whitman*

*College*, (1912) 222 U. S. 334, 32 S. Ct. 147, 56 U. S. (L. ed.) 226.

Suit on promissory note providing for attorney's fee.—In determining whether the jurisdictional amount is involved, if the suit is brought on a promissory note providing for the payment of a reasonable attorney's fee in case of suit, the attorney's fee may be considered. *Springstead v. Crawfordville State Bank*, (1913) 231 U. S. 541, 34 S. Ct. 195, wherein the court said: "Clearly such fee was no part of the costs, nor was it interest. It may be that the agreement to pay an attorney's fee in the event of suit created only an accessory right (though under *Brown v. Webster*, (1895) 156 U. S. 328, this is doubtful), but nevertheless it gave a right to recover and created a legal obligation to pay. It is true its effectiveness was dependent upon suit being brought, yet the moment suit was brought the liability to pay the fee became a 'matter in controversy' and as such to be computed in making up the requisite jurisdictional amount, *Brown v. Webster*, (1895) 156 U. S. 328, and this has been the rule since applied by lower federal courts. *Rogers v. Riley*, (C. C. Ky. 1896) 80 Fed. 759; *Continental Casualty Co. v. Spradlin*, (C. C. A. 4th Cir. 1909) 170 Fed. 322; *Howard v. Carroll*, (D. C. Md. 1912) 195 Fed. 646."

#### IV. SUITS ARISING UNDER THE CONSTITUTION, LAWS, OR TREATIES OF THE UNITED STATES.

A suit involving the infringement of a patent is one arising under laws of United States. *The Fair v. Kohler Die & Specialty Co.*, (1913) 228 U. S. 22, 33 S. Ct. 410, 57 U. S. (L. ed.) 716.

"A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either." *Cleveland, C. & St. L. Ry. Co. v. Hirsch*, (C. C. A. 6th Cir. 1913) 204 Fed. 849.

Must so appear from plaintiff's statement.—The plaintiff cannot make out a case as arising under the Constitution or laws of the United States, unless it necessarily appears by the complaint or petition or bill in stating plaintiff's cause of action, and it must in some form appear upon the record, by a statement of facts in legal and logical form such as is required in good pleading, that the suit is one which really and substantially involves a dispute or controversy as to a right which depends upon the construction or effect of the Constitution or some law or treaty of the United States. *Taylor v. Anderson*, (E. D. Okla. 1911) 197 Fed. 383.

Statement of defense.—To the same effect as the original note, see *Taylor v. Anderson*, (E. D. Okla. 1911) 197 Fed. 383.

When the plaintiff bases his cause of action upon an act of Congress jurisdiction cannot be defeated by a plea denying the merits of the claim. *The Fair v. Kohler Die & Special-*

ty Co., (1913) 228 U. S. 22, 33 S. Ct. 410, 57 U. S. (L. ed.) 712.

#### VI. DIVERSE CITIZENSHIP.

**State citizenship.**—To constitute citizenship of a state in relation to the Judiciary Act requires, first, residence within such state; and, second, an intention that such residence shall be permanent. In this sense, state citizenship means the same thing as domicile in its general acceptation. *Hammerstein v. Lyne*, (W. D. Mo. 1912) 200 Fed. 165.

**Citizens of territories.**—To the same effect as the original note, see *Anaconda Copper Mining Co. v. Butte-Balaklava Copper Co.*, (D. C. Mont. 1912) 200 Fed. 808.

A state is not a "citizen."—To the same effect as the original note, see *Deseret Water, Oil & Irrigation Co. v. State of California*, (C. C. A. 9th Cir. 1913) 202 Fed. 498.

**Citizenship of corporation.**—A corporation is a mere creature of local law, incapable of having legal existence beyond the limits of the sovereignty creating it, and it must be treated as a citizen of the state creating it, within the meaning of that clause of the Constitution extending judicial power in federal courts to controversies between citizens of different states. *Lemon v. Imperial Window Glass Co.*, (N. D. W. Va. 1912) 199 Fed. 927; *Woerheide v. H. W. Johns-Manville Co.*, (E. D. Pa. 1912) 199 Fed. 535; *Revett v. Clise*, (W. D. Wash. 1913) 207 Fed. 673.

"The citizenship of a corporation is conclusively presumed, for the purposes of jurisdiction of the federal courts, to be that of the state in which it was created; and while a corporation organized in one state may be licensed or empowered by law to do business in another, its citizenship remains in the state in which it was organized, although the local law may declare that on compliance therewith it becomes a domestic corporation. It cannot be required, without its consent, to answer in a federal court other than that of the district in which it was incorporated to a civil action brought by a citizen of a different state, although it may be doing business in the district where sued and have a general agent there." *Baldwin v. Pacific Power & Light Co.*, (D. C. Ore. 1912) 199 Fed. 291.

**Nature of suit.**—Where a state law allows a person claiming an interest or estate in real property, not in the possession of another, to maintain a suit in equity to remove the cloud or to quiet title, without being in actual possession of the premises, such a suit may be maintained in the federal courts where a diversity of citizenship exists. *Johnson v. North Star Lumber Co.*, (C. C. A. 9th Cir. 1913) 206 Fed. 624.

**Representative parties.**—To the same effect as the original note, see *Laubscher v. Fav*, (N. D. Ohio 1912) 197 Fed. 879.

**Partnership or joint stock company.**—In principle there would seem to be no difference between a corporation and a partnership, if the latter has the right to sue in the

firm name. The Supreme Court, however, has always denied as to a partnership, or joint-stock company, the presumption that its members are citizens of the state of its domicile, and has always required the allegation, or proof, of the diversity of citizenship of its members. *Empire Rice Mill Co. v. K. & E. Neumond*, (E. D. La. 1912) 199 Fed. 800.

**Several parties, plaintiff or defendant.**—When the plaintiff alleges a cause of action as existing against defendants jointly charged by him, and one of them is a citizen of a different state, the fact that ultimately the claim may be adjudged a several one, existing only against the citizen of the other state, does not necessarily give to that party a right to remove. The plaintiff has a right to make his charge a joint one if he sees fit, and that he may be mistaken and misconceive his rights, and that his claim might be only against the citizen of a different state, does not affect his right to sue the defendants as jointly liable, providing it is done in good faith and not for the purpose of preventing a removal by a pretensive and fraudulent joinder. *Price v. Southern Power Co.*, (W. D. S. C. 1913) 206 Fed. 496.

It is, undoubtedly, the duty of the court in determining whether there is the requisite diversity of citizenship to arrange the parties with respect to the actual controversy, looking beyond the formal arrangement made by the bill. *Helm v. Zarecor*, (1911) 222 U. S. 32, 32 S. Ct. 10, 56 U. S. (L. ed.) 77.

**Averment of citizenship.**—To the same effect as the original note, see *Pike County, Pa. v. Spencer*, (C. C. A. 3d Cir. 1911) 192 Fed. 11; *Shade v. Northern Pac. Ry. Co.*, (W. D. Wash. 1913) 206 Fed. 353.

#### VII. SUITS BETWEEN CITIZENS AND ALIENS.

**What are.**—To the same effect as the original note, see *Suravitz v. Pristasz*, (C. C. A. 3d Cir. 1912) 201 Fed. 335.

**Mere removal from the United States of a person born here, and a residence in a foreign country for a period of years, with out any showing of intention to become a citizen of such country, does not render such person an alien so as to give a federal court jurisdiction of an action brought against her by a citizen of the United States.** *Hammerstein v. Lyne*, (W. D. Mo. 1912) 200 Fed. 165.

#### XII. PLACE OF BRINGING SUIT.

**To what suits applicable.**—To the same effect as the original note, see *Southern Pac. R. Co. v. Arlington Heights Fruit Co.*, (C. C. A. 9th Cir. 1911) 191 Fed. 101; *Mattison v. Boston & M. R. Co.*, (N. D. N. Y. 1913) 205 Fed. 821.

A strong opinion reviewing the authorities dealing with the subject of the place of bringing suit is *Western Union Telegraph Co. v. Louisville & N. R. Co.*, (E. D. Tenn. 1912) 201 Fed. 932.

**Suits by and against aliens and foreign corporations.**—To the same effect as the

original suit see *Wind River Lumber Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, (C. C. A. 9th Cir. 1912) 196 Fed. 340; *Hall v. Great Northern Ry. Co.* (D. C. Mont. 1912) 197 Fed. 488.

The fact that a foreign corporation maintains an office and has a resident agent of limited authority in the district for some special purpose has been held in numerous cases not sufficient to justify the inference of the presence of the corporation within the district. *Real Estate Trust Co. of Philadelphia v. Washington-Virginia Ry. Co.*, (E. D. Pa. 1913) 204 Fed. 678.

**Suits by and against domestic corporations.**—In *L. G. McKnight & Son Co. v. Cramer Furniture Co.*, (C. C. A. 1st Cir. 1911) 189 Fed. 48, it was held that an action at law instituted in the Circuit Court for the District of Massachusetts by a Maine corporation against a North Carolina corporation was properly dismissed for want of jurisdiction. The court said: "The defendant is a corporation of the state of North Carolina, having its usual place of business in that state, and having no place of business in the state of Massachusetts. The action was begun in the district of Massachusetts by service of summons upon its vice president, also a director, who was not in Massachusetts on business of the defendant corporation. The question of jurisdiction upon such facts as are above set forth, and upon such additional facts as are contained in the bill of exceptions, is so well settled to the contrary of the contention of the plaintiff in error that we need only refer to the . . . authorities."

A suit against a railroad corporation cannot be removed to a federal court of a district in a state in which it is not incorporated, and in which the plaintiff is not a resident, although it operates a portion of its lines through such state and has complied with the laws of such state applicable to foreign corporations doing business in the state. *Stone v. Chicago, B. & Q. R. Co.*, (W. D. Mo. 1912) 195 Fed. 832, wherein the court said: "The reason stated is that the property of railroad companies in any given state and district is so extensive and so permanently located in its nature that the residence of the corporation becomes thereby fixed and localized. To my mind there is no sound reason for this distinction. The difference, if there is any, is in degree only. Residence, as well as citizenship, depends, not upon property, but upon intent. It inheres in persona, not in re. In the case of a corporation it is artificial and arbitrary. To avoid confusion and to give proper effect to statutes conferring jurisdiction and the right of removal, the Supreme Court has arbitrarily assigned both citizenship and residence to the state of incorporation; and, having done so, it has placed all corporations upon the same footing, as, indeed, the spirit of our institutions would demand. That in most states a residence of corporations organized in other states has been recognized for purposes of service of process, and the like, and that such residence and the jurisdic-

diction of the local courts have been made conditions precedent to a license to do business in such states, can have no effect upon acts of Congress conferring or limiting federal jurisdiction, nor upon the interpretation of such acts and the definition of their terms by the Supreme Court of the United States. Jurisdiction of the federal courts, by reason of diversity of citizenship, was conferred because it was assumed that local sympathy may incline to the citizen of that state in which the case is tried. To remove this inequality, so far as practicable, a national tribunal was provided; but the power to prescribe the boundaries of jurisdiction, including the right of removal, was vested in the Congress. Changed conditions may suggest change in such provisions, but that is for the legislative branch of the government. As closer physical relations with other communities cannot change the citizenship of the corporation, neither can they operate to create a residence distinct from that citizenship, and inconsistent with the very theory upon which jurisdiction based upon diversity of citizenship is conferred. That right is founded not upon distinctions between persons, whether natural or corporate as such, but upon diversity in locality of citizenship and residence. When Congress by the acts of 1887 and 1888 sought to contract the jurisdiction of the federal courts, admittedly as to natural persons, by no longer permitting the action to be brought in a district where the defendant might be found, is it probable that, respecting corporations, the law was intended to remain unchanged? It will be noted that in cases like that at bar both parties in their citizenship are strangers to the state jurisdiction in which the suit is brought. However, the Supreme Court has expressly made the rule announced in *Shaw v. Quincy Mining Company* [145 U. S. 444] and in *Re Keasbey & Mattison Company* [160 U. S. 221] applicable to railroad corporations. In *Southern Pacific Railway Company v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. ed. 942, the plaintiff, a citizen of the state of Texas and a resident in the Eastern District thereof brought an action in the Circuit Court of the United States for the Western District of that state against the defendant, a corporation incorporated in the state of Kentucky. Here it will be seen that one of the parties, to wit, the plaintiff, was a citizen and resident of the state in which the suit was brought, but in a district other than that in which the jurisdiction was invoked. The railroad company filed an answer or demurrer, in the nature of a plea to the jurisdiction, maintaining that the suit, if brought in the state of Texas at all, must be brought in the district of the residence of the plaintiff—that is to say, in the Eastern District of Texas—and this plea was, of course, sustained. Mr. Justice Gray, again delivering the opinion of the court said: "The case is governed by the decision of this court at the last term, by which it was adjudged that the

act of 1887, having taken away the alternative, permitted in the earlier acts, of suing a person in the district "in which he shall be found," requires an action at law, the jurisdiction of which is founded only upon its being between citizens of different states, to be brought in the state of which one is a citizen, and in the district therein of which he is an inhabitant and resident; and that a corporation cannot, for this purpose, be considered a citizen or a resident of a state in which it has not been incorporated.' That the exemption from being sued in any other district might be waived by the corporation is recognized here, as in many other cases, but that privilege does not confer a jurisdiction upon the federal court within the meaning of the removal act."

**Citizenship of corporation.**—In *Parker Washington Co. v. Cramer*, (C. C. A. 7th Cir. 1912) 201 Fed. 878, the facts were as follows: Plaintiff filed his declaration in the Circuit Court of the United States for the Northern District of Illinois to recover damages for personal injuries alleged to have been sustained by him through the negligence of the defendant. Respecting jurisdiction on the ground of diversity of citizenship, the declaration alleged that the plaintiff was a citizen of Illinois, and that the defendant, a corporation, was a citizen of New Jersey. Without challenging the truth or the sufficiency of the jurisdictional averment, defendant went to trial upon the merits, and the jury returned a verdict for plaintiff, and the court thereupon entered the judgment to which a writ of error was addressed to the Circuit Court of Appeals resulting in a reversal of the judgment. The court said: "The record is barren of anything to sustain jurisdiction, except the averment in the declaration. Inasmuch as the fiction is, not that the corporation itself is really a citizen, but that the stockholders are all citizens of the state which chartered the corporation, and that the corporation is a mere form through which such citizens are exercising their constitutional right of being heard in a federal court when the controversy is between citizens of different states, the approved form of allegation is that the defendant is a corporation organized and existing under the laws of the named state. From this formula of averment an irrebuttable presumption that the stockholders are citizens of the chartering state is held to arise. And, since the corporation itself cannot be in truth a citizen, an allegation that it is a citizen is inadmissible as a basis on which to found the aforesaid irrebuttable presumption. We are constrained, therefore, to hold that the averment of jurisdiction is bad, and to reverse the judgment for the want of any showing of jurisdiction."

The words "inhabitant," "residence" and "resident" are synonymous. *Bogue v. Chicago, B. & Q. R. Co.*, (S. D. Ia. 1912) 193 Fed. 728.

Several parties, plaintiff or defendant. — Where an action is brought in a state court by several plaintiffs, only one of whom

is a citizen of the state, against a defendant who is a resident of a state different from that of any of the plaintiffs, the defendant cannot remove the cause to the federal court of the district where brought, without the consent of the plaintiffs. *Puget Sound Sheet Metal Works v. Great Northern R. Co.*, (W. D. Wash. 1912) 195 Fed. 350.

**Waiver of objections.**—To the same effect as the original note, see *H. J. Decker, Jr., & Co. v. Southern Ry. Co.*, (N. D. Ala. 1911) 189 Fed. 224; *Southern Pac. R. Co. v. Arlington Heights Fruit Co.*, (C. C. A. 9th Cir. 1911) 191 Fed. 101; *Atchison, T. & S. F. Ry. Co. v. Gilliland*, (C. C. A. 9th Cir. 1912) 193 Fed. 608; *Bogue v. Chicago, B. & Q. R. Co.*, (S. D. Ia. 1912) 193 Fed. 728; *Northwestern Lumber Co. v. Cizen*, (C. C. A. 9th Cir. 1912) 196 Fed. 454; *Camp v. Bonsal*, (C. C. A. 4th Cir. 1913) 203 Fed. 913; *Marian Coal Co. v. Peale*, (C. C. A. 3d Cir. 1913) 204 Fed. 161; *Simpson v. Geary*, (D. C. Ariz. 1913) 204 Fed. 507.

The clause which provides that "where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit should be brought only in the district of the residence of either the plaintiff or the defendant," has often been the subject of consideration by the courts. The definite result has been an interpretation of it which excludes the idea of mere jurisdiction as such, and limits it to venue, from which it is held to follow that only the right or personal privilege exists of claiming that the suit was brought in a wrong district. If neither party reside in that district, the venue may be objected to by the party sued; or if the suit be brought in a state court, the plaintiff, after removal, may object in the federal court. In short, both parties in such a case must consent to proceeding in the federal court. If the plaintiff sues in the wrong federal district, he, of course, thereby expressly consents to its jurisdiction; and if the defendant does not object, he impliedly consents, and the question is closed. If the suit is brought in a state court, and the defendant removes it, he thereby consents to the venue and to the jurisdiction of the court to which the removal is made; but in that event the plaintiff has not consented until he does something to manifest it, and until then he may move to remand the case. This consent, of course, is not regarded as conferring jurisdiction when none exists, but as having respect to venue only—the locality or district in which the suit is brought. *Turk v. Illinois Cent. R. Co.*, (W. D. Ky. 1912) 193 Fed. 252.

### XIII. SUITS BY ASSIGNEES.

A suit to recover the contents of a chose in action can only be maintained in a federal court where the assignor could have sued in that court if no assignment had been made. *Brown v. Fletcher*, (C. C. A. 2d Cir. 1913) 206 Fed. 461. To the same effect see *Waterman v. Chesapeake & O. Ry. Co.*, (D. C. N. J. 1912) 199 Fed. 667.

## Vol. IV, p. 312, sec. 2.

## I. CASES INVOLVING FEDERAL QUESTION.

Only a defendant has a right to remove the cause. *W. G. Coyle & Co. v. Stern*, (C. C. A. 5th Cir. 1912) 193 Fed. 582; *Hagerla v. Mississippi River Power Co.*, (S. D. Ia. 1912) 202 Fed. 771.

How federal question presented.—To the same effect as the original note, see *Dalles & Rockland Ferry Co. v. Hendryx*, (C. C. Ore. 1911) 189 Fed. 266; *Bowers v. First Nat. Bank of Mountainhome, Idaho*, (C. C. Idaho 1911) 190 Fed. 676; *State of Kansas v. Beal*, (C. C. Kan. 1911) 193 Fed. 543; *W. G. Coyle & Co. v. Stern*, (C. C. A. 5th Cir. 1912) 193 Fed. 582; *Western Union Tel. Co. of Illinois v. Southeast & St. L. Ry. Co.*, (C. C. A. 7th Cir. 1913) 208 Fed. 266.

While the defendant may set up a federal question as a defense to the action in the state court, and on adverse ruling thereon by the highest state court may test the question in the Supreme Court on writ of error to the state court, the cause cannot be removed from the state court to a federal court unless the plaintiff's statement of his case in his complaint or petition necessarily discloses such federal question, and, if it does not so appear, the want cannot be supplied by any statement in the petition for removal. *Boyd v. Great Western Coal & Coke Co.*, (E. D. Okla. 1911) 189 Fed. 115.

That a suit is against an officer of the United States claiming to act under a law of Congress is not sufficient to secure its removal from a state court. *Stanfield v. Umatilla River Water Users' Ass'n* (C. C. Ore. 1911) 192 Fed. 596.

A corporation organized under the laws in force in Indian Territory may not, since statehood, when made defendant in a cause in a state court involving the jurisdictional amount, remove the same to the federal court solely on the ground that it is a corporation organized and existing under the laws of the United States, for it is not such a corporation. *Boyd v. Great Western Coal & Coke Co.*, (E. D. Okla. 1911) 189 Fed. 115.

## II. DIVERSE CITIZENSHIP AND ALIENAGE.

## 1. IN GENERAL.

The reason and object of removal for diverse citizenship is to provide a tribunal presumed to be more impartial than one of the state of the residence of one of the litigants. *Anaconda Copper Mining Co. v. Butte-Balaklava C. Co.*, (D. C. Mont. 1912) 200 Fed. 808.

"Of which the Circuit Courts of the United States are given jurisdiction by the preceding section."—To the same effect as the original note, see *Waterman v. Chesapeake & O. Ry. Co.*, (D. C. N. J. 1912) 199 Fed. 667; *Hall v. Great Northern Ry. Co.*, (D. C. Mont. 1912) 197 Fed. 488; *Younts v. Southwestern Tel. & Telephone Co.*, (E. D. Ark. 1911) 192 Fed. 200; *Anderson v. Sharp*, (W. D. Tex. 1911) 189 Fed. 247.

Case becoming removable after action commenced.—A case not removable when and as brought may thereafter become in its nature removable, and may then be removed, though the original time to answer or plead has expired. But this presupposes a case that could have been brought as it thereafter was made—wherein the jurisdictional facts as they subsequently appeared were existing facts when the suit was brought. *Anaconda Copper Mining Co. v. Butte-Balaklava C. Co.*, (D. C. Mont. 1912) 200 Fed. 808.

The state is not a citizen within the meaning of the removal statute. In *re Silvies River*, (D. C. Ore. 1912) 199 Fed. 495.

Both plaintiff and defendant nonresidents.—A suit commenced in a state court in a district in which neither the plaintiff nor the defendant resides is not removable by the defendant to the Circuit Court of the United States for such district on the ground of diversity of citizenship, and where, after such removal, objection to the jurisdiction of such Circuit Court has not been waived by the plaintiff, the suit must be remanded to the state court. *Western Union Telegraph Co. v. Louisville & N. R. Co.*, (E. D. Tenn. 1912) 201 Fed. 932.

If the plaintiff sues in a state court in a district other than that of his residence or that of the defendant's residence, and the defendant attempts to remove into the federal court for that district, while the defendant, by so doing, consents to be sued in the federal court of the wrong district, the plaintiff, unless by subsequent appearance, does not so consent, and is entitled to a remand into the state court. Choosing the venue of the state court in that district is held not to be a consent to the jurisdiction of the federal court of that district on removal, and, consequently, the plaintiff's consent, as well as that of defendant, is essential to jurisdiction. *H. J. Decker, Jr., & Co. v. Southern Ry. Co.*, (N. D. Ala. 1911) 189 Fed. 224.

A cause instituted in a state court by a citizen of a state of the United States other than that of the forum against a citizen of such a state other than that of the forum, relating to a matter of venue rather than of general jurisdiction, can be removed with the consent of both parties, and only with such consent, into the federal court for that district. *H. J. Decker, Jr., & Co. v. Southern Ry. Co.*, (N. D. Ala. 1911) 189 Fed. 224.

Suits by and against aliens.—When the plaintiff is an alien and the defendant is a resident of another state than that in which the suit is brought, the suit may be removed to the federal court on petition of the defendant. *Smellie v. Southern Pac. Co.*, (N. D. Cal. 1912) 197 Fed. 641. See *Hall v. Great Northern Ry. Co.*, (D. C. Mont. 1912) 197 Fed. 488.

But if the removal is to a district comprised within the limits of the state in which the suit is brought and not to the district of the defendant's residence, the plaintiff can



have the suit remanded to the state court if the cause stated in the complaint is within the concurrent jurisdiction of the federal court and the state court. *Sagara v. Chicago, R. I. & P. Ry. Co.*, (C. C. Colo. 1911) 189 Fed. 220.

An alien plaintiff is presumed to have no choice as to districts and no provision is therefore made in his favor as to venue in that respect. Consequently, an alien plaintiff who institutes a suit in a state court in a district in which defendant does not reside has no complaint because the defendant removes the cause into the federal courts of that district; since the law confers on the alien plaintiff no privilege of selection as to districts. In cases of alien plaintiff, consent of the defendant to the venue is alone requisite, and such consent is implied in the institution by the defendant of the removal proceedings. *H. J. Decker, Jr., & Co. v. Southern Ry. Co.*, (N. D. Ala. 1911) 189 Fed. 224.

A corporation organized under the laws of a state other than that of the forum can remove a cause brought against it by an alien from a state into a federal court. *H. J. Decker, Jr., & Co. v. Southern Ry. Co.*, (N. D. Ala. 1911) 189 Fed. 224.

If there is a joint liability the plaintiff has an absolute right to enforce it, and the fact that he joins a resident as defendant along with a non-resident, for the purpose of preventing a removal of the cause from a state court to a federal court, is immaterial.

On the question of whether the defendants so joined are jointly liable to the plaintiff the United States Supreme Court will not go behind the decision of the state court. *Chicago, R. I. & P. R. Co. v. Schwyhart*, (1913) 227 U. S. 184, 33 S. Ct. 250, 57 U. S. (L. ed.) 473.

Defendant citizen of state admitted to Union pending proceedings.—Where at the time an action was commenced the defendant was a resident of a territory and therefore could not have a removal of a cause for diverse citizenship, the subsequent admission of the territory to statehood will not give a right of removal. *Anaconda Copper Mining Co. v. Butte-Balaklava C. Co.*, (D. C. Mont. 1912) 200 Fed. 808.

May be waived.—To the same effect as the original note see *Bogue v. Chicago, B. & Q. R. Co.*, (S. D. Ia. 1912) 193 Fed. 728.

In *Baldwin v. Pacific Power & Light Co.*, (D. C. Ore. 1912) 199 Fed. 291, the court commenting on the right of waiver said: "A suit commenced in a state court is not removable to the federal court unless it is one plaintiff could have brought in such a court by original process. And, where jurisdiction is founded solely upon diversity of citizenship, suit in a federal court can be brought only in the district of the residence of either the defendant or the plaintiff. It was consequently held by the Supreme Court in *Ex parte Wisner*, [203 U. S. 449] *supra*, that under sections 1, 2, and 3 of the act of March 3, 1887, as corrected by the act of August 13, 1888 (chapter 866, 25 Stat. 433), which are substantially the same as the provisions of the Judicial Code referred to,

a court of the United States could not acquire jurisdiction by removal of an action commenced in a state court by a citizen of another state against a nonresident defendant who is a citizen of a state other than that of plaintiff, even by consent of both parties, and this doctrine was followed by the Court of Appeals of this circuit in *Yellow Aster M. & M. Co. v. Crane*, 150 Fed. 580, 80 C. C. A. 566. It was however, subsequently modified by the Supreme Court in *Re Moore*, 209 U. S. 490, 28 Sup. Ct. 585, 52 L. ed. 904, 14 Ann. Cas. 1164, to the extent that the right to be sued in the district in which either the plaintiff or the defendant resides is personal to the parties and might be waived, and was waived by a nonresident defendant in an action brought in the state court filing a petition for removal, and by a nonresident plaintiff filing an amended complaint in the federal court after removal and signing a stipulation giving the defendant time in which to plead thereto, and it may be that the appointment by a foreign corporation of a local agent authorized to receive service of summons in all actions or proceedings brought in the federal court of the district of his residence will be deemed a consent to be sued in such district."

There is no waiver of the right to removal by defendants making their defense in the state court, after that court has, over defendant's objection, declined to surrender jurisdiction in the case. *Missouri, K. & T. Ry. Co. v. Chappell*, (W. D. Okla. 1913) 206 Fed. 688.

## 2. HOW DIVERSE CITIZENSHIP MADE TO APPEAR.

From the record.—To the same effect as the original note, see *West Side R. Co. v. California Pac. R. Co.*, (N. D. Cal. 1913) 202 Fed. 331.

When on the face of the record plaintiff appears to have a cause of action against each of the defendants joined, one of whom is a resident of the same state as plaintiff, it is not material that the actual purpose of plaintiff in joining the resident defendant was to prevent a removal of the cause to the federal court. *Armstrong v. Kansas City Southern Ry. Co.*, (W. D. Ark. 1911) 192 Fed. 608.

It is well settled that the record must affirmatively show jurisdiction to make the removal, and that the facts necessary to show diversity of citizenship may not be left to argument or inference. *Rife v. Lumber Underwriters*, (C. C. A. 6th Cir. 1913) 204 Fed. 32.

Where jurisdiction depends upon diversity of citizenship, such citizenship, or the facts which in legal intendment constitute it, must be distinctly or positively averred in the pleadings or appear positively and with equal distinctness in other parts of the record. *McEldowney v. Card*, (E. D. Tenn. 1911) 193 Fed. 475. And in determining whether there is a case for removal it is the

duty of the state court to examine, not only the petition for removal, but the rest of the record. *Missouri, K. & T. Ry. Co. v. Chappell*, (W. D. Okla. 1913) 206 Fed. 688.

### 3. HOW AMOUNT IN CONTROVERSY MADE TO APPEAR.

Though a party may allege facts in his complaint from which it appears that more than \$2,000 is due him, yet, if he limit his demand to less than that amount, the cause cannot be removed to the federal court on the ground of diverse citizenship. *Lesh v. Bailey*, (1911) 49 Ind. App. 254, 95 N. E. 341. See also *Collins v. Twin Falls North Side Land & Water Co.*, (D. C. Idaho 1913) 204 Fed. 134, wherein it was held that the plaintiff may in his prayer waive a part of the recovery to which, according to the averments of the complaint, he is entitled, and thus avoid removal.

Where the allegation of the amount in controversy stands admitted for want of a denial, the federal court will take jurisdiction. *Studebaker v. Salina Waterworks Co.*, (D. C. Kan. 1912) 195 Fed. 164.

If the plaintiff amends his petition increasing the amount or ad damnum, so as to constitute a removable cause, the right to remove is thereby given, and, if the defendant by proper application in due time avails itself of that right, it cannot be denied. *Ft. Smith & W. R. Co. v. Blevins*, (Okla. 1913) 130 Pac. 525.

If the amount in controversy affirmatively appears from the pleadings on file to be less than \$2,000, though the petition for removal asserts it to exceed that sum, the state court does not lose jurisdiction of the case. *Bacon v. Iowa Cent. Ry. Co.*, (Ia. 1912) 137 N. W. 1011.

### 4. WHO MAY REMOVE THE SUIT.

Only the defendant has the right to remove a suit. *Hagerla v. Mississippi River Power Co.*, (S. D. Ia. 1912) 202 Fed. 771.

Where there are several defendants joined, a removal cannot be had, unless it appear from the record that the defendant seeking it is the sole, proper, or necessary party defendant in the action. *West Side R. Co. v. California Pac. R. Co.*, (N. D. Cal. 1913) 202 Fed. 331.

One of several defendants cannot remove the cause where there is no separate controversy though the rule does not apply where one only of two defendants has been served. *Bowles v. H. J. Heinz Co.*, (S. D. N. Y. 1911) 188 Fed. 937.

When a suit is brought in a state court by a nonresident against two defendants, one a nonresident and the other a resident, between the latter of whom and the plaintiff, therefore, there is no diversity of citizenship, in determining whether there is liability on the part of the resident and nonremoving defendant and that jointly with the other defendant, which, if so, will render the cause nonremovable, the law of the state where the suit is brought governs. *M'Allister v. Chesa-*

*peake & O. R. Co.*, (E. D. Ky. 1912) 198 Fed. 680.

**Joint tortfeasors.**—Where one is injured by the concurrent negligence of two persons he may join them in one action, in which case it is not a good ground for the removal of the action from a state court to a federal court that one of the defendants was a citizen of another state. The fact that the plaintiff might have sued the defendants separately, in which case one of these defendants would have been entitled to remove the action against him to a federal court, is immaterial. *Chicago, R. I. & P. R. Co. v. Dowell*, (1913) 229 U. S. 102, 33 S. Ct. 684, 57 U. S. (L. ed.) 1090, *affirming* (1910) 83 Kan. 562, 112 Pac. 136.

Where a defendant in condemnation proceedings purchased the land in question after maps of the land had been filed in the county clerk's office and notices posted on the property and published in the newspapers, but before the petition for condemnation had been filed in the state court, it was held that he had a right to remove the cause to the federal court on a proper showing of diverse citizenship as the proceedings were not commenced until the petition was filed in the state court. In *re Bensel*, (C. C. A. 2d Cir. 1913) 206 Fed. 369.

**Being nonresidents of that state.**—To the same effect as the original note, see *Drovers' Deposit Nat. Bank v. Tichenor*, (E. D. Wis. 1913) 202 Fed. 1013.

The defendant, if a resident of the state, has not the right of removal on the ground of diversity of citizenship. *Dalles & Rockland Ferry Co. v. Hendryx*, (C. C. Ore. 1911) 189 Fed. 266.

If an alien sues a citizen in a state court in the district of the citizen's residence, the citizen cannot remove the case, not being a nonresident defendant. *H. J. Decker, Jr., & Co. v. Southern Ry. Co.*, (N. D. Ala. 1911) 189 Fed. 224.

A railroad corporation may be a resident of any state in which it has its line. *Bogue v. Chicago, B. & Q. R. Co.*, (S. D. Ia. 1912) 193 Fed. 728.

**Aliens.**—In *Attleboro Mfg. Co. v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, (D. C. Mass. 1913) 202 Fed. 293, the plaintiff, a Rhode Island corporation engaged in business in Massachusetts, brought suit in the state court against a corporation organized under the laws of the empire of Germany but engaged in the insurance business in Massachusetts. It was held that the defendant was entitled to remove the suit into the federal court of Massachusetts. The court said: "The plaintiff seeks such a construction of the act as restricts an alien defendant's right of removal to cases in which the suit against the alien is brought in the district of the plaintiff's residence. Plaintiff cites from *Cochran v. Montgomery*, 199 U. S. 260, 273, 26 Sup. Ct. 58, 63 (50 L. ed. 182, 4 Ann. Cas. 451), the following: 'The main purpose of the act of 1887, as has been repeatedly said, is to restrict the jurisdiction, and this was largely accomplished in

the matter of removals by withholding the right from plaintiffs and only according it to defendants when sued in the plaintiff's district.' It is argued that it is not the policy of the law to give to aliens privileges not granted to citizens, and that if the defendant in the present suit, instead of being an alien, had been a citizen of one of the United States, he would not have had the privilege, against the plaintiff's objection, of having his case tried in the federal court. The inability of a citizen to remove in such a case is due, however, to provisions of the Removal Act that relate specifically to actions between citizens of different states, meaning thereby citizens of different states of the Union. Section 1 provides that such actions shall be brought only in the district of the residence of either the plaintiff or the defendant. Section 2 of the act provides for removal 'by the defendant or defendants therein being nonresidents of the state.' It follows, of course, that the words 'being nonresidents' preclude a citizen defendant from removing when sued in the courts of his own state. It by no means follows, however, that the sole purpose of the removal acts, so far as they relate to aliens, was to enable a defendant to avoid the trial of a case in the state court of the plaintiff's residence. By article 3, § 2, of the Constitution of the United States, the judicial power was extended to controversies between a state or the citizens thereof, and foreign states, citizens, or subjects. The statutes in pursuance of this provision which grant to aliens the right to a federal tribunal have not expressly limited this right to the single case where the alien is sued in the state of the plaintiff's residence. To impose such a limitation by construction would be to go beyond the clear terms of the Removal Act, and to cut down the right of removal given to an alien through a reference to provisions which are expressly confined to an action between citizens of different states of the Union. The suggestion that an alien should have no greater right than a citizen is not of sufficient force to justify the limitation of the right of the alien defendant. The plaintiff cites no case which supports its contention, though it cites many cases from which it seeks to deduce the principle that the only purpose of the act is to enable a defendant to escape from the state courts of the plaintiff's residence. The reason for affording an alien a right to a federal tribunal may be much broader than this, as indicated by the constitutional provision to which reference has been made. The argument that a decision in favor of this defendant would practically reinstate Revised Statutes, § 629, subsec. 1, which, as stated in *O'Connor v. Texas*, 202 U. S. 501, 26 Sup. Ct. 726, 50 L. ed. 1120, has been repealed, seems of little force. On the contrary, the fact that for a very long period of time the right of removal which the alien defendant now asserts was clear and undisputed supports a natural construction of the statute which preserves that right unimpaired, rather than a construction which,

without express warrant in the terms of the act, cuts down a long recognized right. There seems to be nothing unreasonable in giving the act a construction favorable to the defendant, and this construction is directly supported by the decision of the Circuit Court of Appeals for the Ninth Circuit in *Wind River Lumber Co. v. Frankfort M., A. & P. G. Co.*, 196 Fed. 340. This case is directly in point and seems a satisfactory and sufficient authority."

##### 5. PETITION FOR REMOVAL.

**Averment as to citizenship of plaintiff.**—Where a petition for removal of a cause for diverse citizenship alleged that the plaintiff "who, as appears from her petition, at the time of the commencement of said suit was, and ever since has been, and now is, a citizen and resident of the western district of the state of Oklahoma," it was held that the averment of the citizenship of the plaintiff was not insufficient although the petition of the plaintiff referred to did not fully sustain the allegation of residence. *Missouri, K. & T. Ry. Co. v. Chappell*, (W. D. Okla. 1913) 206 Fed. 688.

**Averment of citizenship of corporation.**—To the same effect as the original note, see *Wells v. Russellville Anthracite Coal Min. Co.*, (E. D. Ark. 1913) 206 Fed. 528.

**Averment of diversity of citizenship.**—The diversity of citizenship to authorize a removal need not be alleged in the petition for removal, when it appears from the complaint or any part of the record when the petition for removal was filed. *Wells v. Russellville Anthracite Coal Min. Co.*, (E. D. Ark. 1913) 206 Fed. 528.

**Facts taken as true.**—The facts stated in the petition for removal, which do not conflict with anything contained in the pleadings in the suit removed, will be taken as true unless traversed. *Camp v. Field*, (N. D. Ga. 1911) 189 Fed. 285.

**Fraudulent joinder to prevent removal.**—The plaintiff may in good faith proceed in the state courts upon an action which he alleges to be joint, if it be so really, or if it is sufficiently uncertain as not to justify the inference that the allegation that the liability is a joint one is merely colorable or pretentive. But it is the duty of the federal courts not to sanction devices intended to prevent removals to the federal courts where one has that right, and to be equally vigilant to protect the right to proceed in the federal court as to permit the state courts in proper cases to retain their own jurisdiction. *Price v. Southern Power Co.*, (W. D. S. C. 1913) 206 Fed. 496.

"A fraudulent joinder made to defeat the federal jurisdiction will not, if established, be permitted to accomplish its purpose; and the court, upon sufficient application, will look behind mere ingenuity of pleading, to the extent even of scrutinizing the facts alleged upon which the propriety of the joinder is asserted. In such cases the true rule is that the federal court upon a proper petition

for removal may examine into the merits sufficiently to determine whether the allegations by reason of which a nonresident defendant may be sued in a state court are fraudulently and fictitiously made for the purpose of preventing removal. More than that, it is its duty to make such examination. It is undoubtedly true that the mere fact that the joinder was made for the obvious or admitted purpose of defeating the jurisdiction of the national courts will not suffice to confer jurisdiction upon them, provided a cause of action exists against the resident defendant joined. Good faith must attend the joinder. It will not be exacted that the action must ultimately succeed, but there must be reasonable ground from the existing state of laws and facts to believe that the cause of action has merit; and it must be stated in good faith. The fraud here under consideration is simply a purpose to deny to the nonresident defendant the right of having his case tried in the jurisdiction to which he would otherwise be entitled by the unwarranted joinder as a codefendant of one against whom the plaintiff knows, or has sufficient reason in law to know, he has no legal ground for suit. This may appear upon the face of the pleading, or it may be skillfully concealed by allegations that are untrue and unjustified. The duty of this court is the same in either case, except that the latter involves inquiry into the facts stated, while the former does not. It is well settled that when it is disclosed, either upon the face of the complaint or in a showing by affidavit, or by oral testimony taken upon plea, that the plaintiff has no cause of action against the employé who is made defendant, the cause is removable by the other defendant if the proper diversity of citizenship exists between that defendant and the plaintiff. . . . If, in the examination in this court, therein authorized and approved, it appears either that no case at all is stated against the resident defendant, or if apparently stated, that fraud has been employed in presenting the facts for the purpose of defeating the federal jurisdiction, then it is the duty of this court so to declare even though the possible effect might be ultimately to defeat the entire cause of action. Upon no other basis can effect be given to the conceded power of the courts to protect themselves against frauds upon their jurisdiction. Otherwise, nonresident defendants would be at the mercy of the ingenious, but disingenuous, pleader." *Clark v. Chicago, R. I. & P. Ry. Co.* (W. D. Mo. 1912) 194 Fed. 505.

The rule which permits a removal to the federal court in case of the fraudulent joinder of defendants whose presence destroys diversity of citizenship cannot be carried to the extent of permitting such fraudulent joinder to be inferred from the fact only that no cause of action is found to exist against any defendant, resident or nonresident, or of permitting removal in a case where the negligence of the corporate defendant can be made out only by proof of negligence of the servant alleged to be fraudulently joined,

but against whom a cause of action is stated. *Enos v. Kentucky Distilleries & Warehouse Co.*, (C. C. A. 6th Cir. 1911) 189 Fed. 342.

In *McGarvey v. Butte Miner Co.*, (D. C. Mont. 1912) 199 Fed. 671, on a motion to remand an action removed for alleged fraudulent joinder, the court said: "Upon the facts that may be taken as proven hereon, the removing defendant contends that the law is that its codefendant, whose joinder, unless proven fraudulent, defeats removal, is not liable; and hence the conclusion, fraudulent joinder. Plaintiff, contra.

"The law is fairly debatable. But if plaintiff knew the aforesaid facts, and if the law be as claimed by the defendant, these are but circumstances, and not conclusive of fraudulent joinder. Where the law is locally unsettled, it is the right of plaintiff to adopt and fairly urge that view thereof that best serves his interests, to join defendants accordingly, and, if the case be not otherwise removable, to secure a trial and determination of the disputed issues, fact and law, upon his theory and in the forum of his choice, the state court. This being plaintiff's right, its exercise is not fraudulent, though its chief motive be to prevent removal and compel trial in the state court. The case on removal is taken to be what plaintiff in good faith has made it. He may be in error in respect to both facts and law, his complaint may show misjoinder on its face, but fraud cannot be predicated upon his mere mistakes, though they defeat removal. The exercise of the right aforesaid is consistent with good faith, for law is not settled by a litigant's belief or contention, but by the court's determination. This determination is for the trial, and not on remand. On remand, the issue is not what is the law of the case, but is the joinder fraudulent? And the fraud to be alleged and proven to make out fraudulent joinder is essentially that in any case—in general, willful or negligent misstatement of fact.

"Fraudulent joinder is not proven here; this court has no jurisdiction of the action, and the motion to remand is granted."

Where the claim is made in the petition for removal that the joinder has been fraudulently made for the purpose of preventing a removal, the question of fraud in the joinder must be tried and determined in the federal court. *Price v. Southern Power Co.*, (W. D. S. C. 1913) 206 Fed. 496.

A defendant who alleges that another was fraudulently joined in an action as a party defendant for the purpose of preventing a removal of the action for diverse citizenship, has the burden of proving such allegation. *Evans v. Sioux City Service Co.*, (N. D. Ia. 1913) 206 Fed. 841.

"The existence of fraud may be established as in other cases from circumstances. It is very seldom that fraud can be established, except by inference drawn from the circumstances of the case. If it be clear that legally the defendant who is a citizen of the same state as the plaintiff can be liable to the plaintiff on no reasonably legal ground on

the cause of action set up in the complaint or declaration, and that the plaintiff knew or must be presumed to have known such to be the case, then the joinder as a codefendant of such citizen of the same state as plaintiff, the presence of which codefendant cannot be justified by any legal rule as to parties, so as that his presence as a defendant is explainable only by the joinder having been pretensively made so as to defeat a removal. This would justify the inference that the joinder was a fraudulent one on the part of the plaintiff." *Price v. Southern Power Co.*, (W. D. S. C. 1913) 206 Fed. 496.

### III. SEPARABLE CONTROVERSIES.

#### 1. "BETWEEN CITIZENS OF DIFFERENT STATES."

A suit or action is not removable unless the controversy is one "wholly between citizens of different states which can be fully determined as between them." The settled rule of construction of this provision is that the whole subject-matter of the suit must be capable of being fully determined as between citizens of different states, and complete relief afforded as to the separate cause of action without the presence of others originally made parties to the suit. In *re Silvies River*, (D. C. Ore. 1912) 199 Fed. 495.

"Such controversy must arise upon the pleadings between one or more parties on the one side and one or more of several parties on the other; as distinguished from some other controversy also arising in the action upon the pleadings, between such party or parties on the one side and other additional parties on the other side. There can be no 'separable controversy' in an action where there is a single plaintiff and a single defendant. *Drovers' Deposit Nat. Bank v. Tichenor*, (E. D. Wis. 1913) 202 Fed. 1013.

#### 2. WHO MAY REMOVE.

It is only nonresident defendants who may remove the cause. *Drovers' Deposit Nat. Bank v. Tichenor*, (E. D. Wis. 1913) 202 Fed. 1013.

Joinder of all defendants to separable controversy.—In *Buck v. Felder*, (M. D. Tenn. 1911) 196 Fed. 419, the court said: "Where there is in the suit such a separate controversy 'wholly between citizens of different states,' it is not necessary that all the defendants to that controversy join in the petition for removal, as was required under the earlier Act of July 27, 1866, c. 288, 14 Stat. 306 (*Barney v. Latham*, supra, 103 U. S. at page 210, 26 L. ed. 514), but under the express terms of the Act of August 13, 1888, c. 866, § 2, 25 Stat. 433—following the language of the previous Act of March 3, 1875, except in that right of removal is limited to defendants—'either one or more of the defendants actually interested in such controversy may remove said suit,' that is, any one of the

defendants actually interested in such separate controversy between citizens of different states may remove the suit. *Barney v. Latham*, supra, 103 U. S. at page 212, 26 L. ed. 514; *Hyde v. Ruble*, 104 U. S. 407, 409, 26 L. ed. 823; *Torrence v. Shedd*, supra, 144 U. S. at page 530, 12 Sup. Ct. 726, 36 L. ed. 528; *Chicago, R. I. & P. Ry. Co. v. Martin*, 178 U. S. 245, 247, 20 Sup. Ct. 854, 44 L. ed. 1055; *New England Water Works Co. v. Loan, etc., Co.* (C. C. A. 7th Cir.) 136 Fed. 521, 69 C. C. A. 297; *Greene v. Klinger*, (C. C.) 10 Fed. 689; *Maine v. Gilman*, (C. C.) 11 Fed. 214, 215; *Grindrod v. Crine*, (C. C.) 22 Fed. 257; *Snow v. Smith*, (C. C.) 88 Fed. 657, 658; *Faison v. Hardy*, 114 N. C. 429, 433, 19 S. E. 701; 2 *Fost. Fed. Pract.* 1513. While in general these cases contain merely dicta as to this question in substantially the language of the statute, in *New England Water Works Co. v. Loan & Trust Co.*, supra, this precise point was involved and determined, and it was specifically held by the Circuit Court of Appeals for the Seventh Circuit that under a bill filed in a state court of Illinois to foreclose a mortgage, to which there were various defendants, as the bill disclosed a separate controversy as to whether the mortgage covered a certain pumping station, which was wholly between citizens of different states, that is, the complainants *Farmers' Loan & Trust Company*, a citizen of New York, on the one side, and certain of the defendants, namely, the *Boston Water & Light Company*, a citizen of Maine, and the *International Trust Company*, a citizen of Massachusetts, and possibly the *New England Water Works Company*, a citizen of Rhode Island, on the other side, the *Boston Water & Light Company* being one of the several defendants interested in such separate controversy was entitled to remove the entire suit into the federal court, on its own petition alone. No cases appear to the contrary; and this conclusion accords with the clear and specific language of the Act. The inference is unavoidable that if Congress had intended that all the defendants actually interested in the separate controversy must join in removing the suit, it would not have provided in the Act that 'either one or more of the defendants actually interested in such controversy' might remove the suit, but, following the language of the sentence immediately preceding in reference to the removal of suits in general, would have provided that 'the defendant or defendants' actually interested in such controversy might remove the suit."

Amendment.—A petition for removal based on diverse citizenship cannot be amended so as to show a separable controversy, after the time defendant is required to answer or plead to the plaintiff's petition in the state court. The reason is that this is not properly an amendment to the original petition for removal, but is the bringing forward of another and different ground of removal, and comes too late. *Thompson v. Ward*, (N. D. Ia. 1912) 199 Fed. 861.

## 4. SEPARABLE CHARACTER OF CONTROVERSY.

Whole subject-matter capable of being determined. — To the same effect as the original note, see *McMullen v. Halleck Cattle Co.*, (C. C. Nev. 1910) 193 Fed. 282.

Action against master and servant. — To the same effect as the original note, see *Macutis v. Cudahy Packing Co.*, (D. C. Neb. 1913) 203 Fed. 291.

A joint action against a master and his servant for personal injuries suffered by the plaintiff due to the negligence of the servant cannot be converted into a separable controversy for the purpose of removal, because of the fact that one of the defendants is a nonresident. *Stevenson v. Illinois Cent. R. Co.*, (W. D. Ky. 1911) 192 Fed. 956.

An action against a railroad company for a violation of the Safety Appliance Act and an action against the company and its engineer for common law negligence of the engineer in the management of his train present separable controversies. *Nichols v. Chesapeake & O. Ry. Co.*, (C. C. A. 6th Cir. 1912) 195 Fed. 913.

In *Armstrong v. Kansas City Southern Ry. Co.*, (W. D. Ark. 1911) 192 Fed. 608, one of the questions in dispute was whether a suit against a railway company and a servant for a negligent act of the servant was removable by the corporation as a separable controversy, where the amount involved exceeded \$2,000 exclusive of interest and costs, and requisite diversity of citizenship existed between the company and the plaintiff, the citizenship of the individual defendant sued with the company as joint tortfeasor being identical with that of the plaintiff. The answer was in the negative on the authority of *Alabama G. S. R. Co. v. Thompson*, (1906) 200 U. S. 215, 26 S. Ct. 161, 50 U. S. (L. ed.) 441, 4 Ann. Cas. 1147.

Stockholder's suit. — In *Crawford v. Seattle, R. & S. R. Co.*, (W. D. Wash. 1912) 198 Fed. 920, which was a suit by a stockholder in a railroad corporation against the corporation and certain stockholders, it was held that the facts did not show a separable controversy.

"Where concurrent negligence is charged, the controversy is not separable." *Goede v. City of Colorado Springs*, (D. C. Colo. 1912) 200 Fed. 99.

Concurrent and distinct acts of negligence. — Although there may, in a suit against two or more defendants, one of whom is a nonresident, be charges of concurrent negligence

against all, yet, if there be also a distinct charge of negligence against the nonresident alone sufficient in and of itself to give rise to a cause of action, the case is one involving a separable controversy between citizens of different states, and therefore removable to the proper United States court. *Cayce v. Southern Ry. Co.*, (N. D. Ga. 1912) 195 Fed. 786.

Tort action against city and property owner. — Where in an action against a property owner and a city for injuries received by slipping on an icy sidewalk, the plaintiff alleged negligence in permitting water spouts from a building to empty upon the sidewalk; in permitting the gutter of the building to become leaky causing water to drip upon the sidewalk; and in constructing the sidewalk in such a manner as to empty its water toward the building rather than toward the street, it was held that a separable controversy was not shown. *Goede v. City of Colorado Springs*, (D. C. Colo. 1912) 200 Fed. 99.

## 5. HOW SEPARABLE CONTROVERSY MADE TO APPEAR.

From pleadings at time of filing petition. —

"While it is well settled that in determining whether or not there is a separate controversy, 'in the absence of a showing of fraudulent joinder,' the cause of action must be taken as that which the plaintiff alleges it to be in his pleadings (*Alabama G. S. R. Co. v. Thompson*, (1906) 200 U. S. 206, 26 S. Ct. 161, 50 U. S. (L. ed.) 441, 4 Ann. Cas. 1147, and cases cited), it is equally well settled that the averments of the declaration are not conclusive where the nonresident defendant, as a ground for removal, attacks the bona fide character of the averments of the declaration in reference to a local defendant and avers that such local defendant was joined as a party defendant in bad faith for the sole purpose of preventing a removal to this court, and that if upon inquiry by the federal court it is established to the satisfaction of the court that the averments in the declaration in reference to the local defendant were not made in good faith, but such defendant was joined for the sole purpose of defeating the removal to the federal court, the case will be held to be removable as though such local defendant had not been joined." *Lewis v. Cincinnati, N. O. & T. P. Ry. Co.*, (E. D. Tenn. 1910) 192 Fed. 654.

## Vol. IV, p. 349, sec. 3.

## I. IN GENERAL.

Removal proceedings are in the nature of process to bring the parties before a United States court. — As in other forms of process, the litigant has the right to rely upon the statute and to insist that, in compliance with its terms, the case shall be taken from the state to the federal court in the proper district, on motion of the proper person, at

the proper time, and on giving the proper bond. But these provisions are for the benefit of the defendant and intended to secure his appearance. When that result is accomplished by his voluntary attendance, the court will not, of its own motion, inquire as to the regularity of the issue or service of the process,—or, indeed, whether there was any process at all, since it could be

waived, in whole or in part, either expressly or by failing seasonably to object. *Mackay v. Vinta Development Co.*, (1913) 229 U. S. 173, 33 S. Ct. 638, 57 U. S. (L. ed.) 1138.

## II. PETITION FOR REMOVAL.

**Time to file petition for removal.**—By the express provisions of the section the petition for removal must be filed "at the time or at any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff." *Lillenthal v. Carpenter, Baggott & Co.*, (1912) 148 Ky. 50, 146 S. W. 2.

"Required" in the removal act has reference to the time when the defendant to avoid any default must necessarily answer or plead to the complaint. Until that time comes and at it, whether fixed by statute, by rule, or by agreement between the parties, whether it is the time originally limited or that time extended, the right of removal continues, and can be exercised. Extending the time to answer or plead, to defend, the principal thing, extends the time for removal, to choose the forum wherein to defend, an included incidental thing. The time to plead is the measure of the time to remove—is the time to remove. The federal law and the state law must be read together. The former prescribes a limitation; the latter the extent of it. *Hansford v. Stone-Ordean-Wells Co.*, (D. C. Mont. 1912) 201 Fed. 185. Compare *Wayt v. Standard Nitrogen Co.*, (N. D. Ga. 1911) 189 Fed. 231, wherein it was held that the application for removal must be made at or before the time defenses are due, and not when, by reason of some extension of time, or failure to enter default in the state court, defenses might still be filed.

**Substitution of a new party plaintiff** may extend the time within which the petition for removal may be filed, for such substitution may for the first time create a diversity of citizenship. *Kelly v. Virginia Bridge & Iron Co.*, (E. D. N. C. 1913) 203 Fed. 566 wherein it was held that the reasonable construction of the acts of Congress, and the only one which will prevent the right of removal, to which the statute declares the party to be entitled, from being defeated by circumstances wholly beyond his control, is to hold that the incidental provision as to the time must, when necessary to carry out the purpose of the statute, yield to the principal enactment as to the right, and to consider the statute as, in intention and effect, permitting and requiring the defendant to file a petition for removal as soon as the action assumes the shape of a removable case in the court in which the case was brought.

**Amending petition in federal court.**—To the same effect as the original note, see *Missouri, K. & T. Ry. Co. v. Chappell*, (W. D. Okla. 1913) 206 Fed. 688.

If a suit entered upon the docket of a District Court as removed was never in law removed from the state court, no amendment of the record made in the federal court can affect the jurisdiction of the state court, or put the case rightfully on the docket of the federal court, and no amendment can be made in the federal court to show that the case was a proper one to have been removed. If, however, sufficient grounds for removal are shown on the record as presented to the state court, including the petition for removal, the latter may be amended in the federal court by showing more fully and distinctly the facts which support those grounds. *Missouri, K. & T. Ry. Co. v. Chappell*, (W. D. Okla. 1913) 206 Fed. 688.

## IV. RELATIVE AUTHORITY OF STATE AND CIRCUIT COURTS.

**The mere filing of a petition.**—To the same effect as the original note, see *Missouri, K. & T. Ry. Co. v. Chappell*, (W. D. Okla. 1913) 206 Fed. 688.

## VI. STATE COURT TO PROCEED NO FURTHER.

**In general.**—Where the defendant, resident of another state, regularly and strictly files his petition in the state court for the removal of the cause to the United States Circuit Court, and a sufficient bond, which is offered for the approval of the state court, the said court is ipso facto ousted of jurisdiction; and whether an order for removal is granted or denied by the state court all further proceedings therein are coram non judge and void. *Ft. Smith & W. R. Co. v. Blevins*, (Okla. 1913) 130 Pac. 525.

Where there is a separable controversy and the requisite diversity of citizenship, it is the duty of the state court to accept the petition and bond and proceed no further in the case. A trial and judgment thereafter would be coram non judge, unless its jurisdiction over the causes and the parties was in some way restored. *Anderson v. United Realty Co.*, (1911) 222 U. S. 164, 32 S. Ct. 50, 56 U. S. (L. ed.) 144.

**Enjoining action by state court.**—After presentation of a sufficient petition and bond it is competent for the District Court, by a procedure ancillary in its nature—without violating Revised Statutes, § 720, 4 Fed. Stat. Annot. 509, forbidding a federal court from enjoining proceedings in a state court—to restrain the party against whom a cause has been legally removed from taking further steps in the state court. *Missouri, K. & T. Ry. Co. v. Chappell*, (W. D. Okla. 1913) 206 Fed. 688.

## Vol. IV, p. 371, sec. 5.

"Shall appear to the satisfaction of said Circuit Court."—It is the duty of this court to determine whether the record exhibits a case properly removable, regardless of

whether any objection was taken to the jurisdiction of the federal court, either in the court below or on appeal. *Rife v. Lumber Underwriters*, (C. C. A. 6th Cir. 1913) 204 Fed. 32.

The District Court must search the record and ascertain therefrom whether it has acquired jurisdiction of the action. *Springer v. American Tobacco Co.*, (W. D. Ky. 1913) 208 Fed. 199.

How question of jurisdiction raised and determined.—*By plea in abatement*.—See to the same effect *Pike County, Pa. v. Spencer*, (C. C. A. 3d Cir. 1911) 192 Fed. 11.

During the trial.—To the same effect as the original note, see *Evans v. Lehigh Coal & Nav. Co.*, (E. D. Pa. 1913) 205 Fed. 637.

Motion to remand denied by another judge.—The fact that a motion to remand was denied by one judge does not prevent the moving party from renewing his motion before the successor of the judge who first denied it. *Gaugler v. Chicago, M. & P. S. Ry. Co.*, (D. C. Mont. 1912) 197 Fed. 79, wherein the court said: "The court's jurisdiction is always open to challenge, and while the judge who must try a cause, if tried, reluctantly reviews intermediate matters disposed of by his predecessor, if it appears there is no jurisdiction, it must be so determined, though in effect it sets aside the ruling of the former judge."

Issue may be joined on the allegations of the petition for removal. *Armstrong v. Kan-*

*sas City Southern Ry. Co.*, (W. D. Ark. 1911) 192 Fed. 608.

Cross-bill stating action triable in federal court.—When a cause of action to try title removed to a federal equity court, is not properly triable therein because the plaintiff is not in possession, but the defendant files a cross-bill, alleging possession and praying that his title be quieted against the plaintiffs, and the cross-bill involves the determination of every question of title to the premises involved in the original bill, the court will not remand the cause, but will retain it for determination on the cross-bill. *Baum v. Longwell*, (D. C. N. M. 1912) 200 Fed. 450.

A docket fee of ten dollars is properly allowed on remanding a case by virtue of the authority of the court to "make such order as to costs as shall be just." *Western Union Tel. Co. v. Louisville & N. R. Co.*, (E. D. Tenn. 1913) 208 Fed. 581.

Amendments by trial court after remanding of case.—The authority of the trial court to permit, in the exercise of its discretion, amendments to the pleadings making necessary jurisdictional averments, even after a case has been remanded by the appellate court for want of such averments, is well settled, and such amendment may properly be allowed by the trial court even after verdict and entry of judgment thereon. *McEl-downey v. Card*, (E. D. Tenn. 1911) 193 Fed. 475.

## Vol. IV, p. 380, sec. 8.

General application of section.—By its terms the section is limited to suits to enforce any legal or equitable lien or claim to, or to remove any incumbrance or lien or cloud upon, the title to real or personal property within the district where the suit is brought. *Camp v. Bonsal*, (C. C. A. 4th Cir. 1913) 203 Fed. 913.

This section has nothing to do with the right to bring suits in the Circuit Courts of the United States. It has to do with making it so that suits to enforce certain kinds of causes of action, rightfully brought there, may be prosecuted to a hearing and determination. *Kentucky Coal Lands Co. v. Mineral Development Co.*, (E. D. Ky. 1911) 191 Fed. 899.

To what suits applicable.—*A suit on an insurance policy* is not within the class of cases specified by the section. *Stockbridge v. Phoenix Mut. Life Ins. Co.*, (D. C. Conn. 1912) 193 Fed. 558.

*Eminent domain proceedings* whereby the plaintiff asserts no right of ownership or proprietary interest, or other pre-existing right or claim to the defendants' property, but merely seeks to invoke the exercise of the state's power of eminent domain for the purpose of acquiring, through and by means of its suit, an easement in the defendants' property, is not a suit to enforce a claim to the defendants' property within the meaning of this section. *Western Union Telegraph*

*Co. v. Louisville & N. R. Co.*, (E. D. Tenn. 1912) 201 Fed. 932.

*An action which is bottomed on conspiracy and is in personam* does not belong to the exceptional cases referred to in this section. *Revett v. Clise*, (W. D. Wash. 1913) 207 Fed. 673.

Property must be in the district.—The existence of the property within the jurisdiction is essentially necessary to the exertion of the power of the court to render a binding decree. The statute does not leave this to implication, since it expressly provides that the decree to be rendered shall be limited to the property within the jurisdiction which, therefore, forms the sole basis of the power to judicially act. Where the defendants are without the territorial jurisdiction of the Circuit Court, its authority is dependent upon the property sought to be affected being within the district as contemplated by this section which authorizes the exertion of jurisdiction as to property of absent defendants. *Chase v. Wetzlar*, (1912) 225 U. S. 79, 32 S. Ct. 659, 56 U. S. (L. ed.) 990, wherein the court said: "A federal court has no jurisdiction over a person not within its territorial jurisdiction or over property in the custody of such person not within such territorial jurisdiction, merely because a state court may as to such person and such property, because of some proceeding pending before it, have the authority to treat both



the person and property as constructively present and subject to its jurisdiction. The power which a state court may exert in a particular contingency affords no basis for the assumption that the act of Congress extends to a subject which the language of the act does not embrace. Indeed, if because a state court had no power to treat in a given case a person and his property outside of the territorial jurisdiction as constructively within it in order to afford particular relief, a like power must be imputed to a federal court under the act of Congress, it would result that in such case the act of Congress would become inapplicable, since there would be no absent defendant, as the person as well as the property would be constructively present."

**Diversity of citizenship.**—To the same effect as the original note, see *Texas Co. v. Central Fuel Oil Co.*, (C. C. A. 8th Cir. 1912) 194 Fed. 1.

**Service on absent defendant.**—It is clear that under this statute an order of publication is not authorized except where personal service of the order requiring the absent defendant to appear and plead is not practicable. *Hicks v. Crawford Coal & Iron Co.*, (M. D. Tenn. 1911) 190 Fed. 334.

### Vol. IV, p. 387, sec. 3.

Prior to this act a receiver appointed by a United States court could not be sued in a state court for any purpose without the consent of the former court. *Central Trust Co. of New York v. Wheeling & L. E. R. Co.*, (N. D. Ohio 1911) 189 Fed. 82.

**Garnishment proceedings.**—To the same effect as the original note, see *Central Trust Co. of New York v. Wheeling & L. E. R. Co.*, (N. D. Ohio 1911) 189 Fed. 82.

**"Subject to the general equity jurisdiction."**—The federal statute in relinquishing to parties and to other courts the right to institute and entertain, without leave, proceedings against federal court receivers in respect of the conduct of their business, has reserved to the appointing courts sole power over the matter of satisfaction of the rights determined in such other courts. *Investment Registry v. Chicago & M. Electric Ry. Co.*, (E. D. Wis. 1913) 204 Fed. 500.

**Trespass against receiver of railroad.**—Where a landowner and a railway company contract in writing that in consideration of the landowner's relinquishment of a road necessary to the enjoyment of his property, which traverses the track of the railway company, the latter will donate and dedicate for road purposes a road opened on its right of way for the benefit of the landowner and the public, and subsequently to the closing of the original road the railway company is placed

Service of the order of publication on the person in possession of the property is required only when service is had upon the defendant in person in another district, and not when service is had upon the defendant by publication, as publication is constructive notice to the person in possession as well as to the defendant. *Sidney L. Bauman Diamond Co. v. Hart*, (C. C. A. 5th Cir. 1911) 192 Fed. 498.

The bill must show by the allegations of relevant facts, and by the nature of the relief demanded, that two plain propositions are presented therein and fully covered: First, that there is property within the district over which the parties are in dispute; second, that the petitioner has, in equity, either the title to or a claim upon that property. *Stockbridge v. Phoenix Mut. Life Ins. Co.*, (D. C. Conn. 1912) 193 Fed. 558.

**Appeal.**—Where a ruling of the Circuit Court concerns the power of the court as a federal court to entertain the case under the circumstances presented a direct appeal may be taken to the Supreme Court. *Chase v. Wetzlar*, (1912) 225 U. S. 79, 32 S. Ct. 659, 56 U. S. (L. ed.) 990.

in the hands of a receiver by a United States court, and the receiver closes a part of the substituted road in order to furnish track facilities to a patron, an action for the trespass against the receiver is maintainable without the previous leave of the court in which such receiver was appointed. *Atkinson v. Kreis*, (1913) 140 Ga. 52, 78 S. E. 465.

**Restraining suits in state courts.**—This section prevents a United States District Court from restraining or staying a suit against a receiver in a state court. *Smith v. Jones Lumber & Mercantile Co.*, (W. D. Wis. 1912) 200 Fed. 647.

**Purchaser from receiver.**—Inasmuch as an action can be brought in the state court against the receivers in the federal court, without obtaining permission of that court, a fortiori an action can be brought in the state court against one purchasing property from the receiver, after confirmation of the sale and delivery of the property to such purchaser, without permission of the federal court. The liability of the purchaser is a matter of law which can be adjudicated in the state court. *Lassiter v. Norfolk Southern R. Co.*, (1913) 163 N. C. 19, 79 S. E. 264.

This section is cited in *Chicago Great Western R. Co. v. Hulbert*, (C. C. A. 8th Cir. 1913) 205 Fed. 248.

### Vol. IV, p. 389, sec. 648.

**Trial by referee.**—Since the federal statutes provide that in actions at law the trial

of issues of fact shall be by jury, except where they are tried and determined by the

court in pursuance of a written stipulation, it is well settled by the great weight of authority, that, except by consent of parties, a federal court has no authority to refer the issues in an action at law to a referee and thus substitute a trial by referee for the statutory modes of trial by jury or court, in a matter of accounting or otherwise, and that even although such procedure be authorized by a state statute, the authority to make such reference is not, in such case, conferred upon the federal court by the provision of the conformity statute, R. S. § 914 (4 Fed. Stat. Annot. 563.) *United States v. Wells*, (E. D. Tenn. 1913) 203 Fed. 146.

**Right to jury trial generally.**—In *Vermeule v. Reilly*, (S. D. N. Y. 1912) 196 Fed. 226, a motion by the plaintiff for a reference was overruled on the ground that the action being a common-law action to recover damages the defendant was entitled to a jury trial. The court said: "This is a motion to refer the case to a referee to hear and determine all the issues, upon the ground that the case involves the examination of a long account. The action is a common-law action to recover damages for services alleged to have been rendered and disbursements alleged to have been made by the plaintiff for the defendant while acting as an engineer in certain construction work in Cuba. A reference to hear and determine all the issues in such an action cannot be ordered in the United States courts. The defendant has a constitutional right to a jury trial in such a case, and the United States statutes provide that the trial of issues of fact in common-law cases shall be by jury, unless the parties file a stipulation in writing waiving a jury. The federal courts, however, have power in such an action to appoint an auditor to simplify the items and the issues, where the items involved are so numerous or complex as to render a proper understanding of the controversy by the jury impossible until they have been simplified. The complaint herein

demands judgment for \$94,318.40 for plaintiff's services and disbursements. The plaintiff's bill of particulars contains two lists of disbursements; one containing about 300 items, aggregating \$25,416.99, and the other containing about 100 items, aggregating \$14,962.62. The issues as to the services can be well tried by a jury. But if it were attempted to try the issues as to the disbursements, consisting of about 400 items aggregating about \$40,000, by the same jury, without any preliminary investigation and simplification of the account, the trial would probably be unduly protracted, and it would be very difficult, if not impossible, for the jury to remember the testimony relating to the different items of the disbursements. An auditor may be appointed to take evidence and report when, where, to whom, and for what the various disbursements were made, and the auditor will also be directed to collect and put together the items which, after investigation, are admitted to be correct, the items which in his opinion should be allowed or disallowed in whole or in part, also the items which are similar in their character, and would probably be governed by the same rules of decision, giving the aggregate of such items in each case, and generally to make a preliminary investigation in the case, with a view to a report which will simplify the account and the issues, in order that the case may be intelligently presented to a jury, in accordance with the principles laid down in the case cited above. The auditor is directed to proceed with all reasonable speed, and the trial of the main issues is stayed till the return of the auditor's report."

An action by an assignee of the right to receive a sum of money, concededly in the defendant's hands, is completely cognizable and enforceable in law, and the defendant has a right to a jury trial under this section. *Brown v. Fletcher*, (C. C. A. 2d Cir. 1913) 206 Fed. 461.

## Vol. IV, p. 393, sec. 649.

This section is cited in *Mason v. Smith*, (C. C. A. 6th Cir. 1911) 191 Fed. 502.

## Vol. IV, p. 396, sec. 3.

**Purpose of proviso.**—Its manifest purpose is to require that the Circuit Court of Appeals be composed in every hearing of judges none of whom will be in the attitude of passing upon the propriety, scope or effect of any ruling of his own made in the progress of the cause in the court of first instance, and to this end the disqualification is made to arise, not only when the judge has tried or heard the whole cause in the court below, but also when he has tried or heard any question therein which it is the duty of the Circuit Court of Appeals to consider and pass upon. That the question may be easy of solution or that the parties may consent to the judge's participation in its decision

can make no difference, for the sole criterion under the statute is, does the case in the Circuit Court of Appeals involve a question which the judge has tried or heard in the course of the proceedings in the court below? *Rexford v. Brunswick-Balke-Collender Co.*, (1913) 228 U. S. 339, 33 S. Ct. 515, 57 U. S. (L. ed.) 864.

A judge who hears and disposes of a case in the first instance is ineligible to sit in the Circuit Court of Appeals for the purpose of reviewing his action in the court below although he merely enters a *pro forma* decree for the purpose of enabling the case to be heard for the first time by the reviewing court acting *pro hac vice* as a court of first

instance. *William Cramp & Sons Ship & Engine Bldg. Co. v. International Curtiss*

*Marine Turbine Co.*, (1913) 228 U. S. 645, 33 S. Ct. 722, 57 U. S. (L. ed.) 1003.

## Vol. IV, p. 398, sec. 5.

Only final decisions reviewable.—To the same effect as the original note see *Keatley v. Furey*, (1912) 226 U. S. 399, 33 S. Ct. 121, 57 U. S. (L. ed.) 273.

The test of finality for the purposes of review by the Supreme Court by appeal is the face of the decree appealed from. *Paducah, Ky. v. East Tennessee Tel. Co.*, (1913) 229 U. S. 476, 33 S. Ct. 816, 57 U. S. (L. ed.) 1286.

Right of election.—The issues raised in a case may be such as to entitle the unsuccessful party to elect whether he will take his case direct to the Supreme Court or carry it to the Circuit Court of Appeals as where jurisdiction is invoked wholly upon diversity of citizenship and in the course of the case there arises a question as to the constitutionality of an ordinance which is the foundation of the plaintiff's right. If the unsuccessful party elects to carry the case to the Circuit Court of Appeals that court may certify the constitutional question to the Supreme Court, or it may decide it along with the other question in the case. But from its judgment no writ of error will lie to the Supreme Court, as the Judiciary Act of 1891 does not contemplate two reviews, one by the Circuit Court of Appeals and another by the Supreme Court in such cases. *Boise Artesian Hot & Cold Water Co. v. Boise City*, (1913) 230 U. S. 98, 33 S. Ct. 1003, 57 U. S. (L. ed.) 1409.

### APPEALS DIRECT TO SUPREME COURT.

*Clause 1. In any case in which the jurisdiction of the court is in issue.*

The jurisdiction of a Circuit or District Court is in issue in the sense intended whenever the power of the court to hear and determine the cause, as defined or limited by the Constitution or statutes of the United States, is in controversy. *United States v. Congress Const. Co.*, (1911) 222 U. S. 199, 32 S. Ct. 44, 56 U. S. (L. ed.) 163.

Appeals may be taken directly to this court from the Circuit Court in any case in which the jurisdiction of the Circuit Court is in issue, and it is provided that in such cases the question of jurisdiction alone shall be certified to this court for decision. The question intended to be thus brought to this court by direct appeal is well settled to be the jurisdiction of the court as a federal court. Questions of general jurisdiction applicable as well to state as federal tribunals are not included in such review. The question cannot be brought into the record by certificate if not really presented, and whether so presented this court will determine for itself. *Bogart v. Southern Pac. R. Co.*, (1913) 228 U. S. 137, 33 S. Ct. 497, 57 U. S. (L. ed.) 768. See also *In re Fidelity*

*Trust Co. v. Gaskell*, (C. C. A. 8th Cir. 1912) 195 Fed. 865.

If a case in a District or Circuit Court is dismissed by final judgment or decree, either for want of jurisdiction of the parties or for want of power as a federal court to take jurisdiction of the subject-matter, without the decision of any other question, so that the only question presented by the record is such question of jurisdiction, the judgment or decree can be reviewed by the Supreme Court only, on appeal or writ of error, with a certificate from the lower court of the question of jurisdiction. *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, (C. C. A. 3d Cir. 1911) 192 Fed. 475.

Where a decree of the Circuit Court is the necessary result of a decision of the Circuit Court of Appeals the Supreme Court has not jurisdiction of a direct appeal from the decree. *Brown v. Alton Water Co.*, (1912) 222 U. S. 325, 32 S. Ct. 156, 56 U. S. (L. ed.) 221, wherein the court said: "It is plain that our right to review depends on the existence of a question of jurisdiction subject, under the Judiciary Act of 1891, to be brought here directly from a circuit court. The case reduces itself to this, since the matters of constitutional right to which the court refers in its certificate are not independent, but are involved in and subordinate to the question of jurisdiction, and hence will be disposed of by deciding that issue. It is not disputable that the action of the court below on the question of jurisdiction was the necessary result of the decision of the Circuit Court of Appeals, since it was the imperative duty of the Circuit Court to give effect to that decision. As consequently it will be impossible to reverse for error the action of the Circuit Court without reversing the foundation upon which the action of that court rested, that is, the dominant decree of the Circuit Court of Appeals, it must result that the decree can only be reversed by reviewing and reversing the decree of the Circuit Court of Appeals. That decree, however, not being before us, and moreover as the statute gives no power to this court to review a decree of a Circuit Court of Appeals merely because of the existence of a question of jurisdiction, it comes to pass that we may not by indirection do that which we cannot do directly, and hence the decree of the Circuit Court, under the conditions here existing, is not susceptible of being reviewed."

A mere conflict between courts concerning the right to adjudicate upon a particular subject-matter growing out of a priority of jurisdiction in another forum involves a question of comity, which there would be no right to consider if the direct appeal involves solely a question of jurisdiction. *Railroad Commission of State of Missis-*

Mississippi v. Louisville & N. R. Co., (1912) 225 U. S. 272, 32 S. Ct. 756, 56 U. S. (L. ed.) 1087.

A direct appeal will not lie where the only question involved is whether there was a cause of action stated, the jurisdiction of the court as a federal court not being disputed. *Darnell v. Illinois Cent. R. Co.*, (1912) 225 U. S. 243, 32 S. Ct. 760, 56 U. S. (L. ed.) 1072.

**Jurisdiction over corporation.**—In *Herdon-Carter Co. v. James N. Norris, Son & Co.*, (1912) 224 U. S. 496, 32 S. Ct. 550, 56 U. S. (L. ed.) 857, a question sought to be taken to the Supreme Court direct from the Circuit Court involved issues of fact as to whether the defendant, a corporation, was doing business in the state in which the Circuit Court was sitting and whether an attempted service was made on one who was at the time its agent. The court said: "It is well settled that a question of this character may be brought to this court by direct appeal under the Circuit Court of Appeals Act."

The jurisdiction to entertain the suit of a plaintiff who complains of violations of the interstate commerce act and seeks to recover damages therefor, has been conferred upon the Circuit Courts, as federal courts. The jurisdiction of the Circuit Court is conferred by the interstate commerce act, and the question, whether the plaintiff, under the provisions of the statute, as interpreted by the Supreme Court, is not required primarily to apply for investigation and redress to the Interstate Commerce Commission, is one that affects the court's jurisdiction as a federal court. *Mitchell Coal & Coke Co. v. Pennsylvania R. Co.*, (C. C. A. 3d Cir. 1911) 192 Fed. 475.

**Certificate as to jurisdiction.**—Where, in rendering a decree on the merits the court necessarily decided the question or questions under the Constitution expressly alleged in the bill, this conclusion dispenses with the necessity of considering the question of certificate as to jurisdiction, since the issue on that subject, whether certified or not, is open, in view of the constitutional questions raised in the bill. *Railroad Commission of State of Mississippi v. Louisville & N. R. Co.*, (1912) 225 U. S. 272, 32 S. Ct. 756, 56 U. S. (L. ed.) 1087.

#### *Clause 4. Construction or application of Constitution.*

**Construction of commerce clause.**—Where the jurisdiction of the federal court is invoked solely on the ground that the suit is one arising under the Constitution in that it involves the construction and application of the commerce clause of the Constitution, the appeals go direct to the Supreme Court under this section. *Railroad Commission of Louisiana v. Morgan's L. & T. R. & S. Co.*, (C. C. A. 5th Cir. 1912) 195 Fed. 66.

The fact that since the allowance of a writ of error all the constitutional questions have

been decided adversely to the plaintiff in error does not justify a dismissal of the case by the Supreme Court. *Michigan Cent. R. Co. v. Vreeland*, (1913) 227 U. S. 59, 33 S. Ct. 192, 57 U. S. (L. ed.) 417.

This court will entertain a direct review in a revenue case which involves not only questions of classification and amount of duty thereunder, as specified in the revenue act to which we have referred, but also a question under the fifth section as to the constitutionality of a law of the United States or the validity or construction of a treaty under its authority. Nor did the amendment of the revenue act by the act of May 27, 1908, effect any change in this respect. *B. Altman & Co. v. United States*, (1912) 224 U. S. 583, 32 S. Ct. 593, 56 U. S. (L. ed.) 894.

#### *Clause 5. Validity of United States law or treaty or construction of treaty.*

**"Treaty."**—In *B. Altman & Co. v. United States*, (1912) 224 U. S. 583, 32 S. Ct. 593, 56 U. S. (L. ed.) 894, the court construing the word treaty as used in clause 5 and whether it included a commercial agreement said: "Generally, a treaty is defined as 'a compact made between two or more independent nations with a view to the public welfare.' 2 *Bouvier's Dictionary*, 1136. True, that under the Constitution of the United States the treaty making power is vested in the President, by and with the advice and consent of the Senate, and a treaty must be ratified by a two-thirds vote of that body (Art. II, § 2), and treaties are declared to be the supreme law of the land (Art. VI); but we are to ascertain, if possible, the intention of Congress in giving direct appeal to this court in cases involving the construction of treaties. As is well known, that act was intended to cut down and limit the jurisdiction of this court, and many cases were made final in the Circuit Court of Appeals which theretofore came to this court, but it was thought best to preserve the right to a review by direct appeal or writ of error from a Circuit Court in certain matters of importance, and, among others, those involving the construction of treaties. We think that the purpose of Congress was manifestly to permit rights and obligations of that character to be passed upon in the federal court of final resort, and that matters of such vital importance, arising out of opposing constructions of international compacts, sometimes involving the peace of nations, should be subject to direct and prompt review by the highest court of the nation. While it may be true that this commercial agreement, made under authority of the Tariff Act of 1897, § 32 Fed. Stat. Annot. 501, was not a treaty possessing the dignity of one requiring ratification by the Senate of the United States, it was an international compact, negotiated between

the representatives of two sovereign nations and made in the name and on behalf of the contracting countries, and dealing with important commercial relations between the two countries, and was proclaimed by the President. If not technically a treaty requiring ratification, nevertheless it was a compact authorized by the Congress of the United States, negotiated and proclaimed under the authority of its President. We think such a compact is a treaty under the Circuit Court of Appeals Act, and, where its construction is directly involved, as it is here, there is a right of review by direct appeal to this court."

*Clause 6. Constitution or law of state claimed to be in contravention of U. S. Constitution.*

Where it is "claimed" that an ordinance, imposing license fees, as a law of the state, is in contravention of the Constitution of the United States, the right exists to appeal from the District Court direct to the Supreme Court under par. 6 of this section. And the Supreme Court has jurisdiction to review not only the constitutional question but every other question properly arising. *Boise Artesian Hot & Cold Water Co. v. Boise City*, (1913) 230 U. S. 84, 33 S. Ct. 997, 57 U. S. (L. ed.) 1400.

## Vol. IV, p. 409, sec. 6.

### II. FINAL DECISIONS.

A "final decision" does not include a decision dismissing a cross-bill. *Emery v. Central Trust & Safe Deposit Co.*, (C. C. A. 6th Cir. 1913) 204 Fed. 965.

A decree in bankruptcy proceedings where in a secured creditor intervenes for the purpose of asserting a title or claim to property in the possession of the bankrupt's trustee is not "final." *Houghton v. Burden*, (1913) 228 U. S. 161, 33 S. Ct. 491, 57 U. S. (L. ed.) 780.

### III. REVIEW BY CIRCUIT COURTS OF APPEALS "IN ALL OTHER CASES," ETC.

The naturalization of aliens has all the qualities of a "case" so as to permit a review by appeal or writ of error in the Circuit Court of Appeals. *United States v. Lenore*, (D. C. N. D. 1913) 207 Fed. 865.

Controversies arising in bankruptcy proceedings, as distinguished from bankruptcy proceedings, are appealable to the Circuit Court of Appeals under the Court of Appeals Act of March 3, 1891 (26 Stat. 826, c. 517). In *re Loving*, (1912) 224 U. S. 183, 32 S. Ct. 446, 56 U. S. (L. ed.) 725.

### IV. "UNLESS OTHERWISE PROVIDED BY LAW."

It is settled that the words "unless otherwise provided by law," in this section, refer only to provisions of the same act, or of contemporaneous or subsequent acts, and do not include provisions of earlier statutes. *Western Union Tel. Co. v. White*, (Tex. 1914) 162 S. W. 905.

### V. WHEN DECISIONS OF CIRCUIT COURTS OF APPEALS ARE FINAL.

In general.—This section declares that "the judgments or decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being . . . citizens of different states," and this refers to the jurisdiction of the federal court of first instance. *Shulthis v. McDougal*, (1912) 225

U. S. 561, 32 S. Ct. 704, 56 U. S. (L. ed.) 1205.

When a case is of the class which it was the purpose of this section to submit to the final jurisdiction of the Circuit Court of Appeals, the Supreme Court will go no farther than to inquire whether plain error is made out. *Chicago, R. I. & P. R. Co. v. Brown*, (1913) 229 U. S. 317, 33 S. Ct. 840, 57 U. S. (L. ed.) 1204.

Jurisdictions depending entirely on diverse citizenship.—Where diverse citizenship is the sole ground upon which the jurisdiction of the federal court is invoked a decision of the Circuit Court of Appeals is final. And this is so although another ground might have been invoked that would have entitled the appellant to take the case to the Supreme Court. *Omaha Electric Light & Power Co. v. Omaha*, (1913) 230 U. S. 123, 33 S. Ct. 974, 57 U. S. (L. ed.) 1419.

Jurisdiction not depending entirely on diverse citizenship, etc.—Where the jurisdiction of the Circuit Court is not dependent alone upon diversity of citizenship but there is involved not only the validity of the statute of a state as a regulation of interstate commerce, but a question as to whether the sole remedy in any such case is not by an application to the Interstate Commerce Commission, an appeal lies to the Supreme Court from a decision of the Court of Appeals. *Louisville & N. R. Co. v. F. W. Cook Brewing Co.*, (1912) 223 U. S. 70, 32 S. Ct. 189, 56 U. S. (L. ed.) 355.

A judgment of the Circuit Court of Appeals is not final where diverse citizenship exists, if the case is also arising under the Constitution of the United States. But this is not shown by allegations some of which were without color of merit, and others were in anticipation of defense which it was thought the defendants might possibly interpose. *Denver v. New York Trust Co.*, (1913) 229 U. S. 123, 33 S. Ct. 657, 57 U. S. (L. ed.) 1101.

"If the jurisdiction in the present case rests alone upon diverse citizenship, then, under the Circuit Court of Appeals Act, the judgment of the Circuit Court of Appeals is

final: if, as contended by the plaintiff in error, the petition in the case discloses, as a ground of jurisdiction in addition to that of diverse citizenship, that the case arises under the laws of the United States, then the judgment of the Circuit Court of Appeals is not final and the case can come here from that court. And it is well settled that this question must be decided, not because of questions which may have arisen or which might arise in the subsequent progress of the case, but upon the grounds of jurisdiction asserted in the petition." *Lovell v. Newman*, (1913) 227 U. S. 412, 33 S. Ct. 375, 57 U. S. (L. ed.) 577.

*Whether the jurisdiction depended on diverse citizenship alone, or on other grounds as well, must be determined from the complainant's statement of his own cause of action as set forth in the bill, regardless of questions that may have been brought into suit by the answers or in the course of the subsequent proceedings. It is not enough that grounds of jurisdiction other than diverse citizenship may be inferred argumentatively from the statements in the bill, for jurisdiction cannot rest on any ground that is not affirmatively and distinctly set forth.* *Lovell v. Newman*, (1913) 227 U. S. 412, 33 S. Ct. 375, 57 U. S. (L. ed.) 577; *Shulthis v. McDougal*, (1912) 225 U. S. 561, 32 S. Ct. 704, 56 U. S. (L. ed.) 1205.

*Where the judgment of the Circuit Court is founded upon the Federal Employers' Liability Act, so that the jurisdiction of that court is not dependent entirely upon the diversity of citizenship of the parties, the judgment of the Circuit Court of Appeals is not made final by § 6, and thus (the matter in a controversy exceeding one thousand dol-*

*lars), there is a right to a writ of error from the Supreme Court.* *Missouri, K. & T. R. Co. v. Wulf*, (1913) 226 U. S. 570, 33 S. Ct. 135, 57 U. S. (L. ed.) 355.

*When the jurisdiction of the District Court as originally invoked depends solely upon diverse citizenship but an amended and supplemental bill is filed containing allegations which bring into the case another ground of jurisdiction relating to the deprivation of federal right, a decision of the Circuit Court of Appeals is not final.* *Vicksburg v. Henson*, (1913) 231 U. S. 259, 34 S. Ct. 95.

*A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which result depends. This is especially so of a suit involving rights to land acquired under a law of the United States. If it were not, every suit to establish title to land in the central western states would so arise, as all titles in those states are traceable back to those laws.* *Shulthis v. McDougal*, (1912) 225 U. S. 561, 32 S. Ct. 704, 56 U. S. (L. ed.) 1205.

*An appeal to the Supreme Court does not lie in bankruptcy proceedings by virtue of this section from a ruling of the Circuit Court of Appeals.* *J. W. Calnan Co. v. Doherty*, (1912) 224 U. S. 145, 32 S. Ct. 460, 56 U. S. (L. ed.) 702.

*A constitutional question will not be reviewed by the Supreme Court where it arose only at the trial—Chicago Junction R. Co. v. King*, (1911) 222 U. S. 222, 32 S. Ct. 79, 56 U. S. (L. ed.) 173.

## Vol. IV, p. 422, sec. 7.

Since this act was passed, its uniform construction has been that the granting of an injunction pending the suit is in the sound discretion of the trial court, and that its order will not be disturbed on appeal unless it is violative of the rules of equity, or unless there has been an abuse of discretion, or unless the injunction has been improvidently allowed. The appellate court is not to decide as to what it would have done as to allowing the injunction, but it must recognize that the law has imposed on the primary court the responsibility of the exercise of this power, and unless there has been a plain disregard of the law or of some settled rule of equity which should govern the issuance of injunctions so that it appears clearly that the injunction is issued improvidently, the decree should not be reversed. *Texas Traction Company v. Collier*, (C. C. A. 5th Cir. 1912) 195 Fed. 65.

"Upon a hearing in equity."—Unless the interlocutory order is granted upon a hearing in equity the right to an appeal under the statute does not exist. *Pressed Steel Car Co. v. Chicago & A. R. Co.*, (C. C. A. 7th Cir. 1911) 192 Fed. 517.

The usual meaning of the term "hearing in equity" is the trial of the suit including the introduction of the evidence, the argument of counsel, and the decree of the court. But under this section, wherein an appeal is allowed from an order granting or refusing to dissolve an injunction "upon a hearing in equity," that term means the presentation and submission for decision of the motion for the order including the introduction of the evidence, the arguments of counsel, the other proceedings at that time upon which the order is based, and the order itself. *American Grain Separator Co. v. Twin City Separator Co.*, (C. C. A. 8th Cir. 1912) 202 Fed. 202.

An interlocutory order refusing to dissolve an injunction is appealable, although the hearing on which it is founded is in effect a rehearing of the motion to grant the injunction, because the Congress did not except orders refusing to dissolve injunctions founded on rehearings of the motions to grant them from its general grant of the right of appeal from orders refusing to dissolve injunctions, and, where the legislative body has made no exception from a general

grant or rule, it is not the province of the courts to do so. *American Grain Separator Co. v. Twin City Separator Co.*, (C. C. A. 8th Cir. 1912) 202 Fed. 202.

**Review of case on merits — Injunctions in patent cases.** — To the same effect as the first paragraph of the original note and following the case there cited, see *Sheffield Car Co. v. D'Arcy*, (C. C. A. 6th Cir. 1912) 194 Fed. 686.

**On appeal from a mere interlocutory order the Circuit Court of Appeals may direct a bill to be dismissed if it appears that the complainant was not entitled to maintain its suit.** *Metropolitan Water Co. v. Kaw Valley Drainage Dist. of Wyandotte County, Kansas*, (1912) 223 U. S. 519, 32 S. Ct. 246, 56 U. S. (L. ed.) 533.

**Denial of injunction.** — An order refusing a stay of proceedings, made in a case other than that in which the stay is operative, amounts to a denial of an injunction, but an order refusing a stay, made in the case in which the desired stay would operate, would not amount to such denial of injunction. *Emery v. Central Trust & Safe Deposit Co.*, (C. C. A. 6th Cir. 1913) 204 Fed. 965.

## Vol. IV, p. 428, sec. 11.

**Time of appeal.** — To the same effect as the original note, see *In re Martin*, (C. C. A. 6th Cir. 1912) 201 Fed. 31.

In the computation of the six months allowed by this section for taking out a writ of error from the Circuit Court of Appeals to

**Time of appeal.** — The appeal provided for by this section is a matter of right, and not of discretion, and when properly claimed in due season the right cannot be defeated by the failure of the court to act upon the application within the time required for taking appeal. Thus where within the thirty days specified in this section the appeal papers were presented to a judge of the same court that granted the decree appealed from, but not the judge who granted the decree, it was held that the appeal was "taken" within the statutory period although the judge declined to act and the appeal was not actually allowed by the judge who granted the decree until after the thirty days had elapsed. *J. D. Randall Co. v. Foglesong Mach. Co.*, (C. C. A. 6th Cir. 1912) 200 Fed. 741.

**Effect of appeal as removing cause.** — An appeal from a motion granting a preliminary injunction does not have the effect to remove the cause to the Circuit Court of Appeals, but the cause generally remains in the court below, and continues in the control of that court. *Foote v. Parsons Non-Skid Co.* (C. C. A. 6th Cir. 1912) 196 Fed. 951.

the lower court, the time in which the plaintiff in error was attempting to pursue a mistaken remedy in the Supreme Court will be included. *Darnell v. Illinois Cent. R. Co.*, (C. C. A. 6th Cir. 1913) 206 Fed. 445.

## Vol. IV, p. 434. [Act of Feb. 19, 1897.]

This section is cited in *Troxell v. Delaware, L. & W. R. Co.*, (E. D. Pa. 1913) 205 Fed. 830.

## Vol. IV, p. 450, sec. 700.

**To what courts applicable.** — To the same effect as the original note see *Frank v. United States*, (C. C. A. 6th Cir. 1911) 192 Fed. 864.

**General and special.** — If the finding of the court is general and not special it is not reviewable by the Circuit Court of Appeals. *J. W. Paxson Co. v. Board of Chosen Freeholders*, (C. C. A. 3d Cir. 1912) 201 Fed. 656, wherein the court said: "We are of opinion that the finding of the court was general and not special, and, therefore, like the verdict of a jury, is not now reviewable by this court. No request was made for special findings, and unless some other request, or motion equivalent to a motion for peremptory instructions, or judgment non obstante veredicto was made, with proper exception to the refusal thereof, the findings of fact cannot be the subject of assignments of error. The finding of the court was equivalent to a general verdict, though accompanied by a reasoned opinion."

"A special finding made by the trial court under this statute becomes a part of the record, and the appellate court may without a bill of exceptions determine whether the finding is sufficient to support the judgment. It is furthermore now settled that the question of law whether the special finding of facts supports the judgment is open for determination by the appellate court, although no exception was taken to the judgment in the court below or any specific ruling made by the court below on the question of law involved." *Chicago, R. I. & P. Ry. Co. v. Barrett*, (C. C. A. 6th Cir. 1911) 190 Fed. 118.

For an application of this section and section 649 (4 Fed. Stat. Annot. 393) examine the case of *Continental & Commercial Nat. Bank of Chicago v. Cobb*, (C. C. A. 1st Cir. 1912) 200 Fed. 511.

This section is cited in *Mason v. Smith*, (C. C. A. 6th Cir. 1911) 191 Fed. 502.

## Vol. IV, p. 459, sec. 702.

The findings of fact by the Supreme Court of a territory are conclusive and may not be reviewed on appeal to the Supreme Court

of the United States. That court is limited to a review of questions of law only. *Gonzales v. Duey*, (Ariz. 1914) 138 Pac. 1043.

## Vol. IV, p. 460, sec. 2.

"Our review is confined to determining the question whether the facts found by the court below sustain the judgment. And these facts are to be certified to us by the territorial Supreme Court, either by adopting the find-

ings of the trial court, or by making separate findings of its own." *Citizens' Nat. Bank of Roswell, N. M. v. Davisson*, (1913) 229 U. S. 212, 33 S. Ct. 625, 57 U. S. (L. ed.) 1153.

## Vol. IV, p. 467, sec. 709.

## I. GENERAL AUTHORITY TO REVIEW STATE COURT DECISIONS.

The power to review a judgment of a state court is limited and defined by this section. *Seaboard Air Line Ry. v. Duvall*, (1912) 225 U. S. 477, 32 S. Ct. 790, 56 U. S. (L. ed.) 1171.

## II. FINAL JUDGMENTS OR DECREES IN ANY SUIT IN THE HIGHEST COURT OF A STATE.

Unless the judgment is final the Supreme Court is without jurisdiction to review it. *Missouri & K. I. R. Co. v. Olathe, Kan.*, (1911) 222 U. S. 185, 32 S. Ct. 46, 56 U. S. (L. ed.) 155.

It is settled that this court may not be called upon to review by piecemeal the action of a state court which otherwise would be within the jurisdiction. The rule established by the authorities is that on the question of finality the form of the judgment is controlling, and hence that this court cannot for the purpose of determining whether its reviewing power exists be called upon to disregard the form of the judgment in order to ascertain whether a judgment which is in form not final might by applying the state law be treated as final in character. *Louisiana Nav. Co. v. Oyster Commission of Louisiana*, (1912) 226 U. S. 99, 33 S. Ct. 78, 57 U. S. (L. ed.) 138. Compare *Cedar Rapids Gas Light Co. v. Cedar Rapids*, (1912) 223 U. S. 655, 32 S. Ct. 389, 56 U. S. (L. ed.) 594, wherein the court said: "It would require a very clear case to warrant the reversal of the decree of a state court which though final in form merely postpones a decision upon the merits for further experience."

**Court of Claims.**—The general rule governing the subject of prosecuting error or taking appeals from final judgments or decrees is applicable to judgments or decrees of the Court of Claims, and that rule treats a judgment or decree properly entered in the cause as not final for the purposes of appeal until a motion for a new trial or a petition for rehearing, as the case may be, when entertained by the court, has been disposed of; and the time for appeal begins to run from the date of such disposition.

*United States v. Ellicott*, (1912) 223 U. S. 524, 32 S. Ct. 334, 56 U. S. (L. ed.) 535.

## VII. TITLE, RIGHT, PRIVILEGE, OR IMMUNITY CLAIMED UNDER CONSTITUTION, TREATY OR STATUTE OF, OR AUTHORITY EXERCISED UNDER, UNITED STATES.

Where a right is claimed in a state court arising under a statute of the United States, a question is presented reviewable by the Supreme Court of the United States. *Supreme Lodge, Knights of Pythias v. Knights of Pythias of North America, etc.*, (1912) 102 Miss. 280, 59 So. 88.

"One who sets up a federal statute as giving immunity from a judgment against him, which claim is denied by the decision of a state court, may bring the case here for review under § 709 of the Revised Statutes." *Straus v. American Publishers' Ass'n*, (1913) 231 U. S. 222, 34 S. Ct. 84.

"The denial of a right claimed under the judgment of a court of the United States lays the foundation for a review in this court." *Acme Harvester Co. v. Beekman Lumber Co.*, (1911) 222 U. S. 300, 32 S. Ct. 96, 56 U. S. (L. ed.) 208.

The application of laches and the statute of limitations does not present a federal question. *Wood v. Chesborough*, (1913) 228 U. S. 672, 33 S. Ct. 706, 57 U. S. (L. ed.) 1018.

Whether the Hepburn Act prohibits a carrier from giving free interstate transportation to the employees of the Railway Mail Service when they are not on duty but are traveling for their own benefit or pleasure, is of course a federal question. But whether—assuming that question to be answered in the affirmative—the relation of carrier and passenger arises in the case of gratuitous passage under circumstances such as are presented in this case, is (in absence of an act of Congress regulating the matter) a question not of federal but of state law. *Southern Pac. Co. v. Schuyler*, (1913) 227 U. S. 601, 33 S. Ct. 277, 57 U. S. (L. ed.) 662, 43 L.R.A. (N.S.) 901.

Where in a controversy of a purely federal character the claim is made and denied that there was no evidence tending to show



liability under the federal law, such ruling when duly excepted to is reviewable, because inherently involving the operation and effect of the federal law. *St. Louis, I. M. & S. R. Co. v. McWhirter*, (1913) 229 U. S. 265, 33 S. Ct. 858, 57 U. S. (L. ed.) 1179.

**Under public land law.**—Where the location of a tract of public land is in controversy and the plaintiffs object to the admission of all evidence bearing upon its location other than the field notes of the surveys, under which the plaintiffs claim, but the trial court overrules the objection, a federal question is necessarily involved and decided by virtue of *Rev. Stat. sec. 2396*, 6 Fed. Stat. Annot. 367. *Graham v. Gill*, (1912) 223 U. S. 643, 32 S. Ct. 396, 56 U. S. (L. ed.) 586, wherein the court said: "In passing adversely on these objections the trial court did not merely determine the weight or sufficiency of the evidence to prove a fact, but passed on the competency and legal effect of the evidence as bearing upon the question of federal law, viz., the effect of the requirements of § 2396, *Rev. Stat.*, as to the mode of surveying public lands. Thus a federal question was presented and decided."

The judgment of a foreign state is not protected by the full faith and credit clause of the United States Constitution and, therefore, a writ of error does not lie to a state court for the purpose of determining whether in an action brought therein on a foreign judgment the state court gave to it full faith and credit. *Aetna Life Ins. Co. v. Tremblay*, (1912) 223 U. S. 185, 32 S. Ct. 309, 56 U. S. (L. ed.) 398.

#### VIII. DRAWN IN QUESTION OR SPECIALLY SET UP AND CLAIMED.

**Necessity.**—To the same effect as the original note see *Ferris v. Frohman*, (1912) 223 U. S. 424, 32 S. Ct. 263, 56 U. S. (L. ed.) 492; *El Paso & S. R. Co. v. Eichel*, (1913) 226 U. S. 590, 33 S. Ct. 179, 57 U. S. (L. ed.) 369.

To give the Supreme Court jurisdiction of a writ of error to a state court it must appear affirmatively, not only that a federal question was presented for decision but that its decision was necessary to the determination of the case, and that it was actually decided, or that the judgment as rendered could not have been rendered without deciding it. *Adams v. Russell*, (1913) 229 U. S. 353, 33 S. Ct. 846, 57 U. S. (L. ed.) 1224, wherein the court said: "The rule is a salutary one in view of the different jurisdictions of the state courts and of this court. It leaves in both the full plenitude of their powers. It permits no evasion by the state court of the responsibility of determining the federal question if necessary to be determined; it permits no assumption by this court of jurisdiction to review the decision of local questions. The sufficiency of the local question to sustain the judgment rendered, and the necessity for the determination of the federal question necessarily we have to consider, but, as we said in *John-*

*son v. Risk* [187 U. S. 300], where a defense is distinctly made, resting on local statutes, we should not, in order to reach a federal question, resort to critical conjecture as to the action of the court in the disposition of such defense." And, of course, the principle is applicable whether the question is presented as a ground of defense or a ground of action."

**Claim or right appearing of record.**—That there was set up and denied some claim or right under the Constitution or a statute of the United States must appear upon the record. *Seaboard Air Line Ry. Co. v. Duval*, (1912) 225 U. S. 477, 32 S. Ct. 790, 56 U. S. (L. ed.) 1171.

The bare claim that the judgment of the state court operated to take property of the plaintiff in error without compensation is not enough to justify this court in taking jurisdiction unless it also appears from the averments of fact upon which the claim must depend that the question is one real and substantial and not so utterly without merit as to be frivolous, or a question concluded by previous decisions of this court. *Consolidated Turnpike Co. v. Norfolk & O. V. R. Co.*, (1913) 228 U. S. 596, 33 S. Ct. 605, 57 U. S. (L. ed.) 982.

**Federal question shown to be of unsubstantial character.**—Although a record may present in form a federal question, a motion to dismiss will be allowed where it plainly appears that the federal question is of such an unsubstantial character as to cause it to be devoid of all merit and therefore frivolous. *Deming v. Carlisle Packing Co.*, (1912) 226 U. S. 102, 33 S. Ct. 80, 57 U. S. (L. ed.) 140; wherein the court said: "It has come to be settled that on a motion to dismiss it is the duty of the court to consider whether an asserted federal question is devoid of merit and unsubstantial either because concluded by previous authority or because of its absolutely frivolous nature, and if it is found to be of such character to allow a motion to dismiss. This being true, as the conclusion that a writ of error has been prosecuted for delay is the inevitable result of a finding that it has been prosecuted upon a federal ground which is unsubstantial and frivolous, it follows that the question of delay is involved in and requires to be considered in passing upon a motion to dismiss because of the frivolous character of the federal question. The decisions of this court also leave it no longer open to discussion that where it is found that a federal question upon which a writ of error is based is unsubstantial and frivolous the duty to affirm results."

**By whom claim made.**—We have had frequent occasion to declare that the right of this court to review the judgment of the highest court of a state is circumscribed within the limits of § 709 of the Revised Statutes, now § 237 of the Judicial Code. See *Waters-Pierce Oil Co. v. State of Texas*, (1909) 212 U. S. 86, 29 S. Ct. 220, 53 U. S. (L. ed.) 417, and cases there cited. Among the limitations upon this right is the principle which requires those who seek

to bring in review in this court the judgment of a state court to have a personal as distinguished from an official interest in the relief sought and in the federal right alleged to be denied by the judgment of the state court. This principle was laid down in *Smith v. Indiana*, (1903) 191 U. S. 138, 24 S. Ct. 51, 48 U. S. (L. ed.) 125, in which it was held that the auditor of a county of the state of Indiana could not upon writ of error to this court have the judgment of the Supreme Court of Indiana declaring an exemption law of that state valid and the performance of its provisions obligatory upon him reviewed upon the ground that the act was repugnant to the Federal Constitution." *Marshall v. Dye*, (1913) 231 U. S. 250, 34 S. Ct. 92.

Time to raise question or make claim.—In order to entitle a plaintiff in error to a review on the ground of a deprivation of the right to trial by jury, plaintiff in error should "specially set up" his alleged right in proper time in the state court, and should not rely upon a premature assertion of that right contained in a demurrer where it has no proper place. *Dill v. Ebey*, (1913) 229 U. S. 199, 33 S. Ct. 620, 57 U. S. (L. ed.) 1148.

*Nothing is better settled than that it is too late to raise a federal question for the first time in a petition for a rehearing, after the final judgment of the state court of last resort. If, however, the state court actually entertains the petition and decides the federal question, and this appears by the record, the requirement of § 709 that the right shall be specially set up and denied is complied with.* *Consolidated Turnpike Co. v. Norfolk & O. V. R. Co.*, (1913) 228 U. S. 326, 33 S. Ct. 510, 57 U. S. (L. ed.) 857, rehearing denied 228 U. S. 596, 33 S. Ct. 605, 57 U. S. (L. ed.) 982.

#### IX. DECISION OF STATE COURT.

Must be adverse to right claimed.—To the same effect as the original note, see *Lem Woon v. State of Oregon*, (1913) 229 U. S. 586, 33 S. Ct. 783, 57 U. S. (L. ed.) 1340.

Other grounds of decision.—"It is settled by numerous decisions of this court that where the decision in the state court adverse to the plaintiff in error proceeds upon two independent grounds, one of which, not involving a federal question, is sufficient to sustain the judgment, the writ of error will be dismissed or the judgment affirmed, according to circumstances." *Southern Pac. Co. v. Schuyler*, (1913) 227 U. S. 601, 33 S. Ct. 277, 57 U. S. (L. ed.) 662, 43 L.R.A. (N.S.) 901. See to the same effect *Missouri & K. I. R. Co. v. Olathe, Kan.*, (1911) 222 U. S. 187, 32 S. Ct. 47, 56 U. S. (L. ed.) 156.

It is well established that if there be federal and non-federal grounds, and the latter be sufficient to support the judgment of the

state court, there can be no review by this court. *Wood v. Chesborough*, (1913) 228 U. S. 672, 33 S. Ct. 706, 57 U. S. (L. ed.) 1018.

A decision by the state court that the right to relief prayed for is in any event barred by long delay and laches is sufficient to prevent the Supreme Court from reviewing an alleged federal question arising in the suit. *Preston v. Chicago*, (1913) 226 U. S. 447, 33 S. Ct. 177, 57 U. S. (L. ed.) 293.

"If it appears that the judgment of the state court against the plaintiff in error was based upon a decision of general law broad enough to support the decision, this court will not consider the federal question, though it was considered and determined by the court below adversely to the plaintiff in error." *Consolidated Turnpike Co. v. Norfolk & O. V. R. Co.*, (1913) 228 U. S. 596, 33 S. Ct. 605, 57 U. S. (L. ed.) 982.

The authority to review the action of a state court where it has decided a federal question cannot be rendered unavailing by a suggestion "that the court below may have rested its judgment" on a non-federal ground, for to so hold would simply amount to depriving this court of all power to review federal questions if only a party chose to make such a suggestion. *St. Louis, I. M. & S. R. Co. v. McWhirter*, (1913) 229 U. S. 265, 33 S. Ct. 858, 57 U. S. (L. ed.) 1179.

Where the Circuit Court remands a cause and the state court thereupon proceeds to final judgment, the action of the Circuit Court is not reviewable on writ of error to such judgment. For a state court cannot be held to have decided against a federal right when it is the Circuit Court, and not the state court, which has denied its possession. *McLaughlin v. Hallowell*, (1913) 228 U. S. 278, 33 S. Ct. 465, 57 U. S. (L. ed.) 835.

#### X. QUESTIONS DETERMINED IN SUPREME COURT.

All questions of fact.—While it is true that upon a writ of error to a state court we cannot review its decision upon pure questions of fact, but only upon questions of law bearing upon the federal right set up by the unsuccessful party, it equally is true that we may examine the entire record, including the evidence, if properly incorporated therein, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter. *Kansas City Southern R. Co. v. C. H. Albers Commission Co.*, (1912) 223 U. S. 573, 32 S. Ct. 316, 56 U. S. (L. ed.) 556.

"Upon the issue under the Fourteenth Amendment, the plaintiff argues on the strength of Rev. Stat., § 709, that the facts are open to re-examination here. By that section it is provided that a writ of error to

a state court 'shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States.' It is argued that as the decree of a state court can be reviewed only by writ of error the foregoing words give to a writ of error in a chancery case the effect of an appeal and open the evidence to re-examination to the same extent as upon the appeal. A suggestion to that effect was made in *Republican River Bridge Co. v. Kansas Pac. Ry. Co.*, (1875) 92 U. S. 315, 317, 23 U. S. (L. ed.) 515, but the practice and decisions from an early date have been the other way. But of course findings either at law or in equity may depend upon questions that are re-

examinable here. The admissibility of evidence or its sufficiency to warrant the conclusion reached may be denied; or the conclusion may be a composite of fact and law, such as ownership or contract; or in some way the record may disclose that the finding necessarily involved a ruling within the appellate jurisdiction of this court. Such questions properly saved must be answered, and, so far as it is necessary to examine the evidence in order to answer them or to prevent an evasion of real issues, the evidence will be examined." *Cedar Rapids Gas Light Co. v. Cedar Rapids*, (1912) 223 U. S. 655, 32 S. Ct. 389, 56 U. S. (L. ed.) 594.

## Vol. IV, p. 494, sec. 711, cl. 5.

**Suits for infringement.**—An action which raises a question of infringement is an action arising under the patent law and may be instituted in a federal court, even though the construction of a contract is also involved. Nor is it sufficient to bar an action in the federal court that in general the rule of comity requires that this court should not enjoin the sale of property in the possession of the state court. *American Graphophone Co. v. Pickard*, (W. D. N. Y. 1912) 201 Fed. 546.

"If a bill asserts a right under the patent law to sell a patented machine subject to restrictions as to its use, and alleges a use in violation of the restrictions as an infringement of the patent, it presents a question of the extent of the patentee's privilege, which, if determined one way, brings the prohibited use within the provisions of the patent law, or, if determined the other way, brings into operation only principles of general law. Obviously, a suit for infringement, which must turn upon the scope of the monopoly or privilege secured to a patentee, presents a case arising under the patent law. The jurisdiction of the Circuit Court over such cases has, for more than a century, been exclusive, by the express terms of the statute, although, for the most part, its jurisdiction over other kinds of suits arising under the Constitution and laws of the United States is only concurrent with that of the state courts." *Henry v. A. B. Dick Co.*, (1912) 224 U. S. 1, 32 S. Ct. 364, 56 U. S. (L. ed.) 645, Ann. Cas. 1913D 880.

In *Rauhe v. Justi*, (E. D. Pa. 1912) 196 Fed. 54, the bill in equity set up letters patent for improvements in sets of artificial teeth, and charged the defendants with infringements, and prayed for an injunction, decree for profits, and damages. The bill referred to a license showing that the defendants had formerly acquiesced in the rights claimed by the complainant under the patents. It furthermore averred that the defendants without license or allowance, and against the will of the complainant's rights, well knowing the same, unlawfully and wrongfully did make, construct, use, and vend to others to be used the inventions of

said letters patent, and were threatening to continue so to do. It was held that the federal court had jurisdiction of the case. The court said: "The allegations of the bill must be accepted as verity, the case being presented on demurrer. The license is not now in force, and it will be noticed that the complainant does not rest his right of recovery on the same. It is only incidentally mentioned showing former recognition of complainant's rights secured to him under the patents. The controversy, as appears by the bill, is not regarding such former license or contract, as distinguished from *St. Paul Plow Works v. Startling*, 140 U. S. 184, 11 Sup. Ct. 803, 35 L. ed. 404, and other cases cited by defendants. The cause of action or ground of relief is the infringement of the patents. It arises, not out of contract, but under the patent laws, and is therefore properly cognizable by the District Court of the United States under the provision of the several acts of Congress pertaining thereto. The right to use the invention, whether by license from complainant, invalidity of the patents, and infringement, are usually matters of defense, and may be pleaded in answering the complainant."

**Suits on contracts relating to patents.**—The federal courts have exclusive jurisdiction of all cases arising under the patent laws, but not of all questions in which a patent may be subject-matter of the controversy. For the courts of a state may try questions of title, and may construe and enforce contracts relating to patents. *New Marshall Engine Co. v. Marshall Engine Co.*, (1912) 223 U. S. 473, 32 S. Ct. 238, 56 U. S. (L. ed.) 513.

"The remedy which the complainant seeks may often determine whether the suit is one arising under the patent law and cognizable only in a court of the United States, or one upon a contract between the patentee and his assigns or licensees, and, cognizable only in a state court, unless there be diversity of citizenship. Thus, a bill to enforce a contract concerning the title to a patent, or an interest therein, or to declare a forfeiture of an assignment of an interest in a patent, or even a license to make, sell or use the pat-

ented thing, or an action to recover damages for a breach of a contract relating to a patent or a license thereunder, would not, because of the character of remedy or belief sought, be a suit cognizable in a United States court, although the facts stated might

have justified a suit for infringement in a United States court, if the complainant had elected that remedy." *Henry v. A. B. Dick Co.*, (1912) 224 U. S. 1, 32 S. Ct. 364, 56 U. S. (L. ed.) 645, Ann. Cas. 1913D 880.

## Vol. IV, p. 498, sec. 716.

**Purpose of statute.**—Section 716 grants the courts of the United States power to issue all writs not specifically provided for by the statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law. This statute was no doubt enacted by Congress in order to meet cases of this nature when there is no specific process provided by statute. *John Gund Brewing Co. v. United States*, (C. C. A. 8th Cir. 1913) 204 Fed. 17.

The writ of mandamus can be issued by the United States courts under section 716, only if necessary to the exercise of their jurisdiction. It is not to be used for the correction of errors in respect to matters within the discretion of the lower court. *Vacuum Cleaner Co. v. Platt*, (C. C. A. 2d Cir. 1912) 196 Fed. 398.

**Impounding books and papers for use in trial.**—In *United States v. M'Hee*, (N. D. Ill. 1912) 196 Fed. 586, which was an appeal from an order denying a motion to set aside

an order impounding books and papers for use upon the trial, the court said: "Upon the hearing, counsel for defendants conceded the power of the court to impound property unlawfully or irregularly taken by government officers, where such property belongs to a party to the prosecution. But where it belongs to a stranger to the proceeding, as in this case, they denied the existence of the power, asserting that subpoena duces tecum is in that event the sole remedy. They urge that the power to impound is among those granted by section 716, giving authority to issue all writs necessary to the exercise of jurisdiction; that this provision is applicable only to the parties, not to strangers; and that no decision in favor of the power has been cited or can be found. However, a number of the writs issued under section 716, and in frequent use, run against third persons. This is true of injunction, execution, subpoena ad testificandum, subpoena duces tecum, and prohibition. In practice the distinction urged by counsel has not been made."

## Vol. IV, p. 508, sec. 719.

The enforcement of an order of the Interstate Commerce Commission was enjoined pending an appeal, on the authority of this

section, in *Omaha & C. B. St. R. Co. v. Interstate Commerce Commission*, (1911) 222 U. S. 582, 32 S. Ct. 833, 56 U. S. (L. ed.) 324.

## Vol. IV, p. 509, sec. 720.

**Extent of section.**—Provisions of this section relate only to the stay of proceedings begun in the courts of a state before any resort to the United States Court. *Kansas City Gas Co. v. Kansas City*, (W. D. Mo. 1912) 198 Fed. 500.

The object of the statute is to assume the orderly administration of justice and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons. *People's Gaslight & Coke Co. v. Chicago*, (N. D. Ill. 1911) 192 Fed. 398.

**Protection of federal jurisdiction.**—See to the same effect, *Nelson v. Camp*, (C. C. A. 5th Cir. 1911) 191 Fed. 712.

**What are state courts.**—The municipal court of Kansas City is a court of the state within the meaning of the statute. *Kansas City Gas Co. v. Kansas City*, (W. D. Mo. 1912) 198 Fed. 500; *Jewel Tea Co. v. Lee's Summit*, (W. D. Mo. 1912) 198 Fed. 532.

**Cases removed.**—To the same effect as the original note, see *Missouri, K. & T. Ry. Co. v. Chappell*, (W. D. Okla. 1913) 206 Fed. 688.

The taking of depositions and the incidents thereto are a proceeding in a state court in contemplation of this section. *American Shipbuilding Co. v. Whitney*, (N. D. Ohio, 1911) 190 Fed. 109.

**Bankruptcy cases.**—A suit brought in a state court by trustees in bankruptcy appointed by a federal District Court to recover property of the bankrupt will not be restrained by the equity side of the United States District Court although the trustees were appointed on the bankruptcy side of the same court. *Hull v. Burr*, (C. C. A. 1st Cir. 1913) 206 Fed. 1.

**State judgments.**—As to the power of a federal court to issue a decree preventing the defendant from obtaining the benefit of a state judgment claimed to be inequitable, see *Union Ry. Co. v. Illinois Cent. R. Co.*, (C. C. A. 6th Cir. 1913) 207 Fed. 745.

This section is cited in *Western Union Telegraph Co. of Illinois v. Louisville & N. R. Co.*, (C. C. A. 7th Cir. 1912) 201 Fed. 919.

## Vol. IV, p. 517, sec. 721.

## DECISIONS OF STATE COURTS.

To the same effect as the original note, see *The Golden Rod*, (D. C. Me. 1912) 197 Fed. 830.

**State laws strictly local.**—"The thirty-fourth section of the Judiciary Act of 1789, declaring that the laws of the several states shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply, is limited in its application to state laws strictly local. It does not extend to contracts or other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. In such cases it is the right and duty of the national courts to exercise their own judgment." *Mechanics-American Nat. Bank v. Coleman*, (C. C. A. 8th Cir. 1913) 204 Fed. 24.

**Decisions rendered after rights of parties accrued.**—A decision of a state court in regard to litigation which arose after the rights of the parties were fixed in the federal court is not binding on the federal court. *Jackson Co. v. Gardiner Inv. Co.* (C. C. A. 1st Cir. 1912) 200 Fed. 113.

**Evidence.**—The decision of a state court when but an estimate of the probative effect of certain evidence, is persuasive, but not conclusive, in a federal court. *Harrison v. Foley*, (C. C. A. 8th Cir. 1913) 206 Fed. 57.

The doctrine of the law of the case in its customary sense does not run from state to federal jurisdiction, or conversely. Its application is generally to a second appeal in the same appellate court. *Harrison v. Foley*, (C. C. A. 8th Cir. 1913) 206 Fed. 57.

The proper remedial procedure is essentially a question of local law in which the federal courts will follow the decisions of the state courts. *McKinney v. Kansas Natural Gas Co.*, (D. C. Kan. 1913) 206 Fed. 772.

**Ecclesiastical question.**—The decision of a state court that the attempted union of two different church organizations was invalid does not establish a rule of property that the federal courts are bound to follow although the result of the decision determines the right to use the church property. *Sherard v. Walton*, (W. D. Tenn. 1913) 206 Fed. 562.

**Conditional sale and chattel mortgages.**—There is so much of a local nature entering into conditional sales contracts and chattel mortgages that a federal court will accept the settled law of each state as decisive in respect to any case arising therein. *E. I. Du Pont De Nemours Powder Co. v. Jones Bros.*, (S. D. Ohio 1912) 200 Fed. 638.

"The federal courts, in determining the validity of the chattel mortgage, follow the decisions of the state courts. This doctrine proceeds upon the principle that the validity of a chattel mortgage, executed within a state, is a matter for the state, and the federal courts will accept the settled law of each state as decisive of the question." In re *Harnden*, (D. C. N. M. 1912) 200 Fed. 175.

**Dissolution of corporations.**—The proposition that a corporation is dissolved by operation of law for failure to pay its annual license fee presents a mere question of local law, upon which the decision of the highest court of the state is final. *United States v. Spokane Mill Co.*, (E. D. Wash. 1913) 206 Fed. 999.

**Corporation contracts.**—The construction by a state court of state legislation regarding the validity and effect of contracts made within the state by foreign corporations which have not qualified themselves to engage in business therein will be followed by the federal courts. *Thomas v. Birmingham Ry. Light & Power Co.*, (N. D. Ala. 1912) 195 Fed. 340.

**Validity of deed of trust.**—The federal courts are governed by the law of a particular state in passing upon the validity of a deed of trust made in that state. *Swager v. Smith*, (C. C. A. 4th Cir. 1912) 194 Fed. 762.

## STATE CONSTITUTION AND STATUTES.

**Statutes of limitations.**—"The New York statute of limitations is binding under section 721, upon the courts of the United States only in the trial of actions at law. Still courts in admiralty proceed upon the analogy of the statute in considering whether claims are stale." *Davis v. Smokeless Fuel Co.*, (C. C. A. 2d Cir. 1912) 196 Fed. 753.

## CONSTRUCTION OF STATE CONSTITUTION AND STATUTES.

The construction of the highest judicial tribunal.—To the same effect as the original note, see *Ehmen v. City of Gothenburg*, (C. C. A. 8th Cir. 1912) 200 Fed. 564; *City of Columbia v. Chicago Title & Trust Co.*, (C. C. A. 5th Cir. 1912) 200 Fed. 569.

**Validity of mortgages.**—To the same effect as the original note, see *In re Manning*, (E. D. S. C. 1913) 206 Fed. 685.

**Death by wrongful act.**—The construction by the highest court of a state of a state statute giving a right of action for a death by wrongful act is binding on the federal courts. *Joplin & P. R. Co. v. Payne*, (C. C. A. 8th Cir. 1912) 194 Fed. 387.

## Vol. IV, p. 530, sec. 723.

**In general.**—In the courts of the United States it is a guiding rule that a bill in equity does not lie in any case where a plain,

adequate and complete remedy may be had at law. The statute so declares, and the decisions enforcing it are without number. If

it be quite obvious that there is such a remedy, it is the duty of the court to interpose the objection *sua sponte*, and in other cases it is treated as waived if not presented by the defendant *in limine*. *Singer Sewing Mach. Co. of New Jersey v. Benedict*, (1913) 229 U. S. 481, 33 S. Ct. 942, 57 U. S. (L. ed.) 1288.

The adequate remedy at law, which is the test of equitable jurisdiction in the federal courts, is that which existed when the Judiciary Act of 1789 was adopted. *Richardson v. Pennsylvania Coal Co.*, (M. D. Pa. 1913) 203 Fed. 743.

This section is merely declaratory. *Johnson v. Hanley, Hoyer Co.*, (D. C. R. I. 1911) 188 Fed. 752.

Territorial courts established by the United States are not "courts of the United States" when the statute creating them prescribes that the procedure shall conform as near as may be to that of an adjoining state and that the provisions of Rev. Stat. § 911 et seq., (4 Fed. Stat. Annot. 560), shall govern such courts as far as applicable. *Dill v. Ebey*, (1913) 229 U. S. 199, 33 S. Ct. 620, 57 U. S. (L. ed.) 1148.

Waiver.—The statute was enacted mainly to secure to the defendant the privilege of a trial by jury, and this he may waive. If

in a suit in equity he answers and submits to the jurisdiction of the court, he cannot thereafter object that the plaintiff has a plain, complete, and adequate remedy at law, provided that the subject-matter of the suit is of a class over which a court of chancery has jurisdiction, and it is competent for the court to grant the relief sought. *Cobban v. Conklin*, (C. C. A. 9th Cir. 1913) 208 Fed. 231.

Demand for payment of money.—This section bars an equitable action to compel the payment of a sum of money, concededly in the defendant's hands, which the complainants allege has been duly assigned to them. *Brown v. Fletcher*, (C. C. A. 2d Cir. 1913) 206 Fed. 461.

The illegality or unconstitutionality of a state or municipal tax or imposition is not of itself a ground for equitable relief in the courts of the United States. In such a case the aggrieved party is left to his remedy at law, when that remedy is as complete, practicable and efficient as the remedy in equity. *Singer Sewing Mach. Co. of New Jersey v. Benedict*, (1913) 229 U. S. 481, 33 S. Ct. 942, 57 U. S. (L. ed.) 1288.

This section is quoted in *George Melies Co. v. Motion Picture Patents Co.*, (C. C. N. J. 1911) 190 Fed. 859.

## Vol. IV, p. 534, sec. 725.

Inherent power.—The federal courts hold, without qualification, that the power to punish for contempts is inherent in all the courts of the United States, its existence being essential to preserve order in judicial proceedings and the enforcement of the court's judgments, and, consequently, to the due administration of justice; that it inheres in the dignity of the court itself, and is an attribute as essential and indispensable to the due administration of justice as the person of a judge. In *re Ulmer*, (N. D. Ohio 1913) 208 Fed. 461.

The power to punish for contempt of court is to be used sparingly and with great caution and deliberation. The purpose in invoking the exercise of such power is the enforcement of law and of lawful orders and the punishment of acts of disobedience. A court thus called upon to enforce the law may itself keep well within its limits. It is not a party to the proceeding. In punishing for contempt, the judge acts impersonally and has no interest or concern other than that the law should be obeyed and enforced. To justify punishment, whether of a remedial or punitive character, for a violation of the court's order or for aiding and assisting in its violation, the charge against the accused and the course of procedure must meet legal requirements, and the proof must conform to the settled rules of evidence. *Phillips Sheet & Tin Plate Co. v. Amalgamated Ass'n of Iron, Steel & Tin Workers*, (S. D. Ohio 1913) 208 Fed. 335.

"Officers of said courts" within the meaning of the section do not include customs

officers who acting under a search warrant issued by a United States Commissioner seize matter not authorized by the warrant, which they refuse to give up. In *re Chin K. Shue*, (D. C. Mass. 1912) 199 Fed. 282.

Acts of contempt are not limited to those committed in the immediate presence or vicinity of the court while in session or within the range of its hearing or vision. Locality is not so determinative as is the obstructive quality of the act, and an act, the natural tendency of which is to obstruct justice, may constitute a contempt wherever committed. *United States v. Huff*, (S. D. Ga. 1913) 206 Fed. 700.

"It was the purpose of the act to limit the power of federal courts to punish as for contempt criticisms of judicial decisions or judicial officers, and it seems clear that the limitation expressed in the words, 'so near thereto as to obstruct the administration of justice,' was meant to apply more particularly to that class of contempts and to acts of turbulence and disorder committed not in the presence of the court, nor so near thereto as to present an obstacle to the orderly administration of justice, and not to misbehavior which, at whatever place committed, would tend as completely to obstruct the administration of justice as if committed in the immediate presence or in the vicinity of the court. It is obvious that any wilful attempt improperly to influence jurors in the impartial discharge of their duties in a pending case, whether by attempts to bribe or otherwise, no matter where it is committed, is sufficiently near to the presence of the

court to tend to obstruct the administration of justice. It is not to be supposed that in enacting the statute Congress intended to deprive the federal courts of the power to deal summarily with persons who are attempting to corrupt jurors who have been called to decide pending cases, for without that power the courts would be practically helpless in the presence of an organized scheme, such as is shown by the evidence in this case, for the purpose of interfering with the administration of justice. There is every reason why the court should have the power to deal with such attempts at their very inception, so as to prevent the evil, and should not be confined to the remedy by indictment to punish such acts after the evil has been accomplished." *Kirk v. United States*, (C. C. A. 9th Cir. 1911) 192 Fed. 273.

It has been held that letters delivered to a judge at his home regarding a pending case, concededly so improper in their nature as to constitute contempt in other respects, are within this section as being misbehavior "so near to" the presence of the court as to constitute contempt. *United States v. Huff*, (S. D. Ga. 1913) 206 Fed. 700.

**Misstatement of effect of decision as contempt.**—The circuit court certainly had power at common law to punish as for a contempt a misstatement of the effect of its own decision. That power was, however, taken away from federal judges by section 725, because it is within none of the exceptions contained in the proviso. *Asbestos Shingle, Slate & Sheathing Co. v. H. W. Johns-Manville Co.*, (S. D. N. Y. 1911) 189 Fed. 611.

**Bankrupt's misappropriation of money.**—In the case of *In re Probst*, (C. C. A. 2d Cir. 1913) 205 Fed. 512, the court said: "It seems to us that the bankrupt's misappropriation of the money in his hands is not within the first of these clauses, 'misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice.' He is not an 'officer of the court' who has misbehaved in his official transactions. Our attention has been called to no writ, process, order, rule, decree, or command of the court which he has disobeyed. Had an order been made directing him to pay the amount of the misappropriated money into the registry of the court, and he had disobeyed such order, he would be within the provisions of the

section; but on the record presented here we cannot find authority for the entry of the order sought to be reviewed. This may be a highly technical ruling; but where Congress has been so industrious to restrict the natural inherent powers of a federal court, scrupulous attention to the limitations it has imposed would seem to be the proper course."

An attorney may be adjudged guilty of contempt for indulging in language in his argument to the jury which is disrespectful to the court. *In re Maury*, (C. C. A. 9th Cir. 1913) 205 Fed. 626.

The making of false affidavits and presenting them in court in opposition to a motion is punishable as contempt under this section as obstructing the administration of justice. *In re Steiner*, (S. D. N. Y. 1912) 195 Fed. 299.

Writing disparagingly of litigation does not constitute contempt if it is not directly calculated to incite disobedience to the decree entered. *United States v. Southern Wholesale Grocers' Ass'n*, (N. D. Ala. 1913) 207 Fed. 434.

**Purging by oath.**—The federal courts do not recognize the common-law rule of purgation, and leave the question of the commission of the contempt to be determined by the proof adduced upon the hearing. *United States v. Huff*, (S. D. Ga. 1913) 206 Fed. 700.

**Punishment.**—The character and purpose of the punishment distinguish civil and criminal contempts. The punishment for a civil contempt is remedial and for the benefit of the complainant in the contempt proceedings. The punishment for a criminal contempt is punitive—to vindicate the authority of the court. If imprisonment be imposed in a civil proceeding it must be coercive in its nature. The committal must stand only unless and until the defendant performs the affirmative act required by the court's order. When inflicted in a criminal proceeding it is fixed and certain as a punishment for completed disobedience of orders or for other past wrongdoing. *In re Kahn*, (C. C. A. 2d Cir. 1913) 204 Fed. 581.

Criminal contempts are reviewable only by writ of error. *Grant v. United States*, (1913) 227 U. S. 74, 33 S. Ct. 190, 57 U. S. (L. ed.) 423.

## Vol. IV, p. 552, sec. 737.

**Scope of section.**—The statute does not undertake to define what is an indispensable party, but merely undertakes to formulate principles already controlling in courts of equity, and applicable as well to other courts as to those of federal origin. It remains true, notwithstanding the act of Congress, that a circuit court can make no decree affecting the rights of an absent person, and

can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person, that complete and final justice cannot be done between the parties to the suit without affecting those rights. *Bogart v. Southern Pac. R. Co.* (1913) 228 U. S. 137, 33 S. Ct. 497, 57 U. S. (L. ed.) 768.

## Vol. IV, p. 554, sec. 740.

Patent suits are not governed by this section. *Cheatham Electric Switching Device Co. v. Transit Development Co.*, (E. D. N. Y. 1911) 191 Fed. 727.

## Vol. IV, p. 557, sec. 1.

**Appeals in admiralty to Circuit Court of Appeals.**—With practically substantial unanimity it has been held by the Circuit Courts of Appeals that the statute has no application to those courts. The provision was intended to relieve the Supreme Court of the

labor of looking into the facts found by the Circuit Court on appeals to that court from the District Court in admiralty cases. *The Nyack*, (C. C. A. 7th Cir. 1912) 99 Fed. 383.

## Vol. IV, p. 561, sec. 913.

Under this section, section 918 R. S., and rule 46 of the Supreme Court, a district court has authority to make a general rule providing for the issuance of commissions, either open or closed, to take testimony, which shall be executed as nearly as may be in accordance with the rules of the state of

which the district is a part, and under which rule a *dedimus potestatem* may be issued to examine certain persons in a foreign country upon oral interrogatories and cross-interrogatories. *The Titanic*, (S. D. N. Y. 1913) 206 Fed. 500.

## Vol. IV, p. 563, sec. 914.

The main purpose of the conformity act was to harmonize, as nearly as may be, the manner and form in which parties should present their claims and defense in the preparation of the trial of cases in the federal courts, to those prevailing in the state courts, and it was not the intention to require the federal courts to conform to state courts in all matters of detail respecting practice and procedure, at least as to such details the power to regulate which every court is presumed inherently to possess and exercise as from time to time the ends of justice may require. Such are the details respecting matters of continuance, intermediate motions, new trials, and other incidental powers respecting the control of the parties, or the situation of the case in the court. *Manitowoc Malting Co. v. Feuchtwanger*, (E. D. Wis. 1912) 196 Fed. 506. See also *Steers v. United States*, (C. C. A. 6th Cir. 1911) 192 Fed. 1, wherein it was held that matter pertaining to the conduct of the trial by the trial judge is not governed by this conformity act.

This section is applicable only to causes in the Circuit and District Courts, and not to causes in the appellate courts, of the United States. The practice in such cases in the federal courts is governed by the constitutional, statutory, and common-law provisions applicable to writs of error in actions at law in appellate courts of the United States, and by the rules of those courts. *Farmer v. Atlantic Coast Line R. Co.* (E. D. S. C. 1913) 205 Fed. 319.

Where the state statute or practice is not adequate to afford the relief which Congress has provided in a given statute, resort must be had to the power of the federal court to adapt its practice and issue its writs and administer its remedies so as to enforce the

federal law. *Buckeye Powder Co. v. E. I. Du Pont DeNemours Powder Co.*, (D. C. N. J. 1912) 196 Fed. 514.

**Supremacy of federal constitution and statute—Inconsistent with federal legislation.**—This statute does not require a federal court to follow the state procedure, where to do so would defeat the purpose or impair the effect of any congressional statute. *United States v. Beaty*, (W. D. Va. 1912) 198 Fed. 284.

**Applicability to patent suits.**—The section is applicable to the federal jurisdiction over patent cases, but it does not change the methods of trial of an issue at law under section 861, (3 Fed. Stat. Annot. 7) which requires a motion under section 724 (3 Fed. Stat. Annot. 2) or a bill of discovery to obtain the relief given in the New York courts by section 803 of the New York Code of Civil Procedure including the examination of property. *Cheatham Electric Switching Device Co. v. Transit Development Co.*, (E. D. N. Y. 1911) 190 Fed. 202.

In *Fischer v. Automobile Mfg. Co.* (E. D. N. Y. 1912) 199 Fed. 191 the court said: "The plaintiff has sued at law and expects to try the case before a jury. The procedure, therefore, while based upon jurisdiction in the federal courts over patent causes, will nevertheless conform, as near as may be, to the practice in the state courts, under section 914 of the Revised Statutes. But in spite of this the defendant would not be entitled to an examination of the parties, unless its application be brought under the sections of the Revised Statutes providing for the taking of testimony."

**Pleadings.**—*The federal court may refuse to follow the state statutes in matters of pleading where to do so will unduly extend the trial and involve the parties in great ex-*



pense. *Elk Garden Co. v. T. W. Thayer Co.*, (W. D. Va. 1913) 206 Fed. 212.

*Special plea in abatement to show want of jurisdiction.*—To the operation of this act of conformity there is an exception, and that is, where the defense is that the court has no jurisdiction of the defendant, that defense must be set up by a special plea in abatement. *Kimball v. Detroit, M. & T. Short Line Ry. Co.*, (N. D. Ohio 1910) 189 Fed. 409.

When the citizenship of the parties has been duly alleged, and the answer makes a general denial of each and every allegation in the petition, under the state law the citizenship of the parties has been put in issue, and must be proved in order to establish the jurisdiction of the court, though under the common-law rules of pleading the requi-

site citizenship of the parties, if duly alleged or apparent in the declaration, could not be denied by the defendant, except by plea in abatement, and was admitted by pleading to the merits of the action. *Lindsay-Bitton Live Stock Co. v. Justice*, (C. C. A. 8th Cir. 1911) 191 Fed. 163.

A *compulsory nonsuit* is not allowed in the courts of the United States, except where a statute of the state authorizes it; the practice of directing a verdict for the defendant when the evidence is clearly insufficient to support a verdict for the plaintiff having taken its place. *Board of Com'rs of Denver v. Home Savings Bank*, (C. C. A. 8th Cir. 1912) 200 Fed. 28.

This section is cited in *In re Kinney*, (C. C. A. 1st Cir. 1913) 202 Fed. 137; *Kraver v. Abrahams*, (E. D. Pa. 1913) 203 Fed. 782.

## Vol. IV, p. 577, sec. 915.

Personal service upon the defendant, or his personal appearance in the action, is a prerequisite to the issuance of an order of attachment against his property, and this is so notwithstanding the act of March 3, 1887, 24 Stat. 552, c. 373, as amended August 13,

1888, 25 Stat. 433, c. 866, 4 Fed. Stat. Annot. 386, sec. 1. *Big Vein Coal Co. of West Virginia v. Read*, (1913) 229 U. S. 31, 33 S. Ct. 694, 57 U. S. (L. ed.) 1053.

This section was cited in *M'Dermott v. Hayes*, (C. C. A. 1st Cir. 1912) 197 Fed. 129.

## Vol. IV, p. 585, sec. 918.

Rule 46 of the District Court, Southern District of New York, was authorized by this section. *Walker v. Monad Engineering Co.*,

(C. C. A. 2d Cir. 1912) 196 Fed. 206.

This section is cited in *In re Kinney*, (C. C. A. 1st Cir. 1913) 202 Fed. 137.

## Vol. IV, p. 587, sec. 921.

Reasonableness as determining question of consolidating.—In *Aetna Life Ins. Co. v. Moore*, (1913) 231 U. S. 543, 34 S. Ct. 186, wherein it appeared that the case was consolidated by the court below against objection, and this action of the lower court was assigned as error, the Supreme Court

said: "We doubt if it was reasonable to consolidate the cases. We need not, however, pass on that point, as we direct a new trial on other grounds."

This section is cited in *Rose Mfg. Co. v. E. A. Whitehouse Mfg. Co.*, (C. C. N. J. 1911) 193 Fed. 69.

## Vol. IV, p. 594, sec. 953.

*Disability defined.*—The disability of a judge under this section includes a case where the judge has resigned. *McIntyre v. Modern Woodmen of America*, (C. C. A. 6th Cir. 1912) 200 Fed. 1.

In *Sanborn v. Bay*, (C. C. A. 8th Cir. 1911) 194 Fed. 37, it appeared that the case was tried and judgment rendered on November 1, 1910, at the October term of the Circuit Court for the District of South Dakota, by Judge Carland, then District Judge for that district. After Judge Carland's appointment as Circuit Judge and designation to serve a term in the Court of Commerce, Judge Willard, the District Judge for the District of Minnesota, was by order of the senior Circuit Judge of that circuit designated and appointed to act as District Judge for the District of South Dakota until the appointment and qualification of Judge Carland's

successor. On March 24, 1911, at the instance of the plaintiff in error, Judge Willard, who was then presiding in the Circuit Court pursuant to his designation and appointment, allowed and signed a bill of exceptions in the case which both parties had agreed to as correct. In the Circuit Court of Appeals it was claimed that Judge Willard had no power to perform those acts and a motion was made to suppress the bill of exceptions and dismiss the writ of error. On this question the court said: "Was there any such disability on the part of Judge Carland as authorized his successor, Judge Willard, to sign and allow the bill of exceptions in question? When Judge Carland was appointed and confirmed Circuit Judge and accepted the position, he ceased to be District Judge of the court over which he presided when this case was tried. This seems

to be conceded. The only question is: Did he by becoming a Circuit Judge retain the jurisdiction which before that time he had over the case? By the act approved June 18, 1910 (chapter 309, 36 Stat. pt. 1, p. 539) the Court of Commerce was created. The President was authorized, by and with the advice and consent of the Senate, 'to appoint five additional Circuit Judges . . . who shall hold office during good behavior and who shall be from time to time designated and assigned by the Chief Justice of the United States for service in the Circuit Court for any District, or Circuit Court of Appeals for any Circuit or in the Commerce Court.' These judges were, in the first instance, to constitute the new Court of Commerce for terms from one to five years each respectively. They were not appointed to be Circuit Judges of any particular circuit. On the contrary, they were appointed to be Circuit Judges, subject to assignment from time to time by the Chief Justice for service either in some Circuit Court, some Circuit Court of Appeals, or in the Court of Commerce. It does not appear that Judge Carland has ever been assigned for service in the Circuit Court for the District of South Dakota, and certainly it does not appear that he had been so assigned prior to March 24, 1911, when Judge Willard allowed and signed the bill of exceptions in this case. We therefore conclude he then had no power to act judicially in any matters pending or requiring consideration in the court over which he formerly presided; and inasmuch as the allowance and signing of the bill of exceptions is a judicial act (*Maloney v. Adsit*, 175 U. S. 281, 20 Sup. Ct. 115, 44 L. ed. 163), he had no power to allow or sign it in this case. The remaining question is: Did this want of power or disqualification amount to a 'disability' within the meaning of the act of June 5, 1900, which enabled Judge Willard, his actual successor, to allow and sign the bill of exceptions in this case? The latter was authorized and empowered to do so only in case the judge who tried the case was 'by reason of death, sickness or other disability unable to allow and sign the same.' It is contended by defendant in error that the 'other disability' here referred to means a disability of like character to that arising from 'death or sickness' which immediately precede the words 'other disability,' and they cite the case of *American Bonding & Trust Co. of Baltimore v. Takahashi*, 49 C.

C. A. 267, 111 Fed. 125, in support of their contention. This case involved the question whether the casual or temporary absence of the trial judge from his circuit authorized a judge, assigned to aid or assist him, to allow and sign a bill of exceptions in a case tried before the regular judge himself. It was held in that case that such casual absence did not amount to the 'disability' contemplated by the amended act of June 5, 1900, and some expressions are found in the opinion sustaining the contention of the defendant in error in this case. While we might well agree with the conclusion reached in that particular case, we cannot think the act of 1900 was intended by Congress to limit the 'disqualification' referred to, to one occasioned by physical or mental ailment. This in our opinion would be too narrow a construction. It would not seem to accomplish the legislative purpose or afford the relief which Congress intended to afford by the language actually employed. Inability to perform duty occasioned by death or sickness was obviously not the only disability Congress had in mind. It employed a comprehensive term sufficient to cover all disqualifications, and we do not think the artificial rule noscitur a sociis invoked by counsel was ever intended to be employed to thwart an obvious purpose. Nothing in fact could create a more effective 'disability' than an utter disqualification of the presiding judge to perform the act which Congress attempted to provide for. We accordingly hold that a voluntary resignation of his office (which is practically the situation in this case) by a trial judge is an effective disqualification within the meaning of the act of 1900."

**New trial on resignation of trial judge.**—In *Brent v. Chas. H. Lilly Co.*, (W. D. Wash. 1913) 202 Fed. 335, the court said: "There was a full stenographic report of the proceedings of the trial, the notes of which have now been extended. The defendant is therefore not entitled, on account of the resignation of the trial judge prior to the ruling on the motion for a new trial and settlement of the bill of exceptions, to a new trial as a matter of right."

The District Court of the United States for Porto Rico is within the terms of this statute. *Guardian Assur. Co. of London v. Quintana*, (1913) 227 U. S. 100, 33 S. Ct. 236, 57 U. S. (L. ed.) 437.

## Vol. IV, p. 596, sec. 954.

This is substantially section 32 of the act to establish the judicial courts of the United States, passed at the first session of the first Congress and was based on the English statute of 32 Henry VIII. *Duluth St. Ry. Co. v. Speaks*, (C. C. A. 8th Cir. 1913) 204 Fed. 573.

**Liberal construction.**—This section has been liberally construed by all the federal courts in favor of allowing amendments. *Portland Gold Mining Co. v. Stratton's In-*

*dependence*, (D. C. Colo. 1912) 196 Fed. 714.

**Names of parties.**—To the same effect as the original note see *Reardon v. Balakiala Consol. Copper Co.*, (N. D. Cal. 1912) 193 Fed. 189; *St. Louis & S. F. R. Co. v. Herr*, (C. C. A. 5th Cir. 1912) 193 Fed. 950.

It is permissible under this section to strike out the name of one defendant where the action is against several, even though

the cause of action alleged against the original defendants stated a joint liability only, but there is no authority which permits the striking out of a sole defendant and the substitution in his stead of another. *Portland Gold Min. Co. v. Stratton's Independence*, (D. C. Colo. 1912) 196 Fed. 714.

An amendment which without modifying or enlarging the facts upon which an action is based, in effect merely indicates the capacity in which the plaintiff is to prosecute the action is clearly within the section. *Missouri, K. & T. R. Co. v. Wulff*, (1913) 226 U. S. 570, 33 S. Ct. 135, 57 U. S. (L. ed.) 355.

**Adding jurisdictional averments.**—The objection that diversity of citizenship was not alleged in the complaint is a defect that may be cured after verdict, by amendment, under the provisions of section 954. *Atchison, T. & S. F. Ry. Co. v. Gilliland*, (C. C. A. 9th Cir. 1912) 193 Fed. 608.

## Vol. IV, p. 612, sec. 1000.

**Taking and approval of bond.**—"The supersedeas bond, to be effectual and operate as such, must be approved by the judge who allows the appeal and signs the citation. The statute so reads, and the Supreme Court has so held. If not approved by him or a defective bond is filed, a judge of the appellate court probably may approve or take such action as will cure the defect." *Gay v. Hudson River Electric Power Co.*, (N. D. N. Y. 1911) 190 Fed. 812.

**Entering judgment on bond.**—Where, on writ of error, the judgment is affirmed, the practice is to enter judgment on the bond

A writ of error may be amended by bringing a new party defendant. *Teel v. Chesapeake & O. Ry. Co.*, (C. C. A. 6th Cir. 1913) 204 Fed. 914, wherein the court said: "Since the enactment of the first Judiciary Act of the United States, liberal statutory provisions have been maintained for curing defects of this character wherever proceedings on error or appeal have been instituted in due time, though defectively, and could be remedied without causing injustice; and numerous illustrations may be found of a tendency in the courts to apply such legislation in the spirit in which it was evidently enacted."

The Circuit Court of Appeals is without jurisdiction to allow a petition for an amendment of the record of the trial court. *Jackson v. Gardiner Inv. Co.*, (C. C. A. 1st Cir. 1912) 200 Fed. 120.

## Vol. IV, p. 615, sec. 1001.

**Action against Soldiers' Home.**—On an appeal taken by direction of the Department of Justice in an action by the National Home for Disabled Volunteer Soldiers on a building contract no costs will be allowed against

provided for in this section on motion in the trial court, after the mandate goes down from the appellate court, and not in the appellate court. *City of Clarksdale v. Williamson*, (C. C. A. 5th Cir. 1912) 194 Fed. 412.

A surety is discharged if the plaintiff in error gets the judgment reversed in the Circuit Court of Appeals and the defendant in error, although he might have done so, fails to carry the case to the Supreme Court. *Anderson v. Messenger*, (N. D. Ohio 1913) 208 Fed. 75.

the Home on affirmance of the judgment below. *National Home for Disabled Volunteer Soldiers v. Parrish*, (C. C. A. 6th Cir. 1912) 194 Fed. 940.

## Vol. IV, p. 617, sec. 1005.

**When amendment allowed.**—"The naming of the defendant in the writ of error and naming and serving him in the citation is not necessary to the jurisdiction of the appellate court. The jurisdictional feature would appear to be that the writ of error to a judgment intended to be corrected should have actually been sued out within the time limited. If it is actually sued out within the time limited, although it may be defective, yet such defects, even to the extent of inserting a party omitted before, may, under section 1005, be corrected, although the

period within which a new writ of error could be sued out from the date of the original judgment has elapsed. When, however, the amendment is allowed, any necessary party to the appellate proceedings who was omitted from the writ of error and citation must be notified and brought before the court. As the judgment to be awarded by the appellate court may affect his interests, he is entitled as of right to notice and to be heard upon the appeal." *Gilbert v. Hopkins*, (C. C. A. 4th Cir. 1912) 198 Fed. 840.

## Vol. IV, p. 618, sec. 1007.

**When time begins to run.**—A judgment or decree does not become final for the purposes F. S. A. Supp.—45.

of a writ of error or appeal until the motion for a rehearing which the court sees

fit to entertain is disposed of. A supersedeas cannot be secured until an appeal is taken or a writ of error is sued out, and this cannot be done until a motion for a new trial, if made, is denied. *Sanborn v. Bay*, (C. C. A. 8th Cir. 1911) 194 Fed. 37.

A writ of error does not operate as a supersedeas unless it is filed in the clerk's office within the time fixed by the statute. The time is computed from the date of the judgment. It is well settled that, . . . after the expiration of the 60 days, neither a justice of the circuit court, nor a judge thereof, nor a judge of the circuit court of appeals has the power to allow a supersedeas. *Robinson v. Furber*, (S. D. Tex. 1911) 189 Fed. 918. .

In *Title Guaranty & Surety Co. v. United States*, (1912) 222 U. S. 401, 32 S. Ct. 168, 56 U. S. (L. ed.) 248, it is held that a motion to vacate a supersedeas must prevail, it appearing that although the writ of error was allowed and lodged in the office of the clerk more than six months after the entry of the judgment, the bond was approved to operate as a supersedeas. The court said: "Under these circumstances it is apparent that the order for supersedeas was improvidently granted. No other conclusion is possible in view of § 1007, Rev. Stat., making the allowance of a writ and the lodgment of the same in the office of the clerk within sixty days after the date of a judgment an essential prerequisite to the granting of a supersedeas. It is, nevertheless, insisted, first, that this case is not within the rule, because as the Judiciary Act of 1891 (March 3, 1891, c. 517, 26 Stat. 826) by the sixth section allows one year for the prosecution of error from this court to the judgments of

the Circuit Court of Appeals and in express terms fixes no period for the allowance of a supersedeas, therefore, as the supersedeas was allowed within the year, it was in time. This, however, ignores the provision of § 11 of the act of 1891, as follows: 'And all the provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the Circuit Courts of Appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error.' . . . *Hudson v. Parker*, (1895) 156 U. S. 277, 282. Nor would a different result arise from the concession argumentatively that from a consideration of the context of § 11 of the act of 1891 the passage which we have quoted should be restricted to writs of error from the Circuit Courts of Appeals to inferior courts and to appeals from such courts to the Circuit Courts of Appeals. Nothing is contained in the act of 1891 regulating the time when an appeal from the Circuit Court of Appeals to this court or a writ of error from this court to such courts must be taken in order to operate as a supersedeas. The general provision of Rev. Stat. § 1007 under the hypothesis stated would therefore be applicable. It thus results that the mistake in allowing the supersedeas in the case which is before us is equally demonstrated by the correct application of the act of 1891 as well as by yielding to the erroneous construction of that act which is pressed in argument."

## Vol. IV, p. 624, sec. 1011.

Application to case coming from state court.—"This provision has been a part of the judiciary acts from the beginning, and often has been applied upon writs of error to the circuit and district courts, but never to a

case coming here from a state court." *Buck Stove & Range Co. v. Vickers*, (1912) 226 U. S. 205, 33 S. Ct. 41, 57 U. S. (L. ed.) 174.

## Vol. IV, p. 675, sec. 591.

This section is cited in *May v. United States*, (C. C. A. 8th Cir. 1912) 199 Fed. 53.

## Vol. IV, p. 678, sec. 601.

What constitutes being "concerned in interest" and "of counsel."—In *Epstein v. United States*, (C. C. A. 7th Cir. 1912) 196 Fed. 354, it appeared that the plaintiff in error filed an affidavit in which he alleged that the judge was conducting a hearing in a bankruptcy case for the purpose of discovering assets; that at the conclusion of the hearing the judge appeared to be angry and said in the presence and hearing of affiant, "This is a nasty piece of business; this estate has

been looted by some one;" that the judge then turned to a gentleman standing at the bar and said, "Use what is left of this estate, even to the last penny, to investigate this matter, and if any one, whoever he may be, has committed any act that can be reached and punished under the law, institute proceedings against him." On this it was asserted that the judge was "concerned in interest" in the case, and became "of counsel" for the prosecution. But the court said:

"Official duties of the trial judge include his instructions to grand juries to investigate alleged violations of law, which may be brought to their attention by the district attorney or otherwise, and of whose actual existence the judge personally knows nothing. If in the course of official business in court the judge sees that an offense against the Penal Code has been or is being committed, does his official duty require him to ignore the matter? No, we say. For him to fail to direct an investigation to be made would

be not merely an abandonment of his post as a minister of the law, but as well an implied approval or condonation of the offense. To direct a prosecuting officer (and presumably the 'gentleman standing at the bar' was an officer who pursued the inquiry which resulted in the indictment) to inquire into a matter occurring in court, certainly no more than charging a grand jury makes the judge 'concerned in interest' or 'of counsel' for the prosecution within the meaning of section 601."

## Vol. X, p. 199. [Act of Feb. 11, 1903.]

The special provisions of the Expedition Act requiring in a particular class of cases the organization of a court constituted in a particular manner were not repealed by the Judicial Code. *Ex parte United States*, (1913) 226 U. S. 420, 33 S. Ct. 170, 57 U. S. (L. ed.) 281, wherein the court said: "This is the only question, because if that act was not repealed by the Code, then its provisions amount to an assignment by operation of law of the circuit judges to sit as judges of the District Court for the purpose of discharging the duties imposed by the act. When the issue is thus narrowed solution is readily reached by the application of the elementary rule that a special and particular statutory provision affording a remedy for particular and specific cases is not repealed by a general law unless the repeal be express or the implication to that end be irresistible. *Petri v. F. E. Creelman Lumber Co.*, (1905) 199 U. S. 487, 497. That the new District Court created by the Judicial Code was vested with the duty of hearing and disposing of the cases provided for in the Expedition Act as the successor of the formerly existing Circuit Court, as we have

already stated, is undoubted. The mere fact that the Expedition Act in terms refers to the organization of a Circuit Court would be, as a general rule, under the circumstances, of no importance, and becomes absolutely without significance in view of the express provision of Chap. XIII, section 291, of the Judicial Code, saying: 'Wherever, in any law not embraced within this act, any reference is made to, or any power or duty is conferred or imposed upon, the Circuit Courts, such reference shall, upon the taking effect of this act, be deemed and held to refer to, and to confer such power and impose such duty upon, the District Courts.'" Section 291 will be found in *Fed. Stat. Annot.*, 1912 Supp. p. 249.

The entry of a final decree in conformity with specific directions of the supreme court does not come within the provision of this section requiring a hearing before at least three circuit judges, although a certificate of expedition was filed in the trial court when the suit was originally instituted. *United States v. Terminal Ass'n of St. Louis*, (E. D. Mo. 1912) 197 Fed. 446.

## 1909 Supp., p. 291. [Act of April 14, 1906.]

**Effect of amendment.**—In the federal courts an appeal, as a general rule, lies only from a final decree. It is otherwise in the exceptional instances specified in § 7 of the Court of Appeals Act as amended. *Rexford v. Brunswick-Balke-Collender Co.*, (1913) 228 U. S. 339, 33 S. Ct. 515, 57 U. S. (L. ed.) 864; *United States Fidelity & Guaranty Co. v. Bray*, (1912) 225 U. S. 205, 32 S. Ct. 620, 56 U. S. (L. ed.) 1055.

The thirty-day limitation applies only to appeals thereunder to the Circuit Court of Appeals. *United States Fidelity & Guaranty Co. v. Bray*, (1912) 225 U. S. 205, 32 S. Ct. 620, 56 U. S. (L. ed.) 1055.

**Interlocutory decree dissolving or refusing to grant a temporary injunction or refusing to appoint a receiver.**—In *Texas Co. v. Cen-*

*tral Fuel Oil Co.*, (C. C. A. 8th Cir. 1912) 194 Fed. 1, the court said: "Section 7 of the act of March 3, 1891, as amended by the acts of February 18, 1895, June 6, 1900, and April 14, 1906 (34 Stat. 116), in force at the time this appeal was granted, did not provide for an appeal from an interlocutory order or decree dissolving or refusing to grant a temporary injunction, or refusing to appoint a receiver, and this court would therefore be without jurisdiction to review such an interlocutory decree if an appeal had been taken from that alone. But, as this is an appeal from a final decree dismissing the bill, it brings the whole case here, including all interlocutory orders made during the progress of the case."

1909 Supp., p. 292. [*Act of March 2, 1907.*]

**In general.**—The act expressly provides for a writ of error, to be taken by the United States from the District Court direct to the Supreme Court, from a decision or judgment sustaining a demurrer to an indictment, "where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded." *United States v. Wright*, (1913) 229 U. S. 226, 33 S. Ct. 630, 57 U. S. (L. ed.) 1180.

This act was not repealed by the Judicial Code of March 3, 1911, c. 231, 36 Stat. 1087, Fed. Stat. Annot. Supp. 1912, p. 132. *United States v. Winslow*, (1913) 227 U. S. 202, 33 S. Ct. 253, 57 U. S. (L. ed.) 481.

**Scope of act.**—In *United States v. Carter*, (1913) 231 U. S. 492, 34 S. Ct. 173, the court commenting on the authority given it under the Criminal Appeals Act, said: "It is settled that under the Criminal Appeals Act we have no authority to revise the mere interpretation of an indictment and are confined to ascertaining whether the court in a case under review erroneously construed the statute. *United States v. Keitel*, (1908) 211 U. S. 370; *United States v. Stevenson*, (1909) 215 U. S. 190, 196. Our power to review the action of the court then in this case can alone rest upon the theory that what was done amounts to a construction of the statute. But it is obvious that the ruling that the counts which were quashed were bad in law did not necessarily involve a construction of the statute, and may well have rested upon the opinion of the court as to the mere insufficiency of the indictment."

The interpretation of an indictment by the

lower court must be accepted by the Supreme Court and cannot be reviewed under this act. *United States v. Patten*, (1913) 226 U. S. 525, 33 S. Ct. 141, 57 U. S. (L. ed.) 333, 44 L.R.A.(N.S.) 326, followed in *United States v. Winslow*, (1913) 227 U. S. 202, 33 S. Ct. 253, 57 U. S. (L. ed.) 481.

"This statute seems to require an explicit declaration of the law upon which an indictment is based and a ruling on its validity or construction. To contend for one law as applicable in the trial court and another law in the appellate court would seem not only to be opposed to the requirement of the statute but to be inconsistent with orderly procedure and to confound the relation of trial and appellate tribunals." Mr. Justice McKenna in *United States v. George*, (1913) 228 U. S. 14, 33 S. Ct. 412, 57 U. S. (L. ed.) 712.

A writ of error will be dismissed if it appears that the judgment of the court below turned not upon any controverted construction of a statute but merely upon the meaning to be given the indictment. *United States v. Moist*, (1914) 231 U. S. 701, 34 S. Ct. 255.

A decision entered on a motion to quash service, which motion was treated as a demurrer to an indictment, and was granted on a certain construction given to a federal statute upon which the indictment was founded, is a decision from which a writ of error may be taken direct to the Supreme Court. *United States v. Adams Exp. Co.*, (1913) 229 U. S. 381, 33 S. Ct. 878, 57 U. S. (L. ed.) 1237.

## 1912 Supp., p. 135, sec. 14.

**Effect of illegal designation.**—Where the designation of a judge is unauthorized his authority to make any order or decree acting thereunder may be excepted to and thus made the subject of review in due course of law. But mandamus does not lie to compel the judge making the designation to un-

do what he has done, if though he committed a mistake in making the designation, it is made in the course of the exercise of his legitimate jurisdiction under the above section. *Ex parte American Steel Barrel Co.*, (1913) 230 U. S. 35, 33 S. Ct. 1007, 57 U. S. (L. ed.) 1379.

## 1912 Supp., p. 137, sec. 21.

A "personal" bias or prejudice was intended to be relieved against under this section. *Henry v. Speer*, (C. C. A. 5th Cir. 1913) 201 Fed. 869, wherein the court said: "In the enactment of section 21 the plain purpose of the Congress was to afford a method of relief through which a party to a suit may avoid trial before a judge having a *personal* bias or prejudice against him or in favor of the opposite party. That sought to be a relieved against is a personal bias or prejudice—a bias or prejudice possessed by the judge specifically applicable to or directed against

the suitor making the affidavit or in favor of his opponent. The statute qualifies the words bias and prejudice by the single word 'personal.' The deponent in the affidavit filed below failed to use the qualifying word 'personal' in making oath to the existence of bias or prejudice on the part of the judge before whom the case was to be tried. It is contended that the use of the word in the statute, in view of the context, is merely cumulative and tautological; that it may be omitted from the affidavit, and still the quality of bias or prejudice will be revealed to

be personal. But the statute requires the use of the word, and it may not be avoided. Owing to the nature of the statute and its liability to abuse, we are inclined to hold those seeking to avail themselves of it to a strict and full compliance with its provisions. The affidavit filed below illustrates the necessity for such compliance. Its perusal reveals the facts and reasons advanced in support of the charge of bias and prejudice do not tend to show the existence of a personal bias or prejudice on the part of the judge toward petitioner but rather a prejudgment of the merits of the controversy and 'against deponent's right to recover.' Section 21 is not intended to afford relief against this situation."

**Constitutionality.**—If this statute is construed literally to require a judge before whom an action or proceeding is to be tried to designate some other judge to try the case upon the filing of an affidavit of prejudice regardless of whether the allegation is sustained by the facts of the case, it is unconstitutional. *Ex parte N. K. Fairbank Co.*, (M. D. Ala. 1912) 194 Fed. 978, wherein the court said: "To say that the challenge itself, regardless of the grounds for it, itself works a disqualification of the judge because it puts him in a class which it is the policy of the Constitution not to permit to try such questions, is to beg the whole question. The contention rests on a wholly unfounded premise. The judge of a federal court holds his office during good behavior, and the constitutional provisions regarding his induction into office and his displacement therefrom forbid that he be stripped of any of his functions except upon conviction by the Senate of high crimes and misdemeanors after he has had opportunity to be heard; or in consequence of the existence of a peculiar state of facts in particular cases declared by law and ascertained by the courts. The constitution and laws require that he sit in every case in his court, unless he is excluded for causes which disqualify him, the nature of which must be ascertained by law, and the existence of which must be declared by some judicial tribunal. Congress has no power to change the Constitution and revise its policy or to get rid of a judge in any case, in any other way than the Constitution provides. The judge's general fitness and qualification are adjudged by the operation of the Constitution itself when he is appointed, confirmed, commissioned, and qualified. They cannot be gainsaid or attacked except by impeachment as the Constitution provides. If he be an improper person to exercise his functions in any particular case, it must be because of the existence of facts which under the law unfit him to impartially administer justice in it, and the existence of these causes must be ascertained by some judicial tribunal. What these causes are we have seen in an earlier part of this opinion. Congress has no power to declare, what the legislation in some of the states necessarily asserts, that a competent judge is disqualified because a suitor swears that he believes he is. Neither,

when the litigant assigns reasons, can Congress enact that the assignment of such reasons, if they are insufficient in law and morals to prove disqualification, shall be taken to have conclusively proved it. The reasons alleged must be substantial and sufficient, and their truth must be ascertained by a proper tribunal, before the judge can be required to abdicate his functions. Congress has no power to leave it to the arbitrary discretion of a litigant to determine whether or not the judge is a fit person to preside in a particular case, and make his affidavit work a disqualification, although its allegations may be insufficient in law and untrue in point of fact. To so hold would be to decide that under the Constitution and laws a litigant may disqualify a competent judge whenever he chooses, if he is willing to run the risk of prosecution for perjury; and this, too, in the teeth of the Constitution, which provides other and exclusive modes for determining such questions. . . . No sophistry can conceal the plain situation, if the command of the statute be followed. It compels the judge, on presentation of the affidavit and application with proper certificate of counsel and compliance with the other requisites of the statute, to vacate the bench without any inquiry or investigation, as to the truth or effect of the facts alleged in the petition by the judge in question or any other judicial authority. The affidavit maker in fact, though not in name, puts on the judicial robes and excludes the presiding judge and all other judicial authority from any voice in determining the matter, and by the mere filing of his affidavit renders judgment of disqualification and executes it. . . .

"The fact that it is unpleasant to a judge whose impartiality is questioned to pass upon an allegation of his unworthiness to try a case, or that he is not the fittest trier of such questions, does not authorize Congress to disregard the limitations of the Constitution and confer upon the litigant the arbitrary power to condemn the judge and decide the matter in his own favor. There must be some trier of the question, and from the necessity of the case it must be the judge himself, unless it is tried by some other judge or court. An awkward situation does not authorize a violation of the Constitution to remedy it. The remedy lies close at the hands of the legislative power. It is the duty of the legislature not only to see that the courts are pure and impartial, but that justice shall be so administered that they shall be free from suspicion. I do not doubt the power of Congress, when a judge is challenged for personal prejudice or bias, to require that he shall proceed no further until the truth of the challenge is investigated and determined by another judge, and to enact that the judge in question shall preside or not, in the future stages of the litigation, as the other judge may find to be just and right. Beyond this Congress has no constitutional warrant to go, or to make the affidavit of a suitor automatically work out a disqualifi-

cation of a judge throughout every stage of his case. The inherent powers of courts and judges set up to administer the judicial power of the United States have always been held to include ample authority to protect them against insult and assault, whether by physical violence or contumelious behavior and words, and it has been held time and time again that the possession of such powers is essential to their independence and well-being. In a petition giving facts to show personal bias or prejudice, an unscrupulous litigant, if his passions or those of his attorney permit the one to swear, and the other to certify that he swears in good faith, may willfully and falsely charge the presiding judge with high crimes and misdemeanors or other disreputable things without a semblance of truth or decent excuse for doing so. Shackled by this statute, if it be valid, an innocent judge is compelled to enter the slanders upon the records of the court and slink from the discharge of his duty in the particular case as though he were already convicted of crime. If the courts are to last, if they are to perform their functions under the Constitution and exercise the powers committed to them, no such summary way of dealing with, and it may be destroying, a judge can have the force of law. While any conscientious judge would gladly welcome any effort on constitutional lines to remedy the evils at which this statute is aimed, and would feel a sense of relief if the statute were so altered as to conform to the Constitution and thus free him from the embarrassments resulting under the present statute, yet, when this is attempted by a statute which outlaws the judge and drives him from the bench in the particular case on the allegations of an affidavit, whether true or false, which condemn him without any defense or hearing of any kind as an unfaithful and incompetent judge, a court which is mindful of its obligation to the Constitution and the sacredness of its oath of office must decline to give the statute any effect and treat it as a nullity. If the judge is suspected, whether rightfully or wrongfully, of bias or prejudice, the existence of that bias or prejudice must be ascertained by some judicial authority, and the judge must not be left defenseless against such assaults because a litigant in his court makes an *ex parte* affidavit. If the matter be referred to some other judge, all the rights of the litigant are preserved and also the dignity and honor of the courts. This is not the case under the present statute. It makes the affidavit maker, in effect, lawmaker, judge, and executioner. The judge may be entirely blameless, but he is not permitted to defend himself or show the falsity of the accusation, and thus is branded for all time on the records of his court as an unworthy judge."

**Retroactive effect.**—In *Henry v. Speer*, (C. C. A. 5th Cir. 1913) 201 Fed. 869, it was contended that because the alleged action in which the affidavit was filed arose and was commenced prior to the time the Judicial Code became effective the provisions

of section 21 might not be availed of therein to disqualify the judge. The court answering said: "The contention is based on section 29 of the Code, which declares in part: 'The repeal of existing laws, or the amendments thereto, embraced in this act shall not affect any act done, or any rights accruing or accrued, or any suit or proceeding . . . pending at the time of the taking effect of this act, but all such suits and proceedings for acts arising or for acts done prior to such date, may be commenced and prosecuted within the same time, and with the same effect, as if said repeal or amendment had not been made.'"

"This section manifestly pertains to the acts and rights of parties as those acts and rights are involved in the commencement and prosecution of suits and controversies. They may commence and prosecute their causes 'within the same time and with the same effect as if said repeal and amendment had not been made.' Section 21 does not affect the acts done by nor the rights accruing to litigants in the sense this language is used in section 299. We are of opinion that section is entirely irrelevant in this connection. Section 21 has to do with the personality of the judge before whom the suit is to be tried and rights established. It is remedial in its nature; that is, it is meant to afford relief from adventitious predicaments which fair-minded men recognize should be relieved against, when they in fact exist. In affording this relief the Congress has expressed itself plainly and perspicuously. It is not difficult to arrive at its true intent and meaning. We hold the provisions of section 21 to be available, even though the cause of action in which they are invoked arose and was commenced before the time the Judicial Code became effective." But in *Henry v. Harris*, (S. D. Ga. 1912) 191 Fed. 868, it was held that cases pending or causes of action originating before the first of January, 1912, when the Judicial Code became effective, are not governed by this section.

**Disbarment proceedings.**—In *In re Ulmer*, (N. D. Ohio 1913) 208 Fed. 461, the section was held not applicable to disbarment proceedings under the circumstances of the case.

**Direct and criminal contempt.**—This section cannot be applied to the case of a direct and criminal contempt. In *re Ulmer*, (N. D. Ohio 1913) 208 Fed. 461.

"The basis of the disqualification is that 'personal bias or prejudice' exists, by reason of which the judge is unable to impartially exercise his functions in the particular case. It is a provision obviously not applicable save in those rare instances in which affiant is able to state facts which tend to show not merely adverse rulings already made, which may be right or wrong, but facts and reasons which tend to show personal bias or prejudice. It was never intended to enable a discontented litigant to oust a judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the pending case. Neither was it intended to paralyze the ac-



tion of a judge who has heard the case, or a question in it, by the interposition of a motion to disqualify him between a hearing and a determination of the matter heard. This is the plain meaning of the requirement that the affidavit shall be filed not less than ten days before the beginning of the term." Mr. Justice Lurton in *Ex parte American Steel Barrel Co.*, (1913) 230 U. S. 35, 33 S. Ct. 1007, 57 U. S. (L. ed.) 1379.

**Certification of bill of exceptions.**—Where a suggestion is made under this section that a judge is disqualified, and he overrules it and proceeds to try the case or to conclude it if he is engaged in trying it, so far as that action can be taken to the proper appellate court for review, the judge who tries the case can certify to what occurred on the trial for the purpose of allowing the same to be so reviewed. *Ex parte Glasgow*, (N. D. Ga. 1912) 195 Fed. 780.

**Counsel of record.**—A certificate of good faith required by this section is not made by "counsel of record" where it appears that the person who made it has never been admitted to practice in the District Courts, has never signed the roll of its attorneys, or taken the oath as required by its rules, and has never been recognized by the court as a counsellor thereof in any proceedings had in the pending or any other cause in such court. *Ex parte N. K. Fairbank Co.* (M. D. Ala. 1912) 194 Fed. 978.

**Affidavit strictly construed.**—An affidavit of the character defined by section 21 must be strictly construed, and must strictly conform to the statute. *Henry v. Harris*, (S. D. Ga. 1912) 191 Fed. 868.

**Time of filing affidavit.**—An affidavit such as is provided for in this section cannot be filed after a case has been tried and there is a verdict, and where a motion in arrest and for a new trial has been made, and the attempt by the affidavit is to disqualify the judge from concluding the case, ruling on these motions, and sentencing the defendant if he overruled them. *Ex parte Glasgow*, (N. D. Ga. 1912) 195 Fed. 780.

**Sufficiency of affidavit.**—It is not sufficient to disqualify a judge under section 21 to allege that he has formed an opinion as to the law of the case, and the rights of the parties, when it has been judicially formed and published for legitimate purposes. The affidavit must specifically allege personal prejudice and bias on the part of the judge toward the party seeking his disqualification. *Henry v. Harris*, (S. D. Ga. 1912) 191 Fed. 868.

The affidavits required by this section to disqualify a judge are fatally defective where they do not charge as a matter of fact that the judge "has a personal bias or prejudice against the defendant or in favor of the plaintiff" and affirm in legal effect only that affiants are "informed and believe" such is the fact, and are unaccompanied by any statement "of the facts and reasons for the belief." *Ex parte N. K. Fairbank Co.*, (M. D. Ala. 1912) 194 Fed. 978.

**Affidavit alone insufficient.**—An affidavit that a judge before whom an action on proceeding is to be tried is biased or prejudiced without a showing of facts to sustain the allegation is not sufficient under this section. *Ex parte N. K. Fairbank Co.*, (M. D. Ala. 1912) 194 Fed. 978, wherein the court said: "The section, on its face, is a peremptory command 'whenever a party shall make and file an affidavit,' conforming to the terms of the statute, that the presiding judge shall 'proceed no further,' and that 'another judge shall be designated to try the case.' The decisions in states having statutes similar to the Judicial Code are conflicting. The courts in some of the states hold that the affidavit shuts off all judicial inquiry, and, even though the facts alleged may be insufficient to show bias or prejudice, that the judge is bound to grant the application. In other jurisdictions it is held that, while the truth of the facts alleged cannot be contested, yet if the facts alleged, taking them to be true, do not show personal bias or prejudice, the application should be refused. Other cases hold that the truth of the affidavit is subject to contest, to be tried before the judge in question, and upon the proof made before him the application must be granted or overruled. The law and public opinion have long since departed from the policy of bygone ages, illustrated in the statutes of Richard and Henry, that a judge ought not to exercise his functions in the county where he was born, or in the place 'he doth inhabit.' Ever since the courts of the United States were organized, the laws of the United States have provided that a judge 'shall be appointed for each district,' save in exceptional cases, and made the judge guilty of a high misdemeanor if he did not reside in his district, or one of them, if he was judge of more than one. If the judge 'lives, moves and has his being' among the people, he must in the course of his life imbibe bias or prejudice in the popular sense as to very many persons. 'Prejudice or bias,' in the ordinary sense of the term, and not censurable in its character, may arise from innumerable conditions in life. A man ordinarily has a bias in favor of the political party to which he belongs, or a prejudice in some degree against its opponents. The same thing is true in a degree as to the church of which he is a member, and he is generally prejudiced or biased more or less about his race, his country, and its institutions. He cannot avoid forming to some extent bias or prejudice regarding men and affairs in nearly every matter as to which he has to inform his judgment or regulate his conduct in the walks of daily life. He must have neighbors, friends, and acquaintances, business and social relations, and be a part of his day and generation. Evidently the ordinary results of such associations and the impressions they create in the mind of the judge are not the 'personal bias or prejudice' to which the statute refers. The impressions, whether favorable or unfavorable, of men, which a judge receives, or his con-

victions about them growing out of his contact or acquaintance with them in the ordinary walks of life, cannot fall within the evil the statute designs to suppress, unless they are so strong that they result in personal bias or prejudice as to individual suitors, dominating the judge to such an extent that they beget a mental or moral condition which makes the judge willing to do wrong although he sees the right, regarding the justiciable matters brought before him, or else, though the judge's intentions be good, render him incapable of rightly seeing the justice of the cause, or impartially enforcing the right involved as between the parties to the suit. It is not the proper construction of the Judicial Code to hold that Congress intended that any reason that a litigant may choose to assign in his affidavit, however absurd or ridiculous in point of law or morals, will disqualify the judge, or render it improper for him to preside in the case. . . . It is not proof or evidence of the unfitness of a judge in a particular case that an honest but suspicious suitor, or a vicious and dishonest one, swears that he cannot obtain justice before him. Such an affidavit proves only the animus or belief of the man who makes it. It does not prove partisanship or personal prejudice or bias in the judge. If the judge is not biased or prejudiced in fact, a false allegation or imputation that he is, made in the affidavit of a litigant, cannot change the actual mental

or moral status of a judge or unfit him to try a particular case. Affidavits cannot change a pure and impartial judge into a bad official. It is the existence of bias or prejudice, and not the charge, whether honestly or dishonestly made, which constitutes the disqualification. A man by an ex parte affidavit may conclude his own rights or destroy his own reputation, but he can never conclude the rights of others or impose a discreditable status upon a public official by his mere statement of that which does not exist, however solemnly alleged in an ex parte affidavit. To hold otherwise would be to strike down a great principle of justice, which cannot be abandoned without destroying the very foundations of our jurisprudence."

**Duty of judge to determine sufficiency of affidavit.**—Upon the making and filing by a party of an affidavit under the provisions of section 21, of necessity there is imposed upon the judge the duty of examining the affidavit to determine whether or not it is the affidavit specified and required by the statute and to determine its legal sufficiency. If he finds it to be legally sufficient then he has no other or further duty to perform than that prescribed in section 20 of the Judicial Code. He is relieved from the delicate and trying duty of deciding upon the question of his own disqualification. *Henry v. Speer*, (C. C. A. 5th Cir. 1913) 201 Fed. 869.

## 1912 Supp., p. 139, sec. 24, par. First.

**Amount in controversy.**—In view of section 299 of this act, the federal courts have jurisdiction of actions for less than \$3,000 if they were pending or had accrued before Jan. 1, 1912, the date the act went into effect. *McKernan v. North River Ins. Co.*, (E. D. Wash. 1912) 206 Fed. 984.

Where the writ claims \$3,000 a removal cannot be had as the amount in controversy is not over \$3,000 as required by this section to give jurisdiction to the district court. *Starke v. Hoerning*, (E. D. Mich. 1913) 206 Fed. 1006.

Where it appeared that the plaintiff began a suit in a state court by attachment, and the affidavit claimed less than \$3,000, and the writ of attachment claimed damages not exceeding \$3,000, while the ad damnum of the declaration, which was on the common

counts only, claimed \$5,000, and it also appeared that at the time the defendant filed his petition for removal to the federal court there had been no judicial service of process or other paper on him, and he had not appeared generally, it was held that, for the purpose of determining the amount in controversy, the court must look to the present status of the case, which, for want of appearance and plea, would not allow a recovery for an amount exceeding the sum stated in the affidavit. *Starke v. Hoerning*, (E. D. Mich. 1913) 206 Fed. 1006.

The proviso, which is new, does not change the jurisdiction as it formerly existed, but merely makes more clear the jurisdiction under paragraphs 2 to 25 of the section. *Salander v. Tacoma*, (W. D. Wash. 1913) 208 Fed. 427.

## 1912 Supp., p. 139, sec. 24, par. Third.

This section was drawn from section 563 R. S. (Fed. Stat. Annot. vol. 4, p. 220), but it omits certain words contained in section 563, as follows: "And such jurisdiction shall be exclusive, except in the particular cases where jurisdiction of such causes and seizures is given to the circuit courts." In *Murray v. Pacific Coast Steamship Co.*, (W. D. Wash. 1913) 207 Fed. 688, the court commenting on this omission said: "It would appear, although its decision in the

present suit is unnecessary, that the change in the language of the Judiciary Act, as used in the Judicial Code, . . . was made on account of the Circuit Court having been abolished by the Judicial Code and not with the purpose of permitting or granting jurisdiction to the state or common-law courts over those matters theretofore within the exclusive jurisdiction of the admiralty court, especially in view of section 711 having been carried unchanged into the latter Code."

## 1912 Supp., p. 139, sec. 24, par. Eighth.

**Diversity of citizenship unnecessary.**—By paragraph 8, District Courts have jurisdiction "of all suits and proceedings arising under any law regulating commerce, etc." By the proviso of paragraph one of the same section it is not necessary that such suits should involve an amount exceeding \$3,000. Being based on a law of the United States, diversity of citizenship is also unnecessary. *Illinois Cent. R. Co. v. S. Segari & Co.*, (E. D. La. 1913) 205 Fed. 998.

A suit arising under a "law regulating commerce" includes a suit for damages to live stock by reason of the defendant's failure to perform its duty as a common carrier under section 20 of the Interstate Commerce Act, as amended by Act June 29, 1906, c. 3591, § 7, 34 Stat. at L. 584, 593, Fed. Stat. Annot. Supp. 1909, p. 271. *McGoon v. Northern Pac. Ry. Co.* (S. E. D. N. D. 1913) 204 Fed. 998.

A suit by a railroad to recover undercharges on interstate freight is one arising under the interstate commerce laws. *Illinois Cent. R. Co. v. S. Segari & Co.*, (E. D. La. 1913) 205 Fed. 998.

The duty of a carrier to charge and collect the regularly established and published rate, and the corresponding obligation of the shipper to pay the same, regardless of any understanding, agreement, or other act of the parties, arises out of the provisions of the Interstate Commerce Act and not from any contract between the parties, and the District Court has jurisdiction of an action by the carrier to collect from a shipper the difference between what he should have received for a shipment and what he did receive. *Atchison, T. & S. F. Ry. Co. v. Kinkead*, (D. C. Kan. 1912) 203 Fed. 165.

## 1912 Supp., p. 140, sec. 24, par. Fourteenth.

This paragraph is cited in *Simpson v. Geary*, (D. C. Ariz. 1913) 204 Fed. 507.

## 1912 Supp., p. 141, sec. 24, par. Twenty-fourth.

Civil rights only are referred to in this paragraph. *Salander v. Tacoma*, (W. D. Wash. 1913) 208 Fed. 427.

## 1912 Supp., p. 144, sec. 28.

**Construction.**—This section is practically in the language of the previous removal act and must receive a like construction. *Anacosta Copper Mining Co. v. Butte-Balaklava Copper Co.*, (D. C. Mont. 1912) 200 Fed. 808.

"The Judicial Code in the respects here involved does not differ in substance from the previous statutes (see Act Aug. 13, 1888, c. 866, 25 Stat. 433, 434) and decisions made under that act are equally applicable now. The practice as to removals of causes from state to federal courts has become fairly well settled. When a petition and bond are filed, it is the duty of the state court to determine whether on the face of the record a cause for removal is made out. If any issues of fact are raised these cannot be tried in the state court but must be heard and determined in the federal court upon a petition to remand." *Long v. Quinn*, (1913) 215 Mass. 85, 102 N. E. 348.

**Amount in controversy.**—In view of the provisions of section 299 of the Judicial Code (Fed. Stat. Annot. Supp. 1912, p. 252) a removal to the federal court may be had on the ground of diverse citizenship for a cause of action existing before Jan. 1, 1912, the time the code went into effect, although the amount claimed is less than \$3000, the amount fixed by the new code as necessary to give the District Courts jurisdiction. *Missouri, K. & T. Ry. Co. v. Chappell*, (W. D. Okla. 1913) 206 Fed. 688. See to the same effect *Lincoln v. Robinson*, (D. C. Me. 1912)

194 Fed. 571; *Taylor v. Midland Valley R. Co.*, (E. D. Okla. 1912) 197 Fed. 323; *Cady v. Barnes*, (N. D. Ohio 1913) 208 Fed. 359.

**Effect of proviso.**—In *Lee v. Toledo, St. L. & W. Ry. Co.*, (E. D. Ill. 1912) 193 Fed. 685, the court said: "By adding this proviso to the general law, as was done by Congress, defining removable cases, and giving the right to a removal thereof, the general right of removal defined in the enacting part of the section was thus limited, generally throughout the section in each class of cases defined, and whenever a case arising under the liability act falls in any class of cases subject to removal, it is by force of the provisions of the proviso excepted from such right of removal. The language of the proviso is that no case arising under the act in question shall be removed, and such reference to 'no case,' being contained in the same section creating the right, is all-embracing, and cannot well be limited, so as not to include every case described in the section, as I think might well be done, and was properly done in the case cited, the Code not then being in force, when found in the special act alone. I am persuaded that under the provisions of section 28 of the Judicial Code, considered as a whole, including the proviso, the right of removal does not exist in cases arising under the act mentioned in the proviso of that section. It may be difficult to assign a reason for a discrimination in cases of this nature, but the courts have no concern in this

regard, while Congress, possessing the power, as they undoubtedly do, may grant the right of removal in such cases as may to them seem proper, or withhold such right in every case. The right of removal from a state court of concurrent jurisdiction to a United States court is a legislative creation alone, and the courts can act only within and in conformity to the provisions of such legislation. The question is not one of jurisdiction, but of the right of removal from a court of competent jurisdiction to another of concurrent jurisdiction."

This proviso expressly prohibits the removal of any case brought thereunder from a state court to a federal court. In discussing its constitutionality the court in *M'Chesney v. Illinois Cent. R. Co.*, (W. D. Ky. 1912) 197 Fed. 85, said: "Is the act unconstitutional upon the ground that it discriminates against one class of litigants, and denies to them the equal protection of law and due process of law because they are not, while other litigants are, permitted to remove cases to the federal courts? We think this question must be answered in the negative. Congress has full power over the subject of the removal of causes from state to federal courts in all cases to which the judicial power of the United States extends. In the exercise of this power, it has full discretion in cases where diverse citizenship exists. This subject was discussed and conclusively settled by the Supreme Court in *Gaines v. Fuentes*, 92 U. S. 17, 18, 23 L. ed. 524. In its legislative discretion Congress may exert this power to the extent of making one class of cases removable while deny-

ing that right to another class. It has uniformly and without question exercised this right and discretion ever since the original judiciary act of 1789. In respect to the amount in controversy, it has always drawn the line where it pleased. In our day, indeed, from time to time, that line has stood, first at \$500, then at \$2,000, and now at \$3,000. We know of no place where a more general discrimination has been made between classes of cases than in respect to the amount involved, though otherwise the cases are precisely alike. No one, we think, has ever seriously questioned the right to make this character of classification, and the classification now called in question rests upon no different principle. And so after Congress had created certain new rights by the enactment of the employers' liability statute, it provided that no suit brought in a state court to enforce the rights thus created should be removed to a federal court. We cannot think because, under section 28 of the Judicial Code, some cases are made removable, that it is unconstitutional discrimination to deny the right in other cases. In our view Congress has entire control over the subject, and may give the right in some instances where it regards it as proper, and, not give it in other instances where it does not choose to do so."

Cases arising under the Employer's Liability Act cannot be removed into the federal court by virtue of the express language of the section although there is a diversity of citizenship. *Rice v. Boston & M. R. Co.*, (N. D. N. Y. 1913) 203 Fed. 580.

## 1912 Supp., p. 145, sec. 29.

The provision that the petition must be "duly verified" does not do away with the rule settled by continuous decisions of the Supreme Court of the United States to the effect that in aid of the petition for removal the rest of the record may be consulted. *Missouri, K. & T. Ry. Co. v. Chappell*, (W. D. Okla. 1913) 206 Fed. 688.

Notice.—Section 29 was derived from section 3 of the Removal Act of August 13, 1888, c. 866, 25 Stat. 435, 4 Fed. Stat. Annot. p. 349, and the portion respecting prior written notice was the only change of importance introduced. The requirement of notice was changed in Congress from that of "due notice" to "written notice." The language in form is imperative. *United States v. Sessions*, (C. C. A. 6th Cir. 1913) 205 Fed. 502.

The requirement of notice of removal proceedings if not complied with and not waived prevents the court obtaining jurisdiction. *Goins v. Southern Pac. Co.*, (N. D. Cal. 1912) 198 Fed. 432, wherein the court said: "The requirement of notice of removal proceedings is new to the Code, not having found a place in any previous legislation upon the subject; and owing, perhaps, to the brief period elapsing since that act took effect, no question involving this feature has, so far as

appears, before arisen. Its effect must therefore be determined largely, if not wholly, from a consideration of the purpose intended to be subserved thereby, and those considerations, in view of the history of the previous legislation and its construction by the courts, give rise to the uncertainty involved. In all respects other than the requirement of notice, section 29 is, in substantive effect, but a rescript of the provisions on the mode of removal as they existed at the time the Code took effect; the other changes being formal and in matters of detail. It provides, precisely as did the act of 1887 (Act March 3, 1887, c. 373, 24 Stat. 552), for the filing in the state court within a given time of a petition for removal, to be accompanied by a bond, the conditions of which are the same in all respects as there required. This is followed by the provision as found in that act, that: 'It shall be the duty of the state court to accept said petition and bond and proceed no further in said suit.' Then comes the provision in question, in these words: 'Written notice of said petition and bond for removal shall be given the adverse party or parties, prior to filing the same.' The remaining features of the section, relating to

proceedings in this court, are in substance as found in the previous act. The questions arising upon the provisions of the statute as they existed before supplanted by the Code had been mostly settled by judicial construction. Under those provisions, in the absence of any requirement of notice, the proceeding was treated as purely *ex parte*, and the functions of the state court were regarded as largely formal and perfunctory. Upon the filing of a petition showing a case for removal, accompanied by a proper bond, it was the duty of the state court upon application to make a formal order of removal and proceed no further; but if it failed or refused to do so, the cause nevertheless stood removed, and the moving party could proceed to file a copy of the record in the federal court. *Wabash Western Ry. v. Brow*, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. ed. 431. No issues of fact upon the averments of the petition could be raised or tried in the state court, but all such questions were to be heard and disposed of in the federal court to which the cause was removed. And while the state court was not bound to surrender its jurisdiction upon a record which on its face did not in its judgment disclose a case for removal, its refusal was at the peril of having its judgment set aside by the Supreme Court of the United States, should its ruling prove erroneous. *Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. ed. 962, and cases there cited. In other words, it may be stated broadly that, under the procedure obtaining before the Code, *ipso facto*, upon the filing of the requisite petition and bond, the state court was ousted of jurisdiction in the premises; and all questions as to defects or irregularities appearing in the proceedings were to be passed upon and determined by the federal court. *Black's Dillon on Removal of Causes*, §§ 191, 192. Of course, if an order of removal was procured in a case not subject thereto, or where the proceedings were so defective in substance as not to admit of the retention of the cause, then it was the duty of the federal court to remand it, upon the theory that the latter had not acquired jurisdiction by the order, nor the state court lost it. Such being the settled state of the law, what was the purpose intended to be subserved by the requirement of preliminary notice of such proceedings in the state court? Plaintiff, as indicated, takes the extreme ground that it was intended to make the notice a jurisdictional prerequisite, in the absence of which the proceeding cannot be competently initiated. If by this is meant that it is jurisdictional in the same sense that a cognizable controversy is necessary, I cannot accede to the proposition, since manifestly, under well-settled principles, the requirement of notice may be waived. And if plaintiff intends to assert, as would seem to be implied by his argument, that by this new requirement Congress intended to work so radical a change in the effect of removal proceedings as vesting in the state instead of the federal courts the power to pass upon

the sufficiency of such proceedings, to this I am equally unable to assent, since the provisions of the act in other respects, in the light of established principles of construction, do not sustain any such theory. Moreover, it is at variance with the rule of construction provided by the Code itself (section 294) for the interpretation of its provisions. But I do not deem it at all needful to ascribe to Congress the intention to bring about a change in the established procedure so fundamental as that suggested, in order that we may perceive a sufficiently valuable purpose to be subserved by the requirement. The right of removal is justly regarded as one of great moment to the suitor, and its exercise not infrequently involves important changes in the aspects, if not the results, of the controversy; and the history of many cases involving the right tends to disclose the great desirability, if not the necessity, in order to fully protect the rights of the adverse party by avoiding expensive and unseemly delays and other inconveniences of a more or less serious nature that some notice of the proceeding be had. Appreciating this, courts in some instances have undertaken to supply the omissions by a rule requiring notice (*Chiatovich v. Hanchett* [C. C.] 78 Fed. 193; *Creagh v. Equitable, etc., Soc.* [C. C.] 83 Fed. 849); and while they have eventually been compelled to hold that, no notice being required by the statute, none could be insisted upon as essential to the exercise of the right, no court has undertaken to belittle the value of such a provision in the law. The matter of surprise is, therefore, in view of the importance of the right, not that Congress should now have seen fit to make the requirement, but that it should not have earlier perceived the propriety of so doing. Without the effect of materially changing the method of procedure, it will tend to protect the parties and the courts as well, not alone against mistakes and delays in proceedings genuinely instituted, but against unwarranted and frivolous attempts to exercise the privilege in instances where no real right exists. And, speaking in a general way, I entertain little doubt that it was for reasons such as indicated in the class of cases referred to that the requirement of notice has been prescribed."

**Bond.**—The bond must comply with the provisions of this section although it is for the removal of a cause of action which existed before the section took effect. *Missouri, K. & T. Ry. Co. v. Chappell*, (W. D. Okla. 1913) 206 Fed. 688.

In *Chase v. Erhardt*, (D. C. Vt. 1912) 198 Fed. 305, it was held that a defect in the bond was not fatal to the defendant's right to remove. The court said: "The alleged defect of the bond is that it does not provide for the filing of a certified copy of record within 30 days. Instead of that, it provides for the entering of said copy on the first day of the next term of court. The provisions as to the bond were changed by the Judicial Code. The Code, § 29, requires

that the bond shall provide for the filing of a certified copy of record within 30 days. The party praying for removal, having filed a bond that does not comply with the statute, upon objection being made, may amend or file a new bond to the satisfaction of the state court. In the case at bar, had counsel for the plaintiff objected to the bond, the state court could have required an amendment or a new bond before granting the prayer of the petition. This bond is simply to compel the party petitioning for removal to actually enter the case in the federal court and pay costs if he fails in his removal proceedings. If the party petitioning for removal fails to enter his case in the federal court, then there is a liability under the bond for whatever damages the adverse party may suffer. This bond was executed and filed in accordance with the provisions of the statute as it was prior to the enactment of the Judicial Code, and within three months of the time when the Judicial Code took effect. The attention of counsel for the defendant had not been called to the change made in the Judicial Code. The removal proceedings were instituted in good faith under a constitutional right, and with no intent to hinder or delay, and immediately upon the entering of the case in the federal court there was a general appearance by counsel for the plaintiff. The certified copy of record has been filed in good faith, and no delay is caused to the prosecution of the case. This defect in the bond relates to the mode of procedure and is not fatal to the defendant's right to remove. I am aware that there are cases where the courts have held that, where a defective bond has been filed in the state court, it cannot be amended in the federal court, and the case should be remanded; but to my mind the cases cited below are the better authority, based upon better reasons, and result in a more just administration of the law."

The time within which the right of removal may be exercised is a matter for legislation. — *Adams v. Puget Sound Traction, Light & Power Co.*, (W. D. Wash. 1913) 207 Fed. 205.

**Failure to file record within thirty days.** — In *Chase v. Erhardt*, (D. C. Vt. 1912) 198 Fed. 305, the court said: "The Judicial Code provides that one of the conditions of the bond shall be that a certified copy of record shall be filed in the federal court within 30 days. Before the enactment of the Code it was to be filed on or before the first day of the next term of the federal court. Congress evidently intended by this change that the party petitioning for removal should have 30 days in which to secure his copy of record from the state court, and that there should be no confusion or embarrassment as to the date of the next succeeding term of the federal court. There is not a word in section 29 of the Judicial Code, which relates to the procedure of removal, indicating that Congress was demanding or intending to require a more strict enforcement of the rules and regulations as to the procedure in the

removal of causes. The Judicial Code nowhere provides that the entry of the copy of record in the federal court *shall be* within 30 days. Observe the language: 'The said copy being entered within said thirty days, as aforesaid, in said District Court of the United States, the parties so removing the said cause shall within thirty days thereafter plead,' etc. The words above quoted, 'as aforesaid,' refer to the provision as to the bond, viz.: 'A bond, with good and sufficient surety, for his or their entering in such district court, within thirty days from the date of filing said petition, a certified copy of the record.' The Judicial Code was approved March 3, 1911, to take effect January 1, 1912. Former statutes which provided for the filing of the copy of record on or before the first day of the next term, as above stated, have been construed rigidly by some judges and liberally by others. The trend of authorities is that the provisions of law relating to the filing of the copy of record are not mandatory, but directory, and that the court should exercise a discretion in the matter, the line to be drawn upon good faith on the part of the moving party; and if a slip is made in a step in the process of removal, the party should not thereby necessarily lose a constitutional right. It had been held, before the enactment of the Judicial Code, that bonds might be amended and the time for filing papers and pleadings extended in the discretion of the court. If Congress had intended to deprive the court of a discretionary power in these directory steps, upon technical objection being made, it would have used far different language from that made use of in the Judicial Code. I quote again: 'The said copy being entered within said thirty days.' Not the said copy *shall* be entered within 30 days as aforesaid, nor that the said copy not being entered within 30 days the court shall, on motion, remand. On the contrary, it simply provides that the copy being entered in 30 days, the pleadings shall follow within the next 30 days. Is there any question but what, if the copy of record was entered in 40 days, the court could direct the pleadings to be filed within 20 days, especially when there is a general appearance for all the parties in the case? I see nothing in the Judicial Code indicating that the directory steps of the old statute are intended by the Code to become mandatory. I do not wish to be understood that it is not the duty of the court to heed the directory steps pointed out in the statute, but that for good cause shown the court has a discretionary power in the matter."

**Amending plaintiff's pleading after notice of intention to remove.** — Where a suit subject to be removed to a federal court is filed in one of the courts of this state, and the defendant serves written notice on the adverse party of his intention to remove the case, the right to remove, which becomes complete and absolute upon the filing of the petition and bond required by the federal statutes, cannot be defeated by the mere filing of an amendment by the plaintiff, after

a notice of the intention to remove, and before the filing of the petition for removal is actually filed, so changing the allegations of the petition as to make the suit one not removable. In order for an amendment to have this effect it must be allowed by the court before the defendant's right to remove

is perfected by the filing of the petition and bond; the amendment does not become a part of the pleadings until it has been allowed by the court. *Chattanooga Boiler & Tank Co. v. Robinson*, (Ga. 1913) 80 S. E. 299.

## 1912 Supp., p. 150, sec. 37.

**Amount in controversy.**—In view of the provision of section 299 of this act that the repeal of existing laws, or the amendments thereof, embraced in the Judicial Code, shall not affect any act done, or any right accrued or accruing, or any suit or proceeding pending, at the time of the taking effect of the act, a case that was pending in the Circuit

Court when that court ceased to exist, the amount in controversy being over \$2000 but less than \$3000, cannot be remanded to the state court on the ground that the amount in controversy is not sufficient under section 24 to give the District Court jurisdiction. *Lincoln v. Robinson*, (D. C. Me. 1912) 194 Fed. 571.

## 1912 Supp., p. 153, sec. 50.

This section is cited in *Thoma v. Perri*, (D. C. Mass. 1913) 205 Fed. 632.

## 1912 Supp., p. 192, sec. 120.

The proviso is but a reenactment of a prohibition found in the Judiciary Act of March 3, 1891, 26 Stat. L. 827, 4 Fed. Stat. Annot. 396. *William Cramp & Sons Ship &*

*Engine Bldg. Co. v. International Curtiss Marine Turbine Co.*, (1913) 228 U. S. 645, 33 S. Ct. 722, 57 U. S. (L. ed.) 1003.

## 1912 Supp., p. 195, sec. 128.

This section is drawn from the appropriate provisions of section 6 of the Circuit Court of Appeals Act of March 3, 1891, 26 Stat. L. 826, c. 517, 4 Fed. Stat. Annot. 409. But it adds to the enumeration of cases in which

by section 6 the decisions of the Circuit Court of Appeals are declared final, cases arising under the copyright laws. *Street v. Atlas Mfg. Co.*, (1913) 231 U. S. 348, 34 S. Ct. 73.

## 1912 Supp., p. 218, sec. 207.

"The act creating the Commerce Court was intended to be but a part of the existing system for the regulation of interstate commerce, which was established by virtue of the original adoption in 1887 of the act to regulate commerce, and which was expanded by the repeated amendments of that act which followed, developed in practical execution by the rulings of the body (Interstate Commerce Commission), upon whom was cast the administrative enforcement of the act, the whole elucidated and sanctioned by a long line of decisions of this court. That in adopting the provisions concerning the Commerce Court and making it part of the system, it was not intended to destroy the existing machinery or method of regulation, but to cause it to be more efficient by affording a more harmonious means for securing the judicial enforcement of the act to regulate commerce is certain." *Procter & Gamble Co. v. United States*, (1912) 225 U. S. 282, 32 S. Ct. 761, 56 U. S. (L. ed.) 1091.

**Authority in general.**—The authority with which the Commerce Court is clothed in virtue of these provisions does not invest that body with jurisdiction to redress complaints

based exclusively upon the conception that the Interstate Commerce Commission, in a matter submitted to its judgment and within its competency to consider, has mistakenly refused, upon the ground that no right to the relief claimed was given by the act to regulate commerce, to award the relief which was claimed at its hands. In other words, the authority of the Commerce Court is confined to enforcing or restraining, as the case may require, affirmative orders of the Commission, and it has not the power to exert its own judgment by originally interpreting the administrative features of the act to regulate commerce and upon that assumption treat a refusal of the Commission to grant relief as an affirmative order and accordingly pass on its correctness. *Procter & Gamble Co. v. United States*, (1912) 225 U. S. 282, 32 S. Ct. 761, 56 U. S. (L. ed.) 1091, followed in *Hooker v. Knapp*, (1912) 225 U. S. 302, 32 S. Ct. 769, 56 U. S. (L. ed.) 1099.

The authority conferred by Congress upon the Commerce Court with respect to enjoining or setting aside the orders of the Interstate Commerce Commission, like the au-

thority previously exercised by the federal Circuit Courts, was confined to determining whether there had been violations of the Constitution, or of the power conferred by statute, or an exercise of power so arbitrary as virtually to transcend the authority conferred. *Kansas City Southern Ry. Co. v. United States*, (1913) 231 U. S. 423, 34 S. Ct. 125.

"Any order" of the commission means any affirmative order. *Louisville & N. R. Co. v. United States*, (Com. C. 1913) 207 Fed. 691, following *Procter & Gamble Co. v. United States*, (1912) 225 U. S. 282, 32 S. Ct. 761, 56 U. S. (L. ed.) 1091.

## 1912 Supp., p. 221, sec. 208.

The statute contemplates three classes of orders: First, a temporary restraining order staying in whole or in part the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the suspensive order, to be allowed by the court or a judge thereof; second, a preliminary injunction, that is, an injunction pendente lite, which, to quote the words of the statute, may be granted by the court to "restrain or suspend, in whole or in part, the operation of the Commission's order pending the final hearing and determination of the suit;" third, in the nature of things a perpetual injunction upon the entry of the final decree. *United States v. Baltimore & O. R. Co.*, (1912) 225 U. S. 306, 32 S. Ct. 817, 56 U. S. (L. ed.) 1100, wherein the court said: "It must in reason be that the power to issue a preliminary injunction was recognized and preserved so as to afford the court the proper time for deliberation and consideration of the questions to be decided by the Commission instead of compelling that body virtually eo

Disputed questions of fact.—The Commerce Court was not authorized to review the Interstate Commerce Commission's determination of disputed questions of fact, made after a full and fair hearing, on proper notice, unless its power had been exercised in an arbitrary or unreasonable manner, or in violation of constitutional rights. *Florida East Coast R. Co. v. United States*, (Com. C. 1912) 200 Fed. 797.

The jurisdiction of the Commerce Court is considered in *Southern R. Co. v. U. S.*, (Com. C. 1911) 193 Fed. 664; *Arkansas Fertilizer Co. v. United States*, (Com. C. 1911) 193 Fed. 667.

instante upon the presentation of a petition to reach a final conclusion. And it would seem also to be the case that the right to appeal from such an order was given as a safeguard against a possible abuse of discretion by an unwarranted, arbitrary and unreasonable exercise of the power conferred. In other words, that the enlightened purpose of Congress was that the court which it created, in the exercise of the important trusts confided to its authority and where occasion required it as a consequence of the gravity and complexity of the legal questions which might arise, should be afforded ample opportunity for due consideration and ripe judgment and that it was not intended to compel precipitate, and perhaps ill-considered, action."

The word "discretion," used in the law, of course, means a legal discretion, a discretion controlled and limited by sound principles of law applied to the facts in each particular case. *Nashville Grain Exch. v. United States*, (Com. C. 1911) 191 Fed. 37.

## 1912 Supp., p. 222, sec. 210.

Purpose and effect of section.—"It is not disputable that although the right to appeal to this court from an order like the one here in question is conferred, yet obviously the purpose which must have caused the creation of the Commerce Court must have been the desire to interpose between the action of the Commission and this court an intermediate tribunal, having the powers which the stat-

ute delegates to it. Our duty is to give that purpose effect and to uphold the lawful authority of the court, without deviation and yet without hesitation where there has been an abuse of discretion to correct it in the completest way." *United States v. Baltimore & O. R. Co.* (1912) 225 U. S. 306, 32 S. Ct. 817, 56 U. S. (L. ed.) 1100.

## 1912 Supp., p. 230, sec. 237.

A right or privilege claimed in virtue of the authority to incorporate conferred by the general incorporation act of May 5, 1870, enacted by Congress, constitutes a right or privilege claimed under an authority exercised under the United States which, being denied, is reviewable in the Supreme Court. *Creswill v. Grand Lodge K. P. of Georgia*, (1912) 225 U. S. 246, 32 S. Ct. 822, 56 U. S. (L. ed.) 1074.

Where a writ of error is prosecuted to an alleged judgment or a decree of a court of last resort of a state declining to allow a writ of error to or an appeal from a lower state court, unless it plainly appears, on the face of the record, by an affirmation in express terms of the judgment or decree sought to be reviewed, that the refusal of the court to allow an appeal or writ of error was the exercise by it of jurisdiction to review the



case upon the merits, the Supreme Court will refuse jurisdiction of the proceedings. *Norfolk & S. Turnpike Co. v. Commonwealth of Virginia*, (1912) 225 U. S. 264, 32 S. Ct. 828, 56 U. S. (L. ed.) 1082.

Where the Supreme Court of a state does not pass upon the merits of a case before it or upon the correctness of any of the rulings below, but on the contrary holds that it is powerless to do so because its appellate jurisdiction is not invoked in accordance with the laws of the state, its judgment cannot be reviewed by the United States Supreme Court. *John v. Paullin*, (1913) 231 U. S. 584, 34 S. Ct. 178, wherein the court said: "Without any doubt it rests with each

state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when federal rights are in controversy than when the case turns entirely upon questions of local or general law."

If the Supreme Court has not jurisdiction of a suit brought from the state court by writ of error, by reason of the fact that the plaintiff in error had no authority to prosecute the writ of error, it will dismiss the suit without passing on any federal question involved. *State of Wisconsin v. Frear*, (1914) 231 U. S. 616, 34 S. Ct. 272.

## 1912 Supp., p. 231, sec. 239.

The Supreme Court, unless it see occasion to require the whole record to be sent up for consideration, is to make answer respecting the several propositions of law that are certified, and is not to go into questions of fact, or of mixed law and fact. *Stratton's Independence v. Howbert*, (1913) 231 U. S. 399, 34 S. Ct. 136.

Questions of law were certified by the Circuit Court of Appeals of the United States, Sixth Circuit, to the Supreme Court in *Citizens' Banking Co. v. Ravenna Nat. Bank*, (C. C. A. 6th Cir. 1912) 202 Fed. 892.

## 1912 Supp., p. 232, sec. 240.

Power sparingly exercised.—The exceptional power to review, upon certiorari, a decision of a Circuit Court of Appeals rendered on an appeal from an interlocutory order is intended to be and is sparingly exercised. But there can be no doubt that the power exists where no appeal would lie from

a final decree of that court, as is the case where the suit is one in which the jurisdiction of the court of first instance depended entirely upon diverse citizenship. *Denver v. New York Trust Co.*, (1913) 229 U. S. 123, 33 S. Ct. 657, 57 U. S. (L. ed.) 1101.

## 1912 Supp., p. 232, sec. 241.

Scope.—No jurisdiction is conferred upon the Supreme Court to review a judgment or decree of the Circuit Court of Appeals otherwise than by proceedings addressed directly to that court in a cause which is susceptible of being reviewed. *Union Trust Co. of St. Louis v. Westhus*, (1913) 228 U. S. 519, 33 S. Ct. 593, 57 U. S. (L. ed.) 947.

A decree of the Circuit Court of Appeals is not final in a case wherein a secured creditor intervenes in bankruptcy proceedings for the purpose of asserting a title or claim to property in the possession of the bankrupt's trustee. *Houghton v. Burden*, (1913) 228 U. S. 161, 33 S. Ct. 491, 57 U. S. (L. ed.) 780.

## 1912 Supp., p. 234, sec. 248.

A suit brought to recover real estate is like an ordinary action at law and can be brought to the Supreme Court only by writ of error. *Harty v. Victoria*, (1912) 226 U. S. 12, 33 S. Ct. 4, 57 U. S. (L. ed.) 103.

## 1912 Supp., p. 235, sec. 250, par. Fifth.

This section does not include a proceeding by mandamus against the Secretary of the Interior to compel him to issue a patent when his refusal to do so is on the ground that a protest is pending and the mandamus proceeding is founded in the claim that there is no protest pending. The question is one of fact and there is not "drawn in question" the validity or scope of the Secretary's au-

thority. *United States v. Fisher*, (1913) 227 U. S. 445, 33 S. Ct. 329, 57 U. S. (L. ed.) 591.

If the question in issue is one of fact merely and relates to the right of an officer under the circumstances shown to exercise an authority which is not denied if the facts warrant its exercise, the section is not appealable. *United States v. Meyer*, (1913) 227

U. S. 452, 33 S. Ct. 331, 57 U. S. (L. ed.) 594.

If the court of appeals of the District of Columbia holds invalid a regulation of an officer made by him in performance of his duties under the Food and Drug Acts, the validity of an authority exercised under the United States is drawn in question, and an appeal lies to the United States Supreme Court. *United States v. Antikamnia Chemical Co.*, (1914) 231 U. S. 654, 34 S. Ct. 222.

An appeal lies in case the validity of a building regulation made by the Commissioners of the District of Columbia is drawn in question irrespective of the conclusion reached by the court below. *Smoot v. Heyl*, (1913) 227 U. S. 518, 33 S. Ct. 336, 57 U. S. (L. ed.) 621.

"Any law of the United States" embraces only laws of the United States of general operation and does not therefore include laws of the United States local in their application to the District of Columbia. It follows that in the nature of things there exists a large class of cases which involve the construction of a law of the United States in one sense, although not the construction of such law in the sense of the statute, the line of distinction being whether the law whose construction was involved was of general application or merely local in character.

A law of the United States of general application includes Rev. Stat. 3477, (2 Fed. Stat. Annot. 7). *McGowan v. Parish*, (1913) 228 U. S. 312, 33 S. Ct. 521, 57 U. S. (L. ed.) 849.

This clause does not apply to purely local laws of the District of Columbia. *American Security & Trust Co. v. Commissioners of District of Columbia*, (1912) 224 U. S. 491, 32 S. Ct. 553, 56 U. S. (L. ed.) 856, wherein Mr. Justice Holmes writing the opinion of the court said: "In the case at bar if the words 'construction of any law of the United States' are confined to the construction of laws having general application throughout the United States the jurisdiction given to this court by § 250 is confined to what naturally and properly belongs to it. If they are construed the other way it would have been less arbitrary to provide that every question of law could be taken up. That they were not to be understood as the applicant contends is to be inferred not only from the sense of the thing but from clause first: 'In cases where the jurisdiction of the trial court is in issue,' with provision for certifying that question alone. It is difficult to imagine a case in which the jurisdiction of the trial court is in issue where the construction of a special law of the United States would not be drawn in question."

## 1912 Supp., p. 238, sec. 256.

An action brought to recover an assessment levied on national bank stock is an action on a contract and does not come within the provisions of the laws of Congress conferring

exclusive jurisdiction upon United States District Courts in certain cases. *McCormick v. Smith*, (1913) 23 Idaho 487, 130 Pac. 999.

## 1912 Supp., p. 242, sec. 266.

Section 266 of the Judicial Code, practically a reenactment of § 17 of the act of June 18, 1910 (c. 309, 36 Stat. 539, 557), regulates the granting of injunctions by federal courts in cases depending upon the alleged repugnancy of state statutes to the Federal Constitution. *Pullman Co. v. Croom*, (1913) 231 U. S. 571, 34 S. Ct. 182.

This statute applies to cases in which the preliminary injunction is sought in order to restrain the enforcement of a state enactment upon the ground of its "unconstitutionality." The reference, undoubtedly, is to an asserted conflict with the Federal Constitution, and the question of unconstitutionality, in this sense, must be a substantial one. But, where such a question is presented, the application is within the provision, and this being so, all the questions in the case, local as well as federal, may be considered. *Louisville & N. R. Co. v. Garrett*, (1913) 231 U. S. 298, 34 S. Ct. 48.

The purpose of this enactment is well known. It was intended to insure the concurrence of at least two of three judges, one

of whom should be a justice of the Supreme Court, or a circuit judge, before a temporary injunction should issue suspending or restraining the enforcement of any statute of a state upon the ground of its unconstitutionality. Rate legislation in particular, and judicial construction of such legislation, was most prominently in the mind of the Congress. However, the law, by its terms, is not restricted to such; but manifestly the state statute, as a statute, was the subject-matter dealt with, and not the acts of state officers who are charged to have exceeded the powers conferred by a statute whose constitutionality is in nowise attacked. *Chicago, B. & Q. R. Co. v. Oglesby*, (W. D. Mo. 1912) 198 Fed. 153.

A city ordinance is not a statute of the state within the meaning of the section. *Sperry & Hutchinson Co. v. Tacoma*, (W. D. Wash. 1911) 190 Fed. 682.

In *Cumberland Telephone & Telegraph Co. v. City of Memphis*, (W. D. Tenn. 1912) 198 Fed. 955, it was held that the statute was not applicable to an application for a pre-

liminary injunction to restrain the enforcement of an ordinance of the city of Memphis, fixing the rates to be charged by the complainant telephone company. The court said: "We agree that this section of the Code is ambiguous, and is capable of a construction which would make it apply to the case before us. It is well settled that a city ordinance may be considered a law of the state, within the meaning of the constitutional provision that no state shall pass any law impairing the obligation of contracts. *N. O. Waterworks v. Louisiana Sugar Co.*, 125 U. S. 18, 31, 8 Sup. Ct. 741, 31 L. ed. 607; *Iron Mt. R. Co. v. Memphis*, (C. C. A. 6th Cir.) 96 Fed. 113, 126, 37 C. C. A. 410. The same considerations have led to holding that the order of a railroad commission was a 'law of the state.' *Grand Trunk Ry. v. Indiana R. R. Commission*, 221 U. S. 400, 403, 31 Sup. Ct. 537, 55 L. ed. 786. So, too, the mayor of Memphis, who is one of the defendants, is, for some purposes, considered to be an officer of the state (*State v. Critchett*, 1 Lea [Tenn.] 272); and hence the restriction of section 266 to 'injunctions against state officers' does not necessarily exclude the present case. However, considering the entire section together, and what is known as to the reasons for its enactment, the majority of the court, as now constituted, considers that this section does not govern the present case. They think that the natural meaning of 'statute of a state' is a statute or law directly passed by the legislature of the state, and the natural meaning of 'any officer of such state' is an officer whose authority extends throughout the state, and is not limited to a small district; and they believe that Congress used these phrases with this natural meaning, rather than with the broader and less obvious meaning which trained lawyers might find therein. This conclusion is fortified by the requirement that notice must be given to the Governor and the Attorney General, as being real representative parties in interest. It is true that the entire state, and, through the state, the Governor and the Attorney General, are interested in the validity of every municipal ordinance; but this interest is indirect and remote, and, it is thought, probably was not in the congressional mind. The argument of

convenience is also not without force in determining the congressional intent. The cases of direct attack upon a specific act of the legislature by seeking to enjoin the general state officers are, presumably, of great general importance, and are not so numerous that it is impracticable to have them heard by three judges. The controversies involving the constitutionality of ordinances, or rules, or by-laws of cities, villages, counties, taxing districts, and other subordinate municipalities are typically less important, and are so numerous that it would be difficult, if not impossible, to have them all heard under section 266 without disorganizing all the business of the circuit. It seems improbable that Congress intended to create a situation which would be so very difficult to meet. It is understood, also, that the demand for the enactment of this section arose from the instances where the courts had suspended the operation of an act of the legislature or an order of a state commission, in either case affecting the state at large; and that Congress thought it unseemly for one District Judge to set aside, in a preliminary and more or less *ex parte* way, the deliberate acts of the legislature, or of a body acting for the entire state. This consideration would not apply with the same force to the more common controversies involving the conflicting claims of a subordinate municipality and of an individual or a corporation. It is to be observed, further, that counsel on both sides have taken the view that section 266 does not apply, and, accordingly, have not given the statutory notice to the Governor or Attorney General, but have both acquiesced in submitting the application to the District Judge alone. The question being one of power, we cannot be controlled by the views of counsel; but their action is, perhaps, indicative of the probable meaning to the members of Congress of the various phrases which are found in the statute. These being the views of the majority of the court, the application will be heard and determined by the District Judge to whom it was originally made."

This section is cited in *Ohio River & W. Ry. Co. v. Dittay*, (S. D. Ohio 1913) 203 Fed. 537.

## 1912 Supp., p. 249, sec. 290.

This section is cited in *Wilmington City Ry. Co. v. Taylor*, (D. C. Del. 1912) 198 Fed. 159.

## 1912 Supp., p. 250, sec. 294.

The Code does not purport to embody all the law upon the subjects to which it relates. It contains some new provisions and some that are modifications of old ones, but much of it is merely a re-enactment of prior laws with appropriate regard to their proper classification and orderly arrangement. *Street v. Atlas Mfg. Co.*, (1913) 231 U. S. 348, 34 S. Ct. 73.

F. S. A. Supp.—46.

**Effect of new code on pending proceedings.**—In view of the provisions of this section and section 299 of this act it is held that the passage of the new Judicial Code did not affect the right of District Courts to punish for contempt of an order made before the passage of the code. *Morehouse v. Giant Powder Co.*, (C. C. A. 9th Cir. 1913) 206 Fed. 25.

## 1912 Supp., p. 252, sec. 299.

The intention of Congress as expressed in the act was not to have the Judicial Code apply to "proceedings for causes arising or acts done prior to such date," but that in such cases, which arose or constituted a cause of action within the jurisdiction of the national courts prior to January 1, 1912, it should continue, notwithstanding the changes made by the Judicial Code. *Wells v. Russellville Anthracite Coal Min. Co.*, (E. D. Ark. 1913) 206 Fed. 528. See to the same effect *Dallyn v. Brady*, (M. D. Pa. 1912) 197 Fed. 494; *McKernan v. North River Ins. Co.*, (E. D. Wash. 1912) 206 Fed. 984.

"Any suit or proceeding."—Where the sub-

ject matter of an indictment was under inquiry before a grand jury properly impaneled in the District Court and engaged in the discharge of its duties such inquiry was a proceeding and subject to the protection of this section. *United States v. New Departure Mfg. Co.*, (W. D. N. Y. 1912) 195 Fed. 778.

Effect on appeals from judgments of District of Columbia Court of Appeals.—See *Washington Home for Incurables v. American Security & Trust Co.*, (1912) 224 U. S. 486, 32 S. Ct. 554, 56 U. S. (L. ed.) 854.

This section is cited in *Wilmington City Ry. Co. v. Taylor*, (D. C. Del. 1912) 198 Fed. 159.

## 1912 Supp., p. 252, sec. 300.

The District Court may punish for contempt committed in the Circuit Court in proceedings begun in that court before the Judiciary Act went into effect. In *re Steiner*, (S. D. N. Y. 1912) 195 Fed. 299, wherein the court said: "If the 'act had not been passed,' the Circuit Court would still be sitting in this district with power to punish for a contempt committed in such court. The plain meaning of the act is that for the purposes enumerated the District Court acts as if it were the Circuit Court, merely with its name changed. Touching all pending matters the court is continuous; it is one court only from the beginning of the proceeding to its conclusion. The situation is

not such as we find in removed causes where a case is transferred from one court to another; the original court still continuing in existence as a court independent of the other. The proceeding and the court both pass over. Any construction such as that here contended for would lead to the absurd result that all the orders and decrees, injunctive or mandatory, of the old Circuit Court, were practically abrogated on January 1, 1912, because, if such an order or decree cannot be enforced, it becomes mere waste paper. Congress certainly did not contemplate such an absurd result, and there is nothing in the language of the sections which would require its acceptance."

## 1912 Supp., p. 255, sec. 1.

There is no repeal of any part of section 828, R. S. 4 Fed. Stat. Annot. 95. Section 828, being unrepealed, therefore furnishes the only authority for the taxation of the clerk's fees for his services in making up the record, and consequently, unless the fees fixed by that section are divisible, he is entitled to be paid for a printed record at the same rate as though the record were written or typewritten in his office. But such fees have been held not to be divisible. *Sarfert Co. v. Chipman*, (E. D. Pa. 1913) 205 Fed. 937.

Judgment awarding preliminary injunction.—Where the court below upon motion and affidavits and before the taking of any proofs, awarded a preliminary injunction, and the defendant appealed under section 129 of the Judicial Code (Fed. Stat. Annot. 1909 Supp., p. 195), the case is not within this section. *Smith v. Farbenfabriken of Elberfeld Co.*, (C. C. A. 6th Cir. 1912) 197 Fed. 894, wherein the court said: "We are unable to see how such an order can be brought within the definition of the statute by any permissible liberality of construction. Such an order is not final from any point of view or for any purpose."

Fee for indexing.—In *Rainey v. W. R. Grace & Co.*, (1914) 231 U. S. 703, 34 S. Ct. 242, the Supreme Court had under considera-

tion a certificate from the Circuit Court of Appeals containing two questions, namely: "1. When the appellant in a cause in admiralty causes to be printed and presented to this court under said Act of February 13, 1911, printed copies of the apostles on appeal, each of which copies contains a printed index of the contents thereof and is prepared and printed under a rule of the lower court adopted in pursuance of said Act, is this court authorized to hear and determine the cause on such copies and to dispense with the requirement of the payment of fees to the clerk of this court by the appellant as prescribed by section 9 of rule 23 of this court, which is the fee bill prescribed on February 28, 1898, by the Supreme Court under the Act of Congress of February 19, 1897, 29 Stat. 537 (536), 4 Fed. Stat. Annot. 434, which provides as a fee for 'preparing the record for the printer, indexing the same, supervising the printing and distributing the copies, for each printed page of the record and index, twenty-five cents'? 2. Does the first section of the Act of Congress of February 13, 1911, 36 Stat. 901, set aside by implication said fee bill so prescribed by the Supreme Court which is referred to in the first question herein certified?" Both questions were answered in the affirmative.

## JURIES.

### Vol. IV, p. 737, sec. 800.

This section is cited in *Steers v. United States*, (C. C. A. 6th Cir. 1911) 192 Fed. 1; *Thompson v. United States*, (C. C. A. 9th Cir. 1913) 202 Fed. 401, 47 L.R.A.(N.S.) 206.

### Vol. IV, p. 741, sec. 802.

**Jurors returned from whole district.**—Until the court otherwise orders, jurors must be returned from the whole district. If no order is made, the presumption is that the court has determined that drawing them from the whole district will be most favor-

able to an impartial trial, and will not unduly burden the citizens of any part of it, although some unnecessary expense may thereby be incurred. *May v. United States*, (C. C. A. 8th Cir. 1912) 199 Fed. 53.

### Vol. IV, p. 743, sec. 808.

**Persons summoned.**—This section has been construed not to authorize the court to order the marshal to summon or select other persons than those drawn by the commissioners to complete the grand jury except in the event that less than 16 attend under the first

*venire. United States v. Lewis*, (E. D. Mo. 1911) 192 Fed. 633.

The summoning more than 23 veniremen is not prohibited by this section. *United States v. Breeding*, (W. D. Va. 1913) 207 Fed. 645.

### Vol. IV, p. 744, sec. 810.

**Order for writ of venire.**—In *Breese v. United States*, (C. C. A. 4th Cir. 1913) 203 Fed. 824, it was held not to be a good ground of objection to the validity of an indictment that there was an order of court directing in express terms that a writ of venire facias issue, where there was an order requiring the clerk and jury commissioner to draw jurors for service. The court said: "Without reference to any question of waiver, we are of opinion that in enacting this statute Congress had no intent to legislate as to the validity of indictments. The purpose was merely to prevent the expense of having a grand jury unnecessarily summoned. The order of the April term above mentioned so clearly indicated an intent on the part of the judge to have venire issue that we find no merit in the objection."

**Venire ordered by designated judge.**—In *May v. United States*, (C. C. A. 8th Cir. 1912) 199 Fed. 53, to an objection of the defendants that the order of the judge directing a grand jury to be summoned was insufficient, the court said: "The order for this grand jury was made by Judge McPherson, judge of the District Court for the Southern District of Iowa. It appears from the record that he had been designated by the senior circuit judge to act in the Western district of Missouri during the time covered by these proceedings. While so acting he had, by virtue of section 591 of the Revised Statutes (4 Fed. Stat. Ann. 675), authority to discharge all the judicial duties of the judge of that district, and therefore he had authority to order a venire for a grand jury."

### Vol. IV, p. 745, sec. 819.

**Consolidation of indictments.**—If a person against whom there are several indictments charging misdemeanors requests a consolidation under section 1024 Rev. Stat., 2 Fed. Stat. Annot. 337, and the request is

granted, he is entitled to three peremptory challenges only. *Kharas v. United States*, (C. C. A. 8th Cir. 1911) 192 Fed. 503; *Emanuel v. United States*, (C. C. A. 2nd Cir. 1912) 196 Fed. 317.

**Vol. IV, p. 756. [*Jurors to serve in both courts.*]**

This section means that when both courts are in session two sets of jurors shall not be drawn, one for the Circuit and one for the

District Court. *May v. United States*, (C. C. A. 8th Cir. 1912) 199 Fed. 53.

**1909 Supp., p. 327, sec. 1.**

Repeal of territorial statute.—The act of the legislature of the territory of Oklahoma directing the manner in which grand juries

should be impaneled was expressly repealed by this act. *Tegeler v. State*, (Okla. 1913) 130 Pac. 1164.

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**LABOR.****Vol. IV, p. 779, sec. 1.**

Extraordinary emergency.—“No mere requirement of business convenience or pecuniary advantage is an extraordinary emergency within the meaning of this act. The extraordinary emergency which relieves from the act is not one that is contemplated and inheres necessarily in the work. It is a

special occurrence, and the phrase used emphasizes this. It is not an emergency simply which is expressed by it, something merely sudden and unexpected, but an extraordinary one, one exceeding the common degree.” *United States v. Garbisch*, (1911) 222 U. S. 257, 32 S. Ct. 77, 56 U. S. (L. ed.) 190.

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**LARCENY (INCLUDING ROBBERY).****Vol. IV, p. 790, sec. 5456.**

Postage stamps.—To same effect as original note, see *Anderson v. Moyer*, (N. D. Ga. 1912) 193 Fed. 499.

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**LIMITATION OF VESSEL OWNERS' LIABILITY.****Vol. IV, p. 837, sec. 4281.**

Effect of statute.—Prior to the enactment of this statute, the carrier would have been liable to plaintiffs for any loss, except such as was attributable to the act of God or the public enemy. The statute merely relieves the carrier where the notice is not given

and entry made as required thereby from any liability as carrier, but does not attempt to relieve it from any duty as bailee. *Mallory Steamship Co. v. G. A. Bahn Diamond & Optical Co.*, (Tex. 1912) 154 S. W. 282.

**Vol. IV, p. 839, sec. 4283.**

The purpose of this section was to further the interests of the merchant marine and to

establish a uniform rule of liability, which should not overwhelm merchants if a tre-

mendous catastrophe should happen, as is always likely to occur at sea. In re P. Sanford Ross, (E. D. N. Y. 1912) 196 Fed. 921.

**Scope of statute — Extent of liability.**—To the same effect as the original note, see Monongahela River Coal & Coke Co. v. Hurst, (C. C. A. 6th Cir. 1912) 200 Fed. 711.

**Costs.**—The cost of issuing and publishing the monition should be paid out of the fund. All that the petitioner in such a case is required to pay is the expense incurred in availing himself of the act of Congress, the cost of filing the petition and stipulation for costs and value, and the expense of appraisal, etc. Boston Marine Ins. Co. v. Metropolitan Redwood L. Co., (C. C. A. 9th Cir. 1912) 197 Fed. 703.

**Not dependent on number of claims involved.**—The right to limit liability does not depend upon the number of claims involved, nor can that right be refused if the claims in suit be less than the admitted value of the boat, provided there is any probability that there may be other claims from which the right to invoke the federal jurisdiction might be maintained. The Defender, (E. D. N. Y. 1912) 201 Fed. 189.

**This statute applies to death claims.**—Monongahela River Consol. Coal & Coke Co. v. Hurst, (C. C. A. 6th Cir. 1912) 200 Fed. 711.

**Effect on existing judgments.**—Proceedings to limit a vessel owner's liability do not affect the status of a decree already entered in a collision suit. Such a decree is a final adjudication, both as to liability and the amount of damages. But if the defendant's liability is limited only a portion of the judgment may be paid. Monongahela River Consol. Coal & Coke Co. v. Hurst, (C. C. A. 6th Cir. 1912) 200 Fed. 711.

**Time for invoking statute.**—While it is true that a vessel owner has the right to take the benefit of the limitation of liability directly in a suit brought for injuries caused by a collision he is not bound to do so. He has the right to first contest liability for the collision in any court, state or federal, in which action therefor may be brought, including the appellate court of last resort, without raising the question of limitation, and without thereby waiving the right to take the benefit of the statute. Monongahela River Consol. Coal & Coke Co. v. Hurst, (C. C. A. 6th Cir. 1912) 200 Fed. 711.

**Waiver.**—The giving of a supersedeas bond, in an action in personam, is not a waiver of the limited liability statute. Monongahela River Consol. Coal & Coke Co. v. Hurst, (C. C. A. 6th Cir. 1912) 200 Fed. 711.

**Determination of value of vessel.**—In determining the value of a vessel in proceedings to limit the owner's liability for the damage caused by a collision, a fair estimate of the expense and cost of taking her to that port, together with a reasonable sum on account of the risk and the hazard to which she might be subject, affecting her then value, and on account of such hazard as the conditions existing at that time would make it

reasonable to suppose might attend the work of salving her, may be deducted from the value of the vessel when brought into port, although the amount so deducted exceeds the amount allowed for salvage. Boston Marine Ins. Co. v. Metropolitan L. Co., (C. C. A. 9th Cir. 1912) 197 Fed. 703.

**Unseaworthiness of vessel.**—The question of the unseaworthiness of a vessel on account of her equipment is largely determined by custom and usage. Boston Marine Ins. Co. v. Metropolitan Redwood L. Co., (C. C. A. 9th Cir. 1912) 197 Fed. 703.

**Necessity that owner have knowledge of navigation, vessels, etc.**—“We cannot concede that an owner of a vessel, in order to be entitled to limit his liability under the statutes, must, before sending his vessel on her way, acquaint himself with the science of navigation, or acquire expert knowledge concerning his vessel, its equipment, its machinery, or the necessary crew therefor, or must place between himself and the master an intermediary who shall possess such knowledge, and our attention has been directed to no authority which so holds.” Boston Marine Ins. Co. v. Metropolitan Redwood L. Co., (C. C. A. 9th Cir. 1912) 197 Fed. 703.

**“Damages or injury by collision.”**—In the San Pedro, (1912) 223 U. S. 365, 32 S. Ct. 275, 56 U. S. (L. ed.) 473, Ann. Cas. 1913D 1221, the court said: “But it is contended that a salvage claim such as the one here involved is not a claim for ‘damages or injury by collision’ within the meaning of § 4283, Revised Statutes, and therefore not one to which the limited liability act applies; that the damages there referred to are damages by collision to other vessels and their cargo, and that the expense of being towed to port is a claim like one for repairs. It is also said that even if the vessel owners may be able to include what they must pay for such a service in the damages recoverable from the guilty vessel, it is notwithstanding not a damage arising from collision within the meaning of that section. But we need not consider whether the claim is one against the owner of the character described either in § 4283 or the succeeding, § 4284. Those sections have been amended by the eighteenth section of the act of June 26, 1884 (23 Stat. 55, c. 121, so as to include ‘any and all debts and liabilities’ of the owner incurred on account of the ship without his privity or fault. Richardson v. Harmon, (1911) 222 U. S. 96. The service was rendered to the res, benefiting alike owner and creditors. The claim is, therefore, of a highly meritorious character. But the question of preference in payment out of the fund is one to be determined in the limited liability case. We, therefore, express no opinion as to whether such a claim may be preferred or must share pro rata with others.”

**Other boats of same owner.**—The fact that other boats belonging to the same owner as the boat in fault are in the immediate vicinity when the injury occurs does not make them liable, or require the owner to surrender them under the limited liability stat-

ute, where no negligence is alleged against them. *The Sunbeam*, (C. C. A. 2d Cir. 1912) 195 Fed. 468.

An owner may not keep the boat and elect to retain her for his own benefit, rather than to turn her over to the court for sale, and after some time, if a claim arises, yield up a boat greatly deteriorated in value or even partially destroyed, in place of what was subject to the claims at the time those claims arose. *The Passaic*, (E. D. N. Y. 1911) 190 Fed. 644.

A "vessel" includes a scow upon which a pile driver is placed, the scow being moved around from place to place by a tug. In re P. Sanford Ross, (E. D. N. Y. 1912) 196 Fed. 921.

Cause of action in judgment. — A proceeding to limit liability need not be affected by the form or the manner in which the liability is fixed. The statute was intended to and does allow a substitution of the res for the personal claim against the individual in certain kinds of cases, and this should apply to a cause of action in judgment as well as to a cause of action before trial. In re P.

Sanford Ross, (E. D. N. Y. 1912) 196 Fed. 921.

Trial by jury. — If a verdict is recovered in an action in a state court or in a common-law action in a United States court, and if a right to limit all liability to the value of the craft upon which the accident occurred is given by act of Congress, then the right of trial by jury may be enjoyed by the plaintiff; but the collection of damages may be confined to the value of the vessel on which the liability occurred. In re P. Sanford Ross, (E. D. N. Y. 1912) 196 Fed. 921.

Surrendered vessel. — A vessel may be surrendered under the statute either before or after a verdict has been obtained settling the responsibility for the accident. In re P. Sanford Ross, (E. D. N. Y. 1912) 196 Fed. 921.

The Federal Employer's Liability Act (Fed. Stat. Annot. Supp. 1909, p. 584) has not by implication repealed this section in so far as it may be used to limit claims for personal injury of employees when employed on work coming within the provisions of the act. *The Passaic*, (E. D. N. Y. 1911) 190 Fed. 644.

This section is cited in *The Enterprise*, (W. D. Pa. 1912) 196 Fed. 404.

## Vol IV, p. 849, sec. 4284.

The effect of this section is to provide a general average of loss in case the value of the vessel and freight is insufficient to make

full compensation to all sustaining a loss. *Monongahela River Coal & Coke Co. v. Hurst*, (C. C. A. 6th Cir. 1912) 200 Fed. 711.

## Vol. IV, p. 850, sec. 4285.

Power to grant an injunction exists under this section. *The San Pedro*, (1912) 223 U. S. 365, 32 S. Ct. 275, 56 U. S. (L. ed.) 473, Ann. Cas. 1913D 1221.

## Vol. IV, p. 852, sec. 4289.

A scow engaged in carrying stone about the harbor of New York and unloading its cargoes, and similar cargoes from other scows, at places where sea walls are being built and riprap work is being done, although she has not carried a cargo for three years but is

capable of doing so, is within the protection of this section. *The Sunbeam*, (C. C. A. 2d Cir. 1912) 195 Fed. 468.

This section is cited in the case of In re P. Sanford Ross, (E. D. N. Y. 1912) 196 Fed. 921.

## Vol. IV, p. 852, sec. 18.

Scope of section. — This section limits the owner's risk to his interest in the ship in respect to all claims arising out of the conduct of the master and crew, whether the liability is strictly maritime or arises from a non-maritime tort, but leaves him liable for his own fault, neglect, and contracts. *Richardson v. Harmon*, (1911) 222 U. S. 96, 32 S. Ct. 27, 56 U. S. (L. ed.) 110, wherein the court said: "The legislation is in pari materia with the act of March 3, 1851, 9 Stat. 635, c. 43, as carried into the Revised Statutes as §§ 4283 et seq., and must be read in connection with that law, and so read, should be given such an effect not incongruous with that law so far as consistent with the terms of the later legislation. The

former law embraced liabilities for maritime torts, but excluded both debts and liabilities for non-maritime torts. The section under consideration includes debts, save wages of seamen and liabilities of an owner incurred prior to the passage of the law. The avowed purpose of the original act was to encourage American investments in ships. This was accomplished by confining the owner's individual liability, when not the result of his own fault, in the instances enumerated, to his share in the ship. The same public policy is declared to be the motive of the act of which this section is a part. True, a liability may arise out of a contract as well as from a tort. But a liability *ex contractu* is included *ex vi termini*, and the addition



of the words 'and liabilities' would be tautology unless meant to embrace liabilities not arising from 'debts.' In view of the manifest policy of Congress to further encourage the ship-owning industry and the very broad terms employed in this last legislation, we can but infer that the policy of the government was to confine the risk of an owner not personally at fault to his interest in the ship. To say that Congress

meant no more by extending the limitation to any and all debts and liabilities than to include obligations arising *ex contractu*, would be to utterly ignore the fact that such a construction would leave an owner subject to a large class of obligations arising from non-maritime torts, and leave nothing to which the words, 'any and all . . . liabilities' could apply."

## Vol. IV, p. 854, sec. 1.

**Exemption from damages covered by negligence of master or crew.**—Prior to this act it was established that a common carrier by sea could not by any agreement in the bill of lading exempt himself from responding to the owner of the cargo for damages arising from the negligence of the master or crew of the vessel. But the responsibilities of the carrier, with respect to vessels transporting merchandise from or between ports of the United States and foreign ports, were substantially modified by this act. *The Jason*, (1912) 225 U. S. 32, 32 S. Ct. 560, 56 U. S. (L. ed.) 969.

**Failure to ventilate cargo.**—Failure to properly ventilate a ship, with the result that the cargo is injured by dampness, is "negligence, fault, or failure in proper . . . care of . . . merchandise or property committed" to the owner or master of the ship within the meaning of those words as used in this section, and is not a fault or error "in navigation or in the management of the ship" within section 3 of the act, 4 Fed. Stat. Annot. 857. *The Jean Bart*, (D. C. Cal. 1911) 197 Fed. 1002.

**Burden of proof.**—See *The Good Hope*, (S. D. N. Y. 1911) 190 Fed. 597.

## Vol. IV, p. 857, sec. 3.

### IN GENERAL.

**Injuries to passengers.**—This act concerns only the relations between the vessel and her cargo and has no relation to actions for death caused by collision with another boat. *Monongahela Consol. Coal & Coke Co. v. Hurst*, (C. C. A. 6th Cir. 1912) 200 Fed. 711.

**Negligence in towing.**—This act has no application to neglect in towage when tug and tow belong to distinct owners, having with each other only the relations arising under an ordinary contract for safe towage. *The Murrell*, (D. C. Mass. 1911) 200 Fed. 826.

As between the charterer and the owner of a vessel this act does not apply. *Baltimore & Boston Barge Co. v. Eastern Coal Co.*, (C. C. A. 1st Cir. 1912) 195 Fed. 483, affirming (D. C. Mass. 1911) 200 Fed. 826.

**Liability of tug owner for cargo of chartered barge in tow.**—It has been held that this act does not apply to the loss of a cargo from a barge under charter to the owner of the tug towing it. *The Murrell*, (D. C. Mass. 1911) 200 Fed. 826, affirmed (C. C. A. 1st Cir. 1912) 195 Fed. 483. In the District Court it was said: "So far as their language merely is concerned, it may be that the provisions of the Harter Act can be made to include all liabilities of the vessel owner, as carrier, to shippers, for damage from the faults or errors mentioned, whether he is transporting the goods damaged on board the vessel chargeable with the faults or errors in question or on another vessel. The same provisions can in like manner be made to include liabilities to other vessels for dam-

age from such faults or errors. But the construction adopted in *The Delaware*, already referred to, that the act deals only with the relations between 'the vessel and her cargo,' excludes both the above possible constructions, and seems to me in no respect a narrower construction than necessarily results from the court's discussion of the general tenor and provisions of the act, its history, and the exigencies which led to its enactment. 161 U. S. 470-474, 16 Sup. Ct. 516, 40 L. ed. 771. By that construction I must be bound for the purposes of this case. The petitioner, as has appeared, was using two vessels in the transportation of the barge's cargo—one of them the barge upon which the coal was laden, and whose cargo it was in the ordinary sense; the other the tug, which furnished the motive power and controlled the general direction, not only for the barge, but for another vessel not brought into this case. If, as the Supreme Court has said, the Harter Act has no other object than to modify the relations previously existing between a vessel and her cargo, it is necessary, in order to apply it in this case, to find some sense in which the cargo of the barge can properly be called the cargo of the tug. There is no more reason for saying that the West Virginia's cargo may be called the cargo of the tug than for saying that the cargo of the other barge might be so described. Neither barge was being towed alongside the tug. Neither the subcharter of the barge nor the bill of lading given for the coal on board her has been offered in evidence, and it does not appear that either of them refers to this or any particular tug as having any connection with the contract for

transportation made with the owner of the coal. To that contract the owner of the tug may indeed have been one of the parties, but there is nothing to show that anything to be done by this particular tug was contracted for. If the mutual obligations between cargo and carrying vessel could ever have arisen between the tug and the cargo here in question, they could only have arisen from the fact that the tug was actually towing the barge containing the cargo, and they could have had no existence before such actual towage began. No reason whatever appears for calling the coal on board the barge cargo of the tug until the barge was taken in tow. Before that time there was no reason whatever for calling it the cargo of any other vessel than the barge. The petitioner's contention thus requires it to be regarded as at one time the cargo of the barge only, and at a later time the cargo of the tug as well, there being also at that time another cargo with an equal claim to be regarded as the tug's cargo. It is difficult to believe that a construction of the Harter Act which involves results of this kind could have been intended by Congress. Moreover, while it is true that the tug was taking part in the transportation of the cargo, and that tug and tow, even when not made fast alongside each other, are to be regarded as one vessel for many purposes, so to regard them in this case, in order to call cargo on board the barge cargo of the tug, and thus bring the case under the Harter Act, is to permit the petitioner to treat both vessels as one in a proceeding instituted by him on the theory that they are distinct and independent."

**Sacrifices of cargo subsequent to stranding.**—In *The Jason*, (1912) 225 U. S. 32, 32 S. Ct. 500, 56 U. S. (L. ed.) 909, it was held that cargo-owners under the circumstances stated therein had a right to contribution from the shipowners for sacrifices of cargo made subsequent to the stranding of the ship, for the common benefit and safety of ship, cargo and freight. But it was also held that they could not recover contribution from the shipowner in respect of general average sacrifices of cargo, without contributing to the general average sacrifices and expenditures of the shipowner made for the same purpose.

#### DUE DILIGENCE.

**Latent defects.**—Where a bill of lading contains no exception of liability for loss or

damage from latent defects of the ship, her machinery or appliances, the owners are not entitled to the benefit of the Harter act. *The Indrapura*, (C. C. A. 9th Cir. 1911) 190 Fed. 711.

**Affirmative proof of due diligence.**—Neither inference nor presumption can supply the place of affirmative proof of the due diligence required by this act. But this principle does not oblige the court to insist on affirmative proof of what is admitted. *The Murrell*, (D. C. Mass. 1911) 200 Fed. 826.

#### SEAWORTHY VESSEL.

**In general.**—"In determining whether or not the claimant discharged in full the duty which it owed to the libellant in providing a seaworthy vessel and in caring for the cargo, the measure of that duty must be considered with reference to the conditions under which it was to be performed. Conduct reasonably prudent under one set of circumstances may be grossly negligent under another. A ship may be seaworthy for one kind of a cargo and not seaworthy for another, or may be fully equipped for one voyage and wholly unfit for another. *The Southwark*, 191 U. S. 1, 24 Sup. Ct. 1, 48 L. ed. 65. A vessel might be fit for a voyage from Antwerp to England and substantially wanting in equipment for a voyage from Antwerp to San Francisco; so 'due care' of a cargo of lumber would fall far short of the care required for a cargo of fresh fruit or dressed beef. The duty of the carrier is discharged only by the taking of precautions and the exercise of care, reasonably adequate for the protection of the cargo against perils which are known to exist or which by the exercise of reasonable foresight may be anticipated. Presumably the carrier's charges for transportation bear some relation both to the nature of the goods transported and the perils necessarily incident to their transportation and safe delivery." *The Jean Bart*, (D. C. Cal. 1911) 197 Fed. 1002.

#### NAVIGATION OR MANAGEMENT OF THE SHIP.

The causes for exemption include error in the management of a seaworthy vessel. *The Newport News*, (S. D. N. Y. 1912) 199 Fed. 968.

### Vol. IV, p. 863, sec. 4.

A master is not relieved from the duty of issuing a bill of lading by a provision in the charter party that the charterer should sub-

mit one. *Hansen v. American Trading Co.*, (C. C. A. 1st Cir. 1913) 208 Fed. 884.

## MILITIA.

### 1909 Supp., p. 346, sec. 2.

The word "organization," as used in said act, does not relate to or include the enlistment of a soldier. Organization relates to the distribution of the personnel of the army or militia, both commissioned and enlisted, into units. It provides for the distribution of the personnel into different arms and corps, such as infantry, cavalry, artillery, staff corps, medical corps, signal corps, etc., and the distribution of the personnel in each arm of the service corps into different units, such as divisions, brigades, companies, platoons, sections, squads, etc., and, further, into different ranks or grades such as generals, colonels, lieutenant colonels, majors, captains, lieutenants, sergeants, corporals,

privates, etc. Enlistment is the contract of service that a soldier, as distinguished from the officer, enters into with the state or the United States. The enlistment may be different in each state, some for seven years, some for five years, some for three years, with varying provisions for enlistment, and yet the organization of all may be the same; but it is essential to the effectiveness and efficiency of the forces called into the national service that the organization thereof should be the same—one harmonious whole. *Acker v. Bell*, (1911) 62 Fla. 108, 57 So. 356, Ann. Cas. 1913C 1269, 39 L.R.A.(N.S.) 454.

### 1909 Supp., p. 347, sec. 5.

Consent of parents or guardian.—The provision in this section that, when called into service by the President, no further enlistment is necessary, simply does away with the delay necessary to the physical examination or other prerequisites of a similar nature to

the enlistment of the soldier, and has no reference to the necessity of the consent of his parents or guardian. *Acker v. Bell*, (1911) 62 Fla. 108, 57 So. 356, Ann. Cas. 1913C 1269, 39 L.R.A.(N.S.) 454.

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## MINERAL LANDS, MINES, AND MINING.

### Vol. V, p. 8, sec. 2320.

Construction.—"Those acts were not drawn by geologists or for geologists. They were not framed in the interests of science, and consequently with scientific accuracy in the use of terms. They were framed for the protection of miners in the claims which they had located and developed, and should receive such a construction as will carry out this purpose." *San Francisco Chemical Co. v. Duffield*, (C. C. A. 8th Cir. 1912) 201 Fed. 830.

The words "vein," "lode," and "ledge."—A vein or lode is in place within the meaning of the statute when it is inclosed in a general mass of what is known as country rock, that general bed of the country which remains in its original state unaffected by the action of the elements. *Duffield v. San Francisco Chemical Co.*, (C. C. A. 9th Cir. 1913) 205 Fed. 480.

"The use of the terms 'vein' and 'lode' in connection with each other in the act of 1866, and their use in the act of 1872, would seem to indicate that it was the object of the legislator to avoid any limitation in the application of the acts, which a scientific definition of any one of these terms might impose. It is difficult to give any definition of the term, as understood and used in the acts of Congress, which will not be subject to criticism. A fissure in the earth's crust, an opening in its rocks and strata made by some force of nature, in which the mineral is deposited, would seem to be essential to the definition of a lode, in the judgment of geologists. But to the practical miner the fissure and its walls are only of importance as indicating the boundaries within which he may look for and reasonably expect to find the ore he seeks. A continuous body of mineralized

rock, lying within any other well-defined boundaries on the earth's surface and under it, would equally constitute, in his eyes, a lode. We are of opinion, therefore, that the term as used in the acts of Congress is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock. It includes, to use the language cited by counsel, all deposits of mineral matter found through a mineralized zone or belt coming from the same source, impressed with the same forms, and appearing to have been created by the same processes." *San Francisco Chemical Co. v. Duffield*, (C. C. A. 8th Cir. 1912) 201 Fed. 830.

**Discovery of vein or lode.**—To the same effect as original note, see *Hall v. McKinnon*, (C. C. A. 9th Cir. 1911) 193 Fed. 572.

Discovery is necessary to initiate a mining right. To constitute discovery, it is necessary that mineral-bearing rock in place be found, under such circumstances and of such character that a reasonably prudent man, not necessarily a skilled miner, would be justified in expending time and money developing it, with the reasonable expectation of finding ore in paying quantities. This implies, not only that the conditions warrant a reasonably prudent man in so proceeding, with such reasonable expectation, but that the applicant for patent has that expectation. *United States v. Lavenson*, (W. D. Wash. 1913) 206 Fed. 755.

**Exceeding legal limits.**—The cases which protect the locator where he exceeds the legal lateral limits are cases where he has marked his point of discovery and lode line and has made what would otherwise be required in making a valid location under section 2324. *Madeira v. Sonoma Magnesite Co.*, (1912) 20 Cal. App. 719, 130 Pac. 175.

The mere fact, that, in establishing his exterior boundaries, the locator has marked out too great a quantity of land, does not necessarily invalidate his location. Where, however, the locator relies upon the corners he has established or has attempted to mark as indicia of the location of the lode or ledge, a different question may arise and a different rule may govern. *Madeira v. Sonoma Magnesite Co.*, (1912) 20 Cal. App. 719, 130 Pac. 175.

**Placer mine claims.**—This section on its face applies only to claims for veins or lodes situated in rock in place; but by section 2329, 5 Fed. Stat. Annot. 42, it and all other provisions for the entry, location, and patent of vein or lode claims are made applicable also to placer mine claims. *Smith v. Union Oil Co.*, (1913) 166 Cal. 217, 135 Pac. 966.

The words "location" and "located," as used in this section, mean and include the posting of a notice, and the recording thereof when required, and the marking of the boundaries, as required by section 2324, 5 Fed. Stat. Annot. 19. *Smith v. Union Oil Co.*, (1913) 166 Cal. 217, 135 Pac. 966.

## Vol. V, p. 13, sec. 2321.

**Sufficiency of affidavit.**—See *Dean v. Omaha-Wyoming Oil Co.*, (Wyo. 1913) 128 Pac. 881.

## Vol. V, p. 13, sec. 2322.

**Extralateral rights.**—To the same effect as the first paragraph of the original note, see *Work Min. & Mill. Co. v. Doctor Jack Pot Mining Co.*, (C. C. A. 8th Cir. 1912) 194 Fed. 620.

**Exclusive right of possession.**—The location of mineral ground gives to the locator before discovery, and while he complies with the statutes of the United States and the state and local rules and regulations, the valuable right of possession against all intruders, and this right he can convey to another. *Rooney v. Barnette*, (C. C. A. 9th Cir. 1912) 200 Fed. 700.

**Apex.**—The definitions of the word "apex," as used in the statute, all reach the one inevitable conclusion that it is the highest point in the vein. But this is only a general definition, and its application to any particular vein or peculiar location may and often will call for further particularity of description. It must be the top or terminal edge of the vein on the surface or the nearest point to the surface, and it must be the top of the vein proper rather than of a spur or feeder, just as the highest point in the roof

of a house would be taken to be the apex of the house, and not the chimney or flagstaff. Again, an apex is a point from which the vein has a dip as well as strike or course; else it confers no extralateral right. *Stewart Min. Co. v. Ontario Min. Co.*, (1913) 23 Idaho 724, 132 Pac. 787.

**Downward course.**—In this statute the words "downward course" and "course downward" are used interchangeably. It was undoubtedly intended by the use of the words to signify the course of the vein from the surface toward the center of the earth. Sometimes it may happen that the "downward course" of a vein will be perpendicular and the vein will form a vertical plane, but, as a rule, there is a deflection in the downward course of these mineral veins from the perpendicular, which is called their dip; but still the course of the dip is always "downward," and, when the plane of the vein reaches the horizontal, then there is a blanket vein or lode, and on such a vein a locator has no extralateral right. *Stewart Min. Co. v. Ontario Min. Co.*, (1913) 23 Idaho 724, 132 Pac. 787.

## Vol. V, p. 19, sec. 2324.

## IN GENERAL.

**Miner's regulations.**—The section gives to the miners of a mining district and the State or Territory in which the district is situated the power to make regulations "governing the location" of a mining claim, subject to certain requirements. Those requirements may not be dispensed with, but they may be supplemented. *Clason v. Matko*, (1912) 223 U. S. 646, 32 S. Ct. 392, 56 U. S. (L. ed.) 588.

This section is quoted in *Thatcher v. Brown*, (C. C. A. 9th Cir. 1911) 190 Fed. 708.

This section is cited in *Peachy v. Frisco Gold Mines Co.*, (D. C. Ariz. 1913) 204 Fed. 669.

## ONE HUNDRED DOLLARS' WORTH OF LABOR OR IMPROVEMENTS.

**Expenditure solely matter between rival claimants.**—The annual expenditure of \$100, in labor or improvements, required by this section, is solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed to the courts, and not to the Land Department. In this respect, the requirement made by this section is essentially different from that made by section 2325, 5 Fed. Stat. Annot. 31, which makes the expenditure of \$500, in labor or improvements, a condition to the issuance of patent, and therefore a matter between the applicant for patent and the government, the determination of which is committed to the Land Department. *Poore v. Kaufman*, (1911) 44 Mont. 248, 119 Pac. 785.

The proviso of this section calls for an affirmative showing by the original locator. *McKnight v. El Paso Brick Co.*, (1911) 16 N. M. 721, 120 Pac. 694, Ann. Cas. 1912D 1309.

## NOTICE TO CO-OWNER.

**Procedure.**—When one cotenant asserts that he has divested his cotenant of his interest in the common property, the courts make examination of the circumstances under which the alleged divestiture has been brought about, and deny the claim, unless the facts exist authorizing the invocation of the provision, and the personal or constructive notice prescribed has been given in strict conformity with its requirements. *O'Hanlon v. Ruby Gulch Min. Co.*, (1913) 48 Mont. 65, 135 Pac. 913.

## ALL RECORDS OF MINING CLAIMS.

**Recording and posting.**—The statute does not require that a notice shall be recorded. Nor does it require that a notice shall be posted on the claim. It leaves these matters to the regulations of the local laws. The local laws generally require that a notice shall be posted, and, even in the absence of such a requirement, it is a proper aid to the description. *Madeira v. Sonoma Magnesite Co.*, (1912) 20 Cal. App. 719, 130 Pac. 175.

## SHALL BE OPEN TO RELOCATION.

An entry upon a mining claim before the owner of it is in default.—To the same effect as the first paragraph of the original note, see *Rooney v. Barnette*, (C. C. A. 9th Cir. 1912) 200 Fed. 700.

## Vol. V, p. 31, sec. 2325.

**Patent is conclusive of patentee's right.**—To the same effect as the original note, see *Work Min. & Mill. Co. v. Doctor Jack Pot Mining Co.*, (C. C. A. 8th Cir. 1912) 194 Fed. 620.

**Patent cannot be collaterally attacked.**—To the same effect as the original note, see *Work Min. & Mill. Co. v. Doctor Jack Pot Mining Co.*, (C. C. A. 8th Cir. 1912) 194 Fed. 620.

**Construction.**—With respect to the clause of this section which provides that "thereafter no objection from third parties to issuance of a patent shall be held sufficient, except it be shown that the applicant has failed to comply with the terms of this chapter," it has been held that all that it covers is the right to anybody to come in and enter his protest or objection; in other words, to say to the officers of the government that the applicant has not complied with the terms of the statute, and to insist that there shall be an examination by such officers to see if

the terms have in fact been complied with. *Poore v. Kaufman*, (1911) 44 Mont. 248, 119 Pac. 785.

**Existing claims.**—This section refers to a present, tangible claim, existing at some time during the 60-day period of publication. *Poore v. Kaufman*, (1911) 44 Mont. 248, 119 Pac. 785.

**Real purpose to obtain water power or timber rights.**—The land must not only be located for valuable deposits, but claimed for such deposits, when patent is asked. If the sole purpose of location, or making claim to the land, when patent is sought, is to secure valuable water power or timber, a claimant is not entitled to it under the mineral land law. *United States v. Ravenson*, (W. D. Wash. 1913) 206 Fed. 755.

**Affidavit of continuous posting.**—The entryman must furnish a proper "affidavit of continuous posting." *Shank v. Holmes*, (Ariz. 1914) 137 Pac. 871.

## Vol. V, p. 35, sec. 2326.

**Questions determinable.**—By this section there was relegated to a court the jurisdiction to determine the right of possession between the adverse claimants. The determination of that question necessarily involves, not only the question which of the adverse claimants was prior in time in making location, and whether the location was made in compliance with the law, but also the question whether the land occupied and covered by the location was subject to location in the manner in which it was attempted to be acquired. *Duffield v. San Francisco Chemical Co.*, (C. C. A. 9th Cir. 1913) 205 Fed. 480, *reversing* (S. D. Idaho 1912) 198 Fed. 942.

**Validity of location on withdrawn land.**—A location and discovery on land withdrawn quoad hoc from the public domain by a valid and subsisting mining claim is absolutely void for the purpose of founding a contradictory right. *Swanson v. Sears*, (1912) 224 U. S. 180, 32 S. Ct. 455, 56 U. S. (L. ed.) 721.

**Pleading forfeiture.**—Generally forfeiture as a defense must be specially pleaded, but this rule does not necessarily obtain in a proceeding to determine adverse claims under this section, where the title of each party is in issue, and neither can recover without proof of title. *Merchants' Nat. Bank v. McKeown*, (1911) 60 Ore. 325, 119 Pac. 334.

## Vol. V, p. 42, sec. 2329.

The word "mineral," as used in this section, includes what is known as calcium phosphate or rock phosphate. *San Francisco Chemical Co. v. Duffield*, (C. C. A. 8th Cir. 1912) 201 Fed. 830, wherein the court said: "This rock is found in horizontal veins, or what is commonly called 'blanket veins' . . . the veins being of various thicknesses, from a few inches to five or six feet. The rock is found in place having a dip and a strike, is firmly fixed in the mass of the mountain, and occurs between strata of limestone, chert, and shale. The veins usually occur between a bed of overlying fossiliferous limestone and an underlying bed of hard siliceous limestone.

The line of demarcation between the veins of phosphate rock and wall rock of limestone, shale, or chert is well defined and distinct. The distinction between the phosphate rock, having commercial value, and the wall rock, with no commercial value, is readily determined by visual inspection. The phosphate rock is mined by blasting and otherwise, the same as other veins of valuable ore. Its chief commercial value is a soil fertilizer. The rock, after being mined, is reduced at mills for market. That the rock in question is mineral within the meaning of the mining laws is not only conceded by both parties, but sustained by authority."

## Vol. V, p. 42, sec. 2330.

An association of persons may make a location of a tract which shall embrace as many individual claims of twenty acres each as there are individuals in the association, not to exceed eight locators making a location aggregating 160 acres. *Hall v. McKinnon*, (C. C. A. 9th Cir. 1911) 193 Fed. 572.

An agreement between one of the locators with other absent locators as to his share in their individual interest in the claim, if made after the location of the claim and the discovery of the mineral, in no way affects the validity of the location of the associated

claim. *Rooney v. Barnette*, (C. C. A. 9th Cir. 1912) 200 Fed. 70.

**Fraudulent conduct of one of the locators.**—Where a location is made by an association of locators, the fraudulent and concealed conduct of one of the locators will not invalidate the entire location. *Rooney v. Barnette*, (C. C. A. 9th Cir. 1912) 200 Fed. 700.

**Annual work.**—The law does not require the annual work specified in Rev. St. § 2324, 5 Fed. Stat. Annot. 19, to be on each 20-acre lot of an association claim. *Rooney v. Barnette*, (C. C. A. 9th Cir. 1912) 200 Fed. 700.

## Vol. V, p. 43, sec. 2331.

The unit of an individual placer mining claim is twenty acres. *Hall v. McKinnon*, (C. C. A. 9th Cir. 1911) 193 Fed. 572.

## Vol. V, p. 44, sec. 2332.

**Adverse possession.**—Under this section the claimant to mineral lands of the United States who has been in the open, exclusive adverse possession of a claim for a continuous period equal to that required by the

local statute of limitations governing adverse possession of real estate, is relieved of the necessity of making proof of posting and recording a notice of location and such other proofs as are usually furnished by the county

recorder; or, in other words, he is relieved from furnishing the evidence of record title. *Humphreys v. Idaho Gold Mines Develop-*

*ment Co.*, (1912) 21 Idaho 126, 120 Pac. 823, 40 L.R.A.(N.S.) 817.

## Vol. V, p. 49, sec. 2334.

**Duties of mineral surveyors.**—“Mineral surveyors are appointed by the surveyor general under Rev. Stat. § 2334, and their field of action is confined to the surveying of mining claims and to matters incident thereto. They act only at the solicitation of owners of such claims, and are paid by the owners, not by the Government; but their charges must be within the maximum fixed by the Commissioner of the General Land Office, and their work must be done in conformity to regulations prescribed by that officer. They are required to take an oath, and to execute a bond to the United States, as are many public officers. Within the limits of their authority they act in the stead of the surveyor general and under his direction, and in that sense are his deputies. The work which they do is the work of the Government, and the surveys which they make are its surveys. The right performance of their duties is of real concern, not merely to those at whose solicitations they act, but also to the owners of adjacent and conflicting claims and to the Government. Of the representatives of the Government who have to do with the proceedings incident to applications for patents to mining claims, they alone come in contact with the land itself, and have an opportunity to observe its situation and character, and the extent and nature of the work done and improvements made thereon; and it is upon their reports that the surveyor general

makes the certificate required by Rev. Stat. § 2325, which is a prerequisite to the issuance of a patent.” *Waskey v. Hammer*, (1912) 223 U. S. 85, 32 S. Ct. 187, 56 U. S. (L. ed.) 359.

**Payment for survey.**—The United States government cannot be required or obligated to pay for the survey, even though made by one of its own officers, namely, a United States deputy mineral surveyor. There is nothing in the statute which requires any deputy surveyor to make a survey or enter into a contract with an applicant for a survey, except upon terms and conditions which are satisfactory to himself and the claimants. The department is authorized to fix the maximum fees for the survey, but nothing in the statute requires any deputy surveyor to accept even the maximum fees and to make a survey as a public or official duty upon the request of an applicant therefor. The matter of employment, and the manner and amount of payment of the surveyor, are left wholly to the choice and free will of the applicant and the deputy. Any deputy surveyor within the district may be selected by the applicant, and any arrangement or agreement whatever, which is satisfactory to them, may be made as to payment for such services. *Fish & Hunter Co. v. New England Homestake Min. Co.*, (1912) 28 S. D. 588, 134 N. W. 798.

## Vol. V, p. 52, sec. 2337.

**Construction.**—This section is further congressional recognition that land near but not contiguous to known veins or lodes may be nonmineral and enterable as such. If it contains no known valuable mineral deposits, it falls into the nonmineral or agricultural

class, however rich in minerals are the adjacent lands. To attach mineral character to lands, it is not sufficient to demonstrate that adjacent lands are mineral in character. *United States v. Kostelak*, (D. C. Mont. 1913) 207 Fed. 447.

## Vol. V, p. 55, sec. 2347.

**Purpose of statute.**—“The purpose of Congress is manifest to withdraw from disposition except under particular restrictions those limited areas of the public domain which in general opinion based upon substantial evidence have a special value for mineral contents beyond that arising from their adaptation to agricultural or other like uses. True, the mineral character of the land must be known at the time of the grant, and the mineral must be in such quantities as to justify exploitation . . . but that does not mean a positive, absolute certainty which can only be shown by actual exposure or uncovering, nor that temporary distance from

market makes unprofitable the mining of any but a very thick vein or deposit.” *United States v. Diamond Coal & Coke Co.*, (C. C. A. 8th Cir. 1911) 191 Fed. 786.

**Fraud.**—An agreement to acquire title to coal lands of the United States indirectly when it cannot be acquired directly constitutes an attempted fraud, and if the apparent title is so procured it constitutes fraud. *Kennedy v. Lonabaugh*, (1911) 19 Wyo. 352, 117 Pac. 1079, Ann. Cas. 1913E 133.

**Sufficient indictment.**—See *United States v. Wells*, (C. C. A. 2d Cir. 1912) 192 Fed. 870.

**Vol. V, p. 55, sec. 2348.**

A corporation is an association of persons within the meaning of this section. *United States v. Colorado Anthracite Co.*, (1912) 225 U. S. 219, 32 S. Ct. 617, 56 U. S. (L. ed.) 1063.

**Vol. V, p. 56, sec. 2350.**

Entry of one person for another. — "While the coal-land law does not expressly prohibit an entry by one person for the benefit of another, it does limit the quantity of land that may be acquired thereunder by one person to 160 acres, and the quantity that may be acquired by an association of persons to 320 acres and, in exceptional instances, 640 acres; and it declares that its sections "shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions." These restrictions, as this court has held, forbid individuals and associations from acquiring public coal land in excess of the quantities prescribed, whether directly by entries in their own names or indirectly by entries made for their benefit in the names of others. And so, one person cannot law-

fully make an entry in the interest of another who has had the benefit of the law, or in the interest of an association where it or any of its members had held the benefit thereof, or in the interest of a person or an association where he or it has not had such benefit but is seeking, through entries made or to be made by others in his or its interest, to acquire a greater quantity of land than is permitted by the law. But there is no prohibition, express or implied, against an entry by a qualified person for the benefit of another person or association where he or it is fully qualified to make the entry in his or its own name, and is not seeking to evade the restrictions in respect to quantity." See also *United States v. Colorado Anthracite Co.*, (1912) 225 U. S. 219, 32 S. Ct. 617, 56 U. S. (L. ed.) 1063; *United States v. Home Coal & Coke Co.*, (C. C. A. 8th Cir. 1912) 200 Fed. 910.

*Alaska coal lands.* — The restrictive features of this section are applicable to the sale of coal lands in Alaska. *United States v. Munday*, (1911) 222 U. S. 175, 32 S. Ct. 53, 56 U. S. (L. ed.) 149.

**Vol. X, p. 235. [Act of April 28, 1904.]**

This act is cited in *Cardoner v. Stanley Consol. Min. & Mill. Co.*, (C. C. Idaho 1911) 193 Fed. 517.

**Vol. X, p. 236. [Act of Feb. 12, 1903.]**

The phrase "annual assessment labor," found in this act cannot be construed to include or refer to work done upon a claim to accomplish a discovery thereon in order to perfect the location. The use of that phrase

limits the application of the act to claims upon which discovery has been made—claims upon which there has been a valid and completed location. *Smith v. Union Oil Co.*, (1913) 166 Cal. 217, 135 Pac. 966.

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## **MONEY PAID INTO COURT.**

**Vol. V, p. 70, sec. 995.**

Attaching money in custody of court. — Money in the custody of the federal court is not subject to attachment under a process issuing out of a state court. *D. B. Martin Co. v. Shannonhouse*, (E. D. N. C. 1913) 203 Fed. 517, wherein the court said: "The power and duty of a court to decide for it-

self whether property in its possession or under its control can be taken from it by process issuing from another court is essential to its right and duty to administer to its suitors such remedy as according to the law they may be entitled, and to enforce its judgments."



## NATIONAL BANKS.

### Vol. V, p. 82, sec. 5136.

**Fixing terms of officers.**—Subject to the free exercise by its board of directors of its power to remove him at its pleasure at any time, a national bank may, by its articles of incorporation and by-laws, fix the terms of office of its president, or of any other ministerial officer, and the term so fixed becomes his legal term of office, although during that term he is subject to recall by the board under this section. *Rankin v. Tygard*, (C. C. A. 8th Cir. 1912) 198 Fed. 795.

#### BANKING POWERS.

**Dealing in stocks of other corporations.**—To the same effect as the original note, see *Barron v. McKinnon*, (C. C. A. 1st Cir. 1912) 196 Fed. 933; *McBoyle v. Union Nat. Bank*, (1912) 162 Cal. 277, 122 Pac. 458. In the former case the court said: "Section 5136 defines the general powers of national banks in carrying on the business of banking. No express power to deal in stocks is conferred by this section, and it has been uniformly held by the Supreme Court, beginning with the case of *First National Bank v. National Exchange Bank*, 92 U. S. 122, 128, 23 L. ed. 679, that a prohibition to deal in stocks is to be implied from the failure to grant the power. It is also settled that the statutes of the United States constitute the measure of the authority of such corporations, and that they cannot rightfully exercise any powers except those expressly granted, or which are incidental thereto. *California Bank v. Kennedy*, 167 U. S. 362, 366, 17 Sup. Ct. 831, 42 L. ed. 198. The cases arising under this section, upon which the defendant relies, are cases in which a national bank had acquired stock of another corporation, and in which it was sought to enforce its liability as a stockholder in a suit by the receiver of such corporation. The first and leading case is *California Bank v. Kennedy*, supra. In the opinion in that case the court, at page 366 of 167 U. S., at page 833 of 17 Sup. Ct., (42 L. ed. 198), states the question in issue as follows: 'The California National Bank, one of the defendants, has appealed upon the ground that, by virtue of the statutes under which it is organized, it had no power to become a stockholder in another corporation, and that its act in becoming such stockholder is so far ultra vires that it cannot be made liable for any portion of the indebtedness of the corporation.' The opinion proceeds: 'No express power to acquire the stock of another corporation is conferred upon a national bank, but it has been held that, as incidental to the power to loan money on personal se-

curity, a bank may in the usual course of doing such business accept stock of another corporation as collateral, and by the enforcement of its rights as pledgee it may become the owner of the collateral and be subject to liability as other stockholders. *National Bank v. Case*, 99 U. S. 628, [25 L. ed. 448]. So, also, a national bank may be conceded to possess the incidental power of accepting in good faith stock of another corporation as security for a previous indebtedness. It is clear, however, that a national bank does not possess the power to deal in stocks. The prohibition is implied from the failure to grant the power. *First National Bank v. National Exchange Bank*, 92 U. S. 122, 128, [23 L. ed. 679]. Whatever divergence of opinion may arise on this question from conflicting adjudications in some of the state courts, in this court it is settled in favor of the right of the corporation to plead its want of power; that is to say, to assert the nullity of an act which is an ultra vires act.' After citing authorities, the opinion proceeds: 'Applying the principles of law thus settled to the case at bar, the result is free from doubt. The power to purchase or deal in stock of another corporation, as we have said, is not expressly conferred upon national banks, nor is it an act which may be exercised as incidental to the powers expressly conferred. A dealing in stocks is consequently an ultra vires act. Being such, it is without efficacy. *Pearce v. Railroad Company*, 21 How. 441, 445, [16 L. ed. 184]. Stock so acquired creates no liability to the creditors of the corporation whose stock was attempted to be transferred.' A similar question was before the court in *Concord National Bank v. Hawkins*, 174 U. S. 364, 19 Sup. Ct. 739, 43 L. ed. 1007 and *First National Bank of Ottawa v. Converse*, 200 U. S. 425, 26 Sup. Ct. 306, 50 L. ed. 537, and the doctrine laid down in *California Bank v. Kennedy* was affirmed. These cases establish two propositions: First, that a national bank does not possess the power to deal in stocks; and, second, the right of the bank to plead its want of power—in other words to assert the nullity of the ultra vires act, in a suit brought by a receiver to enforce the bank's liability as a stockholder."

**Maintaining suit on commercial paper in hands for collection.**—A national bank cannot act as a technical trustee and hold land for the benefit of third persons. It cannot, for example, act as trustee under a railroad mortgage, nor take title to property to be held for the life of the grantor, with remainder to his children. Every such trans-

action would be voidable at the instance of the Government. . . . But under Revised Statutes, § 5136, 'It may exercise all such incidental powers as shall be necessary to carry on banking,' and it may therefore act as a fiduciary and occupy a trust relation in matters connected with that business. It may do those acts and occupy those relations which are usual or necessary in making collections of commercial paper and other evidences of debt. It is both usual and proper for the legal title to negotiable instruments to be vested in a bank by mere endorsement for purposes of collection, holding the proceeds as the endorser directs. There is no difference in law if the title is conveyed by

a lengthier and more formal instrument. In both cases the bank takes the legal title for the purpose of demand and collection. In a proper case, there is no reason why it might not go further and institute suit thereon in its own name for the recovery of what may be due. If the transfer was made, or the suit was being maintained, for purposes not authorized by the charter of the bank, and if the defendant was in a position where his rights were prejudiced thereby, it would be incumbent on him to raise that defense at the outset of the litigation, or as soon as he learned that fact. *Miller v. King*, (1912) 223 U. S. 505, 32 S. Ct. 243, 56 U. S. (L. ed.) 528.

### Vol. V, p. 93, sec. 5137.

A conveyance of real estate to a national bank in violation of the prohibition contained in this section is not void, but only voidable. *Barron v. McKinnon*, (C. C. A. 1st Cir. 1912) 196 Fed. 933.

A loan made by a national bank upon real estate security, although prohibited by this

section is voidable, and not void, and the sovereign alone can be heard to object. Its ultra vires nature cannot be pleaded as a defense by the debtor. *First Nat. Bank of Westhope v. Messner*, (1913) 25 N. D. 263, 141 N. W. 999.

### Vol. V, p. 105, sec. 5151.

Warranty as "contract" or "engagement." — Shareholders are responsible on the warranty of a bank contained in a deed executed by it, such warrant being a "contract" and an "engagement" within the meaning of this section. *McLean v. Moore*, (Tex. 1912) 145 S. W. 1074.

Statute of limitations. — In the absence of any provision in this act creating the double liability of stockholders of national banks fixing a period of limitation within which actions for its enforcement must be brought, the statute of limitations of the state where suit is brought governs, so far as applicable. But the period of limitation will commence to run only from the time the cause of action has fully matured through the making of an assessment and the arrival of the day when it becomes payable. *Rankin v. Miller*, (D. C. Del. 1913) 207 Fed. 602.

This section contrasted with the following section. — "Both sections deal with the subject of the double liability of stockholders of national banks, and each of them has for its purpose the enforcement of such liability. The variances between them are due to the essential difference in the circumstances under which they respectively are intended to operate. Considering them in their relation to a living stockholder, on the one hand, and, on the other, to the estate of a deceased stockholder, it is clear upon their face that Congress in their enactment had in view a practical, reasonable and consistent plan for the collection of assessments of the double liability. In the case of a living stockholder, the amount of the assessment against him was intended to be paid by him, and suit could be maintained against him as a stock-

holder for its recovery whenever it matured. In the case of a deceased stockholder, who for the purpose of the payment of his share of the assessment was represented by his estate, it was intended that the statutory liability should attach to it in the hands of his executors or administrators as a charge or lien. And it fairly is to be assumed that as Congress intended individual responsibility of the stockholders to serve as security for the payment, in the case of a living stockholder, of his share of an assessment, so it equally intended such charge or lien to serve, in the absence of countervailing equities, as such security in the case of a deceased stockholder. Section 5152 expressly provides that 'the estates and funds' in the hands of 'persons holding stock as executors' shall be 'liable in like manner and to the same extent as the testator . . . would be, if living and competent to act and hold the stock in his own name.' This provision shows a legislative intent that the charge or lien upon the estate of a deceased stockholder in favor of the creditors of a national bank, shall, in the absence of superior countervailing rights or equities, be regarded and enforced equally as the individual responsibility of living stockholders. Further, section 5151 in providing for double liability declares that the stockholders shall be 'held individually responsible, equally and ratably, and not one for another,' for the debts of a national bank; and that section when read in connection with section 5152 which, as before stated, also deals with the subject of the enforcement of the double liability, affords additional reason to support the conclusion that Congress intended the enforcement of the

charge or lien upon the estate of a deceased stockholder equally with the enforcement of the individual responsibility of living stock-

holders to serve as means for the accomplishment of the purpose of the statute." *Rankin v. Miller*, (D. C. Del. 1913) 207 Fed. 602.

## Vol. V, p. 109, sec. 5153.

This section is cited in *United States v. National Bank of Commerce of Seattle, Wash.*, (C. C. A. 9th Cir. 1913) 205 Fed. 433.

## Vol. V, p. 133, sec. 5198.

### II. PAYMENT OF USURY.

**Extension or renewal notes.**—The payment contemplated by this section is an actual payment and not a further promise to pay, consequently the giving of a renewal note will not sustain a recovery from a national bank on account of usurious interest in the original note. *First Nat. Bank of Tishomingo v. Latham*, (1913) 37 Okla. 286, 132 Pac. 897.

### IV. PENALTY.

**Constitutionality.**—The fact that a penalty for usury may be recovered from a national bank but not from a state bank, does not render the law obnoxious to the constitutional requirements of a state that all laws of a general nature have uniform operation. It is sufficient answer to this suggestion to say that laws are of uniform operation, if they apply to all persons in like situation. *Ingraham v. Merchants' Nat. Bank of Greene*, (1913) 153 Ia. 408, 132 N. W. 869.

**Jurisdiction of state courts.**—It is well established that the state courts have concurrent jurisdiction in all matters wherein the jurisdiction of the federal courts is not made exclusive by the Constitution or acts of Congress. But jurisdiction is expressly conferred upon state courts by the latter part of section 5198. *McCormick v. Smith*, (1913) 23 Idaho 487, 130 Pac. 999.

This section expressly confers jurisdiction upon all state courts which, under the state law, already have jurisdiction "in similar cases." The limitation to courts having jurisdiction in similar cases does not mean that only state courts may have jurisdiction, where the state imposes the same penalty; nor does it limit the jurisdiction to cases where the penalty provided by the state law is alone involved. What the United States statutes undoubtedly mean is that any state court that has jurisdiction of actions involving the question of usury shall have jurisdiction of actions arising under them. *Ingraham v. Merchants' Nat. Bank of Greene*, (1911) 153 Ia. 408, 132 N. W. 869.

**Limitation of action.**—The statute of limitations begins to run from the date of the payment of the usurious interest. *McCarthy v. First Nat. Bank of Rapid City, South Dakota*, (1912) 223 U. S. 493, 32 S. Ct. 240, 56 U. S. (L. ed.) 516, wherein the court said: "That the statute does not begin to run from the date of the loan, nor from the date of the satisfaction of the debt,

but from the date interest is paid, appears from an analysis of the two classes of cases referred to in Rev. Stat. § 5198, noting that 'interest paid' in the last clause is used in contradistinction to interest 'reserved or charged,' in the first sentence of the section. Banks may make ordinary loans and charge interest to be collected at the maturity of the note. But as they usually reserve and deduct it in advance, by way of discount, the statute is framed so as to apply to cases where the interest is paid by the debtor as well as to those in which it is reserved by the bank. These deductions by way of discount are not treated as payments. They do not come out of the debtor's pocket, though they lessen the amount which he receives when the loan is made, and when sued he may plead usury and escape liability for the amount thus charged or retained. But, such reservation by the bank, not being a payment made by the debtor, he, of course, cannot avail himself of the right to maintain a suit given only to those who have paid interest. But when the debtor actually makes a payment, as interest, and the bank knowingly receives and appropriates it as such, the usurious transaction is complete, the right of the one and the liability of the other is fixed, the cause of action arises and the statute of limitations begins to run. There is no *locus penitentiae*. That privilege is only granted to those banks which, having charged usury, may, by a refusal to accept interest when tendered, show that they will not carry the illegal contract into execution, and thus escape the two-fold penalty.

"Those courts which hold that the statute begins to run from the payment of the debt, instead of the payment of the interest, have been influenced by statements of Mr. Justice Harlan in *McBroom v. Scottish Mortgage & Land Investment Co.*, (1894) 153 U. S. 318, which involved the construction of the usury statute of the Territory of New Mexico. That act differed in several respects from Rev. Stat. § 5198. But that case did not rule that in a suit under the act of Congress the statute did not run from the date usury was paid and received as such. This court did not understand that such was the meaning of that case, as appears from his opinion in *Brown v. Marion Nat. Bank*, (1898) 169 U. S. 416, which involved a construction of Rev. Stat. § 5198. For he there points out the difference between 'paying' and 'agreeing to pay,' and says that, 'if at any time the obligee actually pays usurious interest, as

such, the usurious transaction must be held to have then and not before occurred, and he must sue within two years thereafter."

The bank incurs the penalty when it exacts the usury. The right of action for the penalty accrues when the usury is paid. Suit under this statute is not postponed until the debt is paid, and a bill is not demurrable for failure to aver payment of the principal obligation. *Meredith v. American Nat. Bank of Sparta*, (Tenn. 1913) 153 S. W. 479.

In an action against a national bank brought under the provisions of this section to recover the penalty therein provided for charging usurious interest, where all the evidence shows that the interest was paid within two years from the time the action was commenced, it is not error to fail to instruct that the "usurious transaction" had reference to the time of actual payment of the interest from which the penalty arises, and not the time of making the usurious contract. *Western Union Tel. Co. v. Foy*, (1912) 32 Okla. 801, 124 Pac. 305.

Twice the amount of the entire interest paid, and not twice the sum by which the interest received exceeded the lawful rate, is the measure of recovery from a national bank under this statute. *Meredith v. American Nat. Bank of Sparta*, (Tenn. 1913) 153 S. W. 479.

## Vol. V, p. 140, sec. 5201.

The United States alone can complain of a violation of this section by a national bank, at least after the contract of pledge has been executed by foreclosure. *First Nat. Bank of Lake Charles v. Lanz*, (C. C. A. 5th Cir. 1913) 202 Fed. 117.

Effect of ultra vires loan.—In *Barron v. McKinnon*, (C. C. A. 1st Cir. 1912) 196 Fed. 933 the court said: "Several cases have arisen under this section where national banks have loaned money on their own shares of stock or purchased such shares, in violation of this section of the statute. In these cases the court has held, as in the

Accord and satisfaction.—In an action brought to recover the penalty provided for the payment of usurious interest, facts constituting accord and satisfaction cannot be proven under the general allegation of payment. *First Nat. Bank of Tishomingo v. Latham*, (1913) 37 Okla. 286, 132 Pac. 891.

### V. STATUTORY REMEDY EXCLUSIVE.

In general.—As without the statute there can be no recovery from the bank for usurious interest actually paid, and as the statute which creates the right to such recovery also prescribes the remedy, that remedy is exclusive of all others for the enforcement of such right. *Reese v. Colquitt Nat. Bank*, (1913) 12 Ga. App. 472, 77 S. E. 320; *Chipman v. Farmers' & Merchants' Nat. Bank*, (1913) 121 Md. 343, 88 Atl. 151; *Merchants' Nat. Bank v. Sharkey*, (1913) 64 Ore. 32, 128 Pac. 1005.

State statutes relating to usury, and prescribing penalties for the charging, reserving, or taking of usury, have no application to negotiable instruments held by national banks. *Reese v. Colquitt Nat. Bank*, (1913) 12 Ga. App. 472, 77 S. E. 320.

Set-off of interest paid.—To the same effect as the original note, see *Merchants' Nat. Bank v. Sharkey*, (1913) 64 Ore. 32, 128 Pac. 1005; *Rushing v. Citizens' Nat. Bank of Plainview*, (Tex. 1913) 162 S. W. 460.

cases relating to real estate, that the bank's title to stock, obtained under these ultra vires transactions, is not void, but only voidable, and hence that the bank can convey a good title to a purchaser."

Security necessary to prevent loss.—This section does not prohibit a national bank from accepting a pledge of its own capital stock, when to do so is necessary to secure the payment of an unsecured pre-existing debt, and so prevent loss to the bank. *First Nat. Bank of Lake Charles v. Lanz*, (C. C. A. 5th Cir. 1913) 202 Fed. 117.

## Vol. V, p. 145, sec. 5209.

### VI. FALSE ENTRIES.

What are false entries.—"The statute prohibits making false entries. Neither false reports nor false verifications are within the statute. False entries in reports are untrue statements of items of account, by written words, figures, or marks made therein. Within the statute here involved they are the offense of him only who knowingly made them or caused them to be made. He who is not so responsible for a false entry is not guilty of making a false entry, though he verifies the association's report containing it." *United States v. Herrig*, (D. C. Mont. 1913) 204 Fed. 124.

Who liable.—"The statute admits only of the construction that the false entry must be made by the officer of the bank in person, or, if by another, the latter must, in an affirmative way, be authorized or directed by the officer to make the particular entry. Familiar rules for the strict construction of criminal statutes demand this. By no proper construction of the language of section 5209 can the court hold that the mere concealment by the president of a national bank of information from a bookkeeper who in ignorance, but without any instructions from the president, makes an entry on his own motion, shall be equivalent to the president

himself making the false entry within the meaning of the statute." *United States v. McClarty*, (W. D. Ky. 1911) 191 Fed. 523.

#### VII. AIDERS AND ABETTORS.

The words "aids and abets" are to be given their natural import, but they apparently render necessary some concrete act. *Keliher*

*v. United States*, (C. C. A. 1st Cir. 1912) 193 Fed. 8.

Officers of bank.—The language of the statute is broad enough to include the officers of the bank among those who may be charged with aiding and abetting, for it refers to "every person." *Kettenbach v. United States*, (C. C. A. 9th Cir. 1913) 202 Fed. 377.

### Vol. V, p. 152, sec. 5210.

Inspection of list by stockholders.—A stockholder in a bank is entitled to inspect the list of stockholders, and his motive for

wishing to inspect the list is wholly immaterial. *Murray v. Walker*, (1913) 156 Ky. 536, 161 S. W. 512.

### Vol. V, p. 152, sec. 5211.

The report must contain a true statement of the condition of the bank and the making and publishing of a false report is pro-

hibited. *Thomas v. Taylor*, (1912) 224 U. S. 73, 32 S. Ct. 403, 56 U. S. (L. ed.) 673.

### Vol. V, p. 154, sec. 5213.

This section is cited in *United States v. Herrig*, (D. C. Mont. 1913) 204 Fed. 124.

### Vol. V, p. 157, sec. 5219.

#### I. LIMIT OF STATE TAXATION.

Power to tax in general.—This statute, in effect, provides that shares of stock in national banks may be taxed by the state, provided no discrimination is made against such shares in favor of shares of stock of other banks in competition with national banks. *Des Moines Nat. Bank v. Des Moines*, (1911) 153 Ia. 336, 133 N. W. 767.

The purpose of Congress in fixing limits to state taxation on investments in the shares of national banks was to render it impossible for the state in levying such a tax to create and foster an unequal and unfriendly competition by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. *First Nat. Bank of Nephi v. Christensen*, (1911) 39 Utah 568, 118 Pac. 778.

Personal property exempt.—This section alone furnishes the measure of the power of a state to tax national banks, their property, or their shares. By its unambiguous provisions, the power is confined to a taxation of the shares of its stock in the names of and against the shareholders, and to an assessment of the real estate in the name of and against the bank itself. The necessary effect is to forbid and prevent, of course, the state from assessing or taxing at all any of the personal property of such institutions. *Tarrant v. Bessemer Nat. Bank*, (1912) 7 Ala. App. 285, 61 So. 47.

Taxation of depositor's credits.—Taxation by the state of credits belonging to depositors is permitted under this section provided the scheme of taxation adopted does not constitute an injurious discrimination. *Clement Nat. Bank v. Vermont*, (1913) 231 U. S.

120, 34 S. Ct. 31, wherein the court said: "The object is to prevent hostile discrimination and for this purpose a standard is fixed. . . . With respect to the taxation of depositors' credits, the federal statutes do not prescribe a rule; and, the property being normally subject to the state's taxing power, there is no warrant for implying a restriction which would extend beyond the requirements of protection from the prejudicial effect of such exactions as would be unjustly discriminatory."

Federal decisions controlling.—The power of a state to tax national banks or the shares of stock in such banks is derived from Congress, and the decisions of the United States Supreme Court on questions touching the power of the state in this respect are controlling. *Des Moines Nat. Bank v. Des Moines*, (1911) 153 Ia. 336, 133 N. W. 767.

#### II. THE RULE AS TO DISCRIMINATION.

Different systems of taxation.—A state is not obliged to apply the same system to the taxation of national banks that it uses in the taxation of other property, provided no injustice, inequality or unfriendly discrimination is inflicted upon them. *Amoskeag Sav. Bank v. Purdy*, (1913) 231 U. S. 373, 34 S. Ct. 114.

Exact equality not required.—The language of the statute clearly prohibits discrimination against shareholders in national banks and in favor of the shareholders of competing institutions, but it does not require that the scheme of taxation shall be so arranged that the burden shall fall upon each and every shareholder alike, without distinction arising from circumstances per-

sonal to the individual. *Amoskeag Sav. Bank v. Purdy*, (1913) 231 U. S. 373, 34 S. Ct. 114.

**How question of discrimination determined.**—The question whether an owner of national bank shares has been subjected to a state tax in excess of the limitation imposed by this section, is a practical question, to be determined by considering whether he is actually discriminated against in favor of other moneyed capital in the hands of individual citizens of the state. *Amoskeag Sav. Bank v. Purdy*, (1913) 231 U. S. 373, 34 S. Ct. 114.

**The term "moneyed capital."**—Moneyed capital does not mean all capital the value of which is measured in terms of money, nor all forms of investments in which the interest of the owner is expressed in money, nor shares of stock in railroad, mining companies, manufacturing companies, or other corporations represented by certificates showing that the owner is entitled to an interest expressed in money value in the entire capital and property of the corporation, nor personal property, such as ordinary chattels or commodities, nor investments in the various manufacturing and industrial enterprises; but does include shares of stock or other interest owned by individuals in enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by the use of money. *First Nat. Bank of Nephi v. Christensen*, (1911) 39 Utah 568, 118 Pac. 778. See to the same effect *Des Moines Nat. Bank v. Des Moines*, (1911) 153 Ia. 336, 133 N. W. 767.

### III. EXEMPTIONS AND DEDUCTIONS.

**Deduction of indebtedness.**—A state statute providing for a tax on bank shares including state and national is not in violation of this section, because not allowing any deductions for the owners' debts. *Amoskeag Sav. Bank v. Purdy*, (1913) 231 U. S. 373, 34 S. Ct. 114, wherein the court said: "It is not insisted that this tax law discriminates against national banks or the stockholders thereof as compared particularly with individual bankers, trust companies or savings banks. The ground of complaint is that § 24, in providing that owners of bank stock (state or national) shall not be entitled to deduction from the taxable value of their shares because of their personal indebtedness, is contrary to the restriction con-

tained in § 5219, Rev. Stat., that the shares of national banks shall not be taxed "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state," because under § 21 of the Tax Law all persons are permitted to deduct their debts from their other taxable personal property in general, including, as is claimed, other moneyed capital. Plaintiff in error relies chiefly upon the decision of this court in *People v. Weaver*, (1879) 100 U. S. 539. That case was in effect a review of the decision of the Court of Appeals of New York in *People v. Dolan*, (1867) 36 N. Y. 59. The question was as to the validity of an assessment and taxation of national bank shares in the city of Albany under the state law of April 23, 1866 (N. Y. Laws 1866, p. 1647), without deduction because of the indebtedness of the taxpayer, in view of the fact that under other laws the owners of other kinds of personal property were entitled to have the amount of their debts deducted from the valuation for the purposes of taxation. The state court in the *Dolan* Case had justified the method adopted in taxing the bank shares, upon reasoning that assumed "that while Congress limited the state authorities in reference to the ratio or percentage levied on the value of its shares, which could not be greater than on other moneyed capital invested in the state, it left the matter of the relative valuation of the shares and of other moneyed capital wholly to the control of state regulation." This court held that the clause in § 5219, "that the taxation shall not be at a greater rate than is assessed upon other moneyed capital," etc., meant that the taxation upon shares should not be greater than on other moneyed capital, taking into consideration both the rate of assessment and the valuation. In other words, that the restriction contained in the act of Congress had to do with the actual incidence and practical burden of the tax upon the taxpayer. . . . But the pertinent statutes in the *Weaver* Case differed from those now before us, and the authority of that decision is not controlling.

**Municipal, state and federal bonds.**—The taxation of national bank shares of stock, without deducting therefrom the government bonds held by the bank issuing such stock, would create a discrimination against national banks in violation of section 5219. *Des Moines Nat. Bank v. Des Moines*, (1911) 153 Ia. 336, 133 N. W. 767.

## Vol. V, p. 170, sec. 5234.

**His status.**—To the same effect as the original note, see *Skud v. Tillinghast*, (C. C. A. 6th Cir. 1912) 195 Fed. 1.

## Vol. V, p. 180, sec. 5239.

### PERSONAL LIABILITY FOR VIOLATIONS OF LAW.

**Who may sue.**—A person who buys from another stock in a national bank in reliance

upon a false report of its condition to the Comptroller of the Currency, and suffers damage thereby, has a right of action under this section against any officer or di-

rector who, knowing its falsity, authorizes such report. The one suffering such damages is within the statutory description "any other person." *Cheesbrough v. Woodworth*, (C. C. A. 6th Cir. 1912) 195 Fed. 875, wherein the court said: "It is urged that, as the statute refers to 'the association' and then to 'its stockholders' before using the phrase, 'any other person,' this last phrase, under the rule of *ejusdem generis*, cannot be extended to cover those who purchase bank stock in the market. This argument must be considered in connection with the cases of *Yates v. Jones National Bank*, 206 U. S. 158, 27 Sup. Ct. 638, 51 L. ed. 1002, and *Yates v. Utica Bank*, 206 U. S. 181, 27 Sup. Ct. 646, 51 L. Ed. 1015, in which the Supreme Court seems to hold that strangers to the bank who are, by false reports, induced to make a deposit therein, are within the protection of this statute, and we are unable to find any basis of classification for applying the rule of *ejusdem generis* which would include those induced to become depositors and exclude those induced to become stockholders. The suggestion on the argument that the statute contemplates only those whose injury is derivative from an injury to the bank cannot be accepted, since the injury to the depositor in the *Yates Case* was not of that class. Nor is the statute one calling for the strict application of the rule invoked. The general banking law has made a great variety of regulations and requirements, and violations thereof would injure an equally great variety of persons. The phrase 'any other person' was especially appropriate for the reason that detailed enumeration would have been very difficult. . . . The damages in such a case are personal to the plaintiff. He sues in his own right, not for the association. It suffers no such damage as plaintiff does by the report, and hence it or its receiver has no concern with this kind of an action. It is true there might be a very large number of instances of individual injury result-

ing from one false report, making a burdensome volume of litigation; but each instance is individual, involving specific causal relation between report and damages, and the similar instances have no legally common character."

**Nature of issue.**—An action under this section for damages caused by buying bank stock on the faith of false reports of the bank's condition sent to the Comptroller of the Currency and published involves no direct issue of negligence. The directors are not exonerated solely because they acted in good faith in making the original loan; nor are they liable merely because they negligently made or permitted to be made reckless or bad loans, or negligently failed to collect loans that were collectible, or because with diligence and care they would have known that loans, reported as assets, were bad. The sole primary issue is whether the defendants caused or permitted to be made a statement of the bank's condition, upon which statement the plaintiff relied to his injury and which statement the defendants knew was materially false. In the trial of this issue the detailed history of the entire transaction and of each defendant's connection is, speaking generally, admissible as tending to show whether the loans were at the time in question in fact bad, and whether each defendant knew that fact, but not as otherwise establishing any liability. *Cheesbrough v. Woodworth*, (C. C. A. 6th Cir. 1912) 195 Fed. 875.

**Nature of directors' liability.**—The liability of the directors under this section is several. The plaintiff may arbitrarily select one as sole defendant or two or more to be joined as defendants. Against each individual selected, a sufficient case must be made out to show that he participated in the tort for which a verdict is had; but the plaintiff's reasons for the selection are wholly immaterial. *Cheesbrough v. Woodworth*, (C. C. A. 6th Cir. 1912) 195 Fed. 875.

## Vol. V, p. 188, sec. 5241.

"Visitorial power" means the power to control and arrest abuses, and to enforce a due observance of the statutes. *State v. First Nat. Bank of Portland*, (1912) 61 Ore. 551, 123 Pac. 712, wherein the court said: "The term should also be interpreted in the light of the visitorial powers enumerated in the National Banking Act. These in brief are set out in § 5240, which provides for the ap-

pointment of bank examiners, authorized to make a thorough examination of the affairs of every banking association, examine its officers and agents, under oath, and make a report of the condition of the bank to the controller. These, we take, are the visitorial powers referred to, and which no authority but Congress can authorize.

## Vol. V, p. 193, sec. 4.

This section does not supersede the closing paragraph of section 4 of the Act of July 12, 1882, quoted in the note to this section.

*Levitan v. Houghton Nat. Bank*, (1913) 174 Mich. 566, 140 N. W. 1019.

## Vol. V, p. 197, sec. 380.

This section is directory merely and an action to recover an assessment levied on national bank stock may be brought by the

receiver's special attorney. *McCormick v. Smith*, (1913) 23 Idaho 487, 130 Pac. 999.

## NATURALIZATION.

Vol. V, p. 201, sec. 2165. [*Declaration of intention.*]

**Sufficiency of renunciation of allegiance.**—A declaration which does not comply with this section in that it fails to renounce forever all allegiance and fidelity, particularly by name, to the prince, etc., to whom the applicant owed allegiance is insufficient. In *re Stack*, (W. D. Mo. 1912) 200 U. S. 330. See also p. 745, *infra*, this title, 1909 Supp. p. 366, sec. 4, cl. first.

**Amendment of declaration.**—A declaration of intention which is insufficient in that it fails to specify particularly by name, the prince, potentate, state, etc., whose allegiance is renounced by the applicant, may not be amended *nunc pro tunc*. In *re Stack*, (W. D. Mo. 1912) 200 Fed. 330, wherein the court said: "In the first place, the filing of a declaration of intention is not a judicial proceeding, nor is a declaration of in-

tention a judicial instrument. Its amendment by any court is, therefore, impossible. In the second place, this declaration was made in a state court of Pennsylvania, while this petition was filed in a federal court in Missouri. This court is without power to amend an instrument of record in the Pennsylvania state court, or to order that court to cause such an amendment to be made. And finally, the effect of this would be now to manufacture an entirely new paper—a jurisdictional paper, which has never existed in prescribed form, and which must have been in existence for the requisite period of at least two years before a petition for naturalization can legally be founded thereon." See also p. 745, *infra*, this title, 1909 Supp. p. 366, sec. 4, cl. first.

Vol. V, p. 206. [*Aliens honorably discharged from service in navy or marine corps.*]

**Aliens serving in navy.**—With respect to aliens who have served or are serving in the navy, proof of an honorable discharge after serving one enlistment of four years, with proof of re-enlistment and continued honora-

ble service for the full five-year period, satisfies the statute. In *re Brykczynski*, (E. D. Wis. 1913) 207 Fed. 813.

This section is cited in *United States v. Plaistow*, (W. D. N. Y. 1910) 189 Fed. 1006.

## Vol. V, p. 207, sec. 2169.

This section was not repealed by the Naturalization Act of June 29, 1906, Fed. Stat. Annot. 1909 Supp., p. 364.

In general.—In *Ex parte Shahid*, (E. D. S. C. 1913) 205 Fed. 812, the court construing this section said: "It is safest to follow the reasonable construction of the statute as it would appear to have been intended at the time of its passage, and understand it as restricting the words 'free white persons' to mean persons as then understood to be of European habitancy or descent. By persons of African nativity or African descent presumably the statute means the negro races of Africa or their descendants by intermixture with the races before defined as being the races constituting free white persons. The negro races of Africa presumably referred to are those races from which the

emancipated slaves in the United States (who were made citizens by the 14th amendment to the United States Constitution) descend. This construction of the statute would exclude from naturalization all inhabitants of Asia, Australia, the South Seas, the Malaysian Islands and territories, and of South America, who are not of European descent, or of mixed European and African descent. Under this definition the inhabitants of Syria would be excluded."

**Military service.**—Service in and an honorable discharge from the military service of the United States does not extend the right of naturalization to those persons who are beyond its provision under this section. In *re Alverto*, (E. D. Pa. 1912) 198 Fed. 688.

"Free white persons."—In the original naturalization act the expression "free white



persons" was doubtless primarily intended to include the white emigrants from Northern Europe, with whom the Congress of that day was familiar, and to exclude Indians and persons of African descent or nativity. Beyond this, perhaps, Congress had no definite object in view. It could not have foreseen the vast immigration problems with which the government is now confronted, or the difficulties which might hamper and embarrass the courts in the administration of the law. But, whatever the original intent may have been, it is now settled, by the great weight of authority, at least, that it was the intention of Congress to confer the privilege of naturalization upon members of the Caucasian race only. It is likewise true that certain of the natives of India belong to that race, although the line of demarcation between the different castes and classes may be dim and difficult of ascertainment. In *re Akhay Kumar Mozumdar*, (E. D. Wash. 1913) 207 Fed. 115.

**Half-breeds.**—A person born at a place in Yokohama, Japan, under the dominion of the Empire of Germany, of a German father and Japanese mother, is not entitled to naturalization for the reason that he is not a white person; the right to become naturalized depending upon parentage and blood and not upon nationality or status. In *re Young*, (W. D. Wash. 1912) 195 Fed. 645, 198 Fed. 715. In the latter opinion the court said: "Congress has, by sec. 2169, R. S., limited the right of naturalization to those aliens being 'free white persons and to aliens of African nativity and to persons of African descent.' The term 'white person' must be given its common or popular meaning. As commonly understood, the expression includes all European races and those Caucasians belonging to the races around the Mediterranean Sea, whether they are considered as 'fair whites' or 'dark whites,' as classified by Huxley, and notwithstanding that certain of the southern and eastern European races are technically classified as of Mongolian or Tartar origin. It is just as certain that, whether we consider the Japanese as of the Mongolian race, or the Malay race, they are not included in what are commonly understood as 'white persons.' In the abstractions of higher mathematics, it may be plausibly said that the half of infinity is equal to the whole of infinity; but in the case of such a concrete thing as the person of a human being it cannot be said that one who is half white and half brown or yellow is a white person, as

commonly understood. In Louisiana, a person was deemed white if the African blood did not exceed one-eighth. The same was true in the Colonial Code Noir of France, 2 Kent. 72, note 'b.' In Ohio, if there was more white blood than black or red, the person was considered white; but, if the colored blood was equal, the person was not white. *Jeffries v. Ankeny*, 11 Ohio 372; *Gray v. State*, 4 Ohio 354. In Virginia and Kentucky the dividing line was generally recognized as the quarter-blood. *Dean v. Commonwealth*, 45 Va. 541; *Gentry v. McMinnis*, 3 Dana (Ky.) 382; 30 Encyc. Law (2d ed.) 517. Courts have found it necessary in certain cases to prescribe to a child either the status of the father or mother, as where one parent was a slave and the other free; and, treating a slave as any other animal property and following the civil law, they have held that the child took the status of the mother. In cases involving the jurisdiction of the court, as where the court had no jurisdiction to try an Indian for a crime committed against an Indian, and it was considered necessary to ascribe the defendant's status to one or the other parent, Indians being free-men, the common law has been followed, and the child has been held to take the status of the father. These decisions arose from the necessity for the adoption of an artificial rule. There is no such necessity in the case at bar. It is not necessary to determine the exact status of the petitioner. All that is necessary is to determine whether he is a 'white person' within the meaning of the law. Counsel for petitioner chiefly rely upon the case *In re Rodriguez*, (D. C.) 81 Fed. 337. In that case the petitioner was a Mexican. It appears that the case was controlled by the fact that the natives of Mexico had for over 300 years been mixing their blood with that of the natives and descendants of Spain; indulging in the presumption that after that length of time the dominant race would have established itself. Further, the court was controlled by the treaty with Mexico of 1868, expressly recognizing the right of Mexicans to become naturalized citizens of the United States. This treaty had, prior to the decision, been abrogated; but, as showing the government's construction of the law limiting the right to citizenship, applied to natives of Mexico, it was considered persuasive. If this decision goes further than here indicated, it is opposed to what this court considers the weight of authority."

## Vol. V, p. 208, sec. 2170.

**"Reside."**—It is familiar knowledge that the word "reside" is capable of different meanings, and when employed in a statute must be construed in the light of the context and the purpose of such statute; generally, however, it signifies nothing more or less than domicile. Some light is thrown upon the intent of Congress by the history of the statute. As originally enacted April 14,

1802 (2 Stat. 153, c. 28), the requirement was simply of five years' residence in the United States, and as then construed the term "residence" meant "domicile." In *re An Alien*, (1842) 1 Fed. Cas. No. 201a. By the amendment of March 3, 1813 (2 Stat. 811, c. 42), the section was made to read as follows: "No person who shall arrive in the United States, from and after the time when

this act shall take effect, shall be admitted to become a citizen of the United States, who shall not for the continued term of five years next preceding his admission as aforesaid have resided within the United States, without being at any time during the said five years out of the territory of the United States." Through the change thus wrought Congress very clearly evinced its intention of requiring continuous physical presence. But, upon the other hand, the fact that in the revision the clause, "without being at any time during the said five years out of the territory of the United States," was omitted, would seem to indicate a purpose again to abandon this requirement. It has been held that under the present law continuity of physical presence is not required. *In re Schneider*, (S. D. N. Y. 1908) 164 Fed. 335; *United States v. Cantini*, (W. D. Pa. 1912) 199 Fed. 857. This we believe to be a correct interpretation both of the new law and of section 2170 of the Revised Statutes. To

establish a residence there must doubtless be a concurrence of act and intent; but, when once established, temporary absences from time to time, unaccompanied by an intent to abandon or change the residence, do not operate to interrupt the continuity thereof. There is nothing in the naturalization act, other than the phrase itself, "has resided continuously within the United States," to indicate a purpose upon the part of Congress to require continuous physical presence, and in the practical administration of the law such a construction would entail consequences harsh in the extreme. Within reasonable limits, therefore, it is a question of fact, to be determined in the light of all the attendant circumstances of each particular case, whether the continuity of residence has been broken by temporary absences. *United States v. Rockteschell*, (C. C. A. 9th Cir. 1913) 208 Fed. 530. See also p. 747, *infra*, this title, 1909 Supp. p. 368, sec. 4, cl. fourth.

## Vol. V, p. 210, sec. 2174.

Seamen on lake-going steamers are entitled to naturalization under the provisions of this section. *In re Sutherland*, (N. D. Ohio 1912) 197 Fed. 841.

Seamen on coastwise steamers are entitled to naturalization under the provisions of this section. *In re Lind*, (N. D. Cal. 1911) 192 Fed. 209.

Sufficiency of certificate.—A certificate of discharge signed by the master of the vessel satisfies the statute. *In re Lind*, (N. D. Cal. 1911) 192 Fed. 209.

In the case of *In re Sutherland*, (N. D.

Ohio 1912) 197 Fed. 841, it appeared that the petitioner for citizenship under this section offered together with his declaration of intention, five certificates of discharge, all of which were made and signed by masters of American vessels, and showed service on lake-going steamers for a period subsequent to the date of his declaration, aggregating three years and nineteen days. These certificates showed good conduct during the period of such service. It was held that the certificates were sufficient.

## 1909 Supp., p. 365, sec. 3.

Rules governing state courts.—In naturalization proceedings the United States Government exercises sovereign functions which exclusively belong to that government, and in authorizing the state courts to act in such proceedings the national government selects such courts and the clerks thereof as government agencies through whom said government is discharging one of its peculiar functions of national sovereignty. This power being one to be exercised as a function of the national government, and governed by rules required by the federal constitutional provision to be uniform, it follows that the state courts must of necessity be controlled in their methods of procedure, as well as in their determination of the rights of applicants for citizenship, by laws enacted by Congress. Upon no other theory could the rule of uniformity be maintained. *State v. Superior Court for King County*, (1913) 75 Wash. 239, 134 Pac. 916.

Record must show jurisdiction.—The jurisdiction of the courts to naturalize aliens is conferred by special statute, and is to be exercised in a special and summary manner, and not according to the rules governing

courts in plenary proceedings. Usually these proceedings are *ex parte*, and the declarations of intention almost invariably *ex parte*. The law is well settled that in such cases a judgment can only be supported by a record which shows that all the facts necessary to confer jurisdiction existed, as no presumptions as to jurisdiction will be indulged. *Ex parte Lange*, (E. D. Mo. 1912) 197 Fed. 769.

Right of appeal.—"As the act of 1906 is silent with regard to any appeal or writ of error, while sedulous in placing guards and restrictions around the proceedings and fully protecting the United States by authorizing a suit to annul any certificate fraudulently obtained or improperly granted, it is not to be supposed that it was the intention of the said act to make a reviewable case of every application for naturalization. The mischief to be remedied was not in that line, but was the hasty or improvident way in which many of the courts under the prior laws naturalized aliens without examination and proper proof. Naturalization of aliens is an act of grace, not right, and it is not necessarily a business of the courts. It is lodged in the

courts for convenience and, at the pleasure of Congress, can be taken entirely away and lodged in the Bureau of Commerce and Labor, which is now charged with supervision of the operations under the act, or with any executive officer, as is now lodged the right

and power to determine whether certain aliens shall be permitted to come into the country at all." *State v. Superior Court for King County*, (1913) 75 Wash. 239, 134 Pac. 916.

## 1909 Supp., p. 366, sec. 4, cl. first.

**Nature of proceedings.**—Proceedings for naturalization in a court of record should be governed by the same general principles as ordinary judicial proceedings, and vacated if the defects are vital and essential things, but sustained if the defects are merely technical and formal. The fact that defects of the latter class cause annoyance and trouble to the supervising, administrative department, cannot make void any proceedings upon which substantial rights are based. *United States v. Erickson*, (W. D. Mich. 1910) 188 Fed. 747.

**Sufficiency of renunciation of allegiance.**—A declaration of intention is insufficient which does not contain a renunciation by name, to the prince, potentate, state, or sovereignty of which the declarant is at the time a citizen or subject. *Ex parte Lange*, (E. D. Mo. 1912) 197 Fed. 769, wherein the court said: "The applicant, although a native of Germany, may be a subject or citizen of some other country; he may have been born there, while his mother, a subject of the Czar of Russia, was there on a visit; his father might have been naturalized in some other country when the applicant was a minor; or the petitioner might himself by naturalization have become a subject of some country other than that of his birth. An applicant may be a subject of a country with which the United States is at war, although not born there. These illustrations show that there are some reasons for the requirement that the renunciation be 'particularly by name to the prince and sovereignty of which, at the time, he is a subject or citizen.' While the court is of the opinion that the naturalization laws should be liberally construed in order to enable those aliens who, under the law, are entitled to American citizenship, to acquire it, the prerequisites prescribed by Congress in plain and unambiguous language cannot be dispensed with by the courts, even if a hardship may result thereby to an individual." See also p. 742, *supra*, this title, vol. 5, p. 201, sec. 2165.

**Amendment of defective declaration of intention.**—No power exists on the part of the federal court to amend a declaration of intention which is defective for failing to correctly state the declarant's last foreign residence and allegiance. *In re Friedl*, (E. D. Wis. 1913) 202 Fed. 300, wherein the court said: "The facts may be summarized thus: The petitioner's original declaration averred his place of birth to have been Eisenberg, Germany, and his intention to forever renounce allegiance particularly to 'William II, emperor of Germany, of which I am now

a subject.' In truth he was born at Eisenberg, Austria-Hungary, and was, at the time of his attempted declaration, a subject of its sovereign. More than three years thereafter, the court receiving such declaration ordered its amendment to accord with the truth, reciting in such order that the 'error as to his birthplace and allegiance as given in said declaration is a clerical error, and due to a misunderstanding on the part of the clerk recording said declaration.' There is at once suggested the basis of the government's challenge of the petitioner's right to citizenship, namely, noncompliance with the statute requiring the making and proof of a declaration of intention to become a citizen, and renunciation of allegiance to a particular foreign sovereign, and that the attempted amendment is wholly nugatory, because beyond the power of the court to grant it. The alien's declaration of intention and its reception by a court, as prescribed in the statute, in no sense constitute a judicial proceeding, incident to which there resides in or is reserved control over either the declarant or the declaration. Nor is the power to receive the declaration to be considered as a grant of jurisdiction. It enables the alien to take a step imperatively prerequisite to a later special judicial proceeding. If the power of substantive amendment exist, then it must follow that naturalization can be effected in any case without amending an insufficient declaration; that is, if the declaration is insufficient, as not complying with the statute, the court, having the power to amend, may proceed to naturalize without amendment, and, while its judgment may be erroneous, it would not be void. It seems to me that such view would frustrate the whole act, because it would place the power of the court above the terms of the act. In a sense it may be said that, before the applicant can invoke the subsequent jurisdiction for an order of naturalization based upon the petition prescribed by the act, he must at his peril have complied with the exact terms of the section respecting his declaration of intention, and must also have seen to it that the precise and true declaration is received by the court and evidenced of record. It is a step embodying, not only the substantive elements specified, but one which, to avail, must be taken at or before a particular time. If a declarant or a petitioner may obtain the benefit of the act upon parol proof of his compliance with its terms respecting his declaration, then the latter become merely advisory, and the act as it has been construed in practice is really superseded and nullified. The hardship resulting

to the petitioner cannot be relieved against merely because it may appear that the error is clerical, and not his own. If the power to amend is to be recognized at all, its exercise may well be invoked in every case where facts are presented disclosing reasonable excuse or meritorious grounds for the exercise of a discretion. It may be noted, however, that in the present case the applicant can hardly claim to be wholly free from fault. As a matter of practice, a copy of the declaration has always been delivered to the declarant. It appears here that such copy, and doubtless disclosing upon its face the error complained of, was retained by declarant for about three years; and, if the merits of the amendment could be considered, declarant could not well claim to have been diligent. I am well satisfied that the power to amend the declaration does not exist, and hence the government's objections, being based as they are upon a defect disclosed in a petition, are well taken. The views above expressed are fully sustained in other districts." See also p. 742, *supra*, this title, vol. 5, p. 201, sec. 2165.

**Renaturalization on loss of certificate of naturalization.**—In the case of *In re Buck*, (E. D. Ark. 1913) 204 Fed. 701, the court said: "The only question to be determined is whether the petitioner, having been once naturalized by a court of competent jurisdiction, and having therefore ceased to be an alien, is entitled to be again naturalized, for the purpose of enabling him to procure a certificate of naturalization, in order that he

may have the evidence of his citizenship. His main object of requiring that certificate is that he has entered a homestead under the laws of the United States and is ready to make final proof, but is unable to do so, as he has no means of establishing his citizenship by a copy of the judgment naturalizing him. The naturalization laws of the United States clearly apply only to aliens and not citizens of the United States. . . . As the petitioner has by the judgment of the circuit court of McLean county, Ill., a court of competent jurisdiction, been naturalized, and is now a citizen of the United States, he has ceased to be an alien, and for that reason I am of the opinion that the court is without jurisdiction to entertain his petition. The loss of the certificate of naturalization or the record of the court does not deprive him of his citizenship. Citizenship having been once acquired, he continues to remain a citizen, unless the judgment should be set aside by a court of competent jurisdiction, or his American citizenship renounced by his voluntary act. Whether his naturalization may under these circumstances be established by oral proof, or in some manner other than by a certified copy of the judgment of the circuit court of McLean county, Ill., is not before the court. The proper proceeding for him to pursue would be to apply to the court which naturalized him to restore the record of the judgment in the manner provided by the laws of the state of Illinois."

## 1909 Supp., p. 366, sec. 4, cl. second.

**Nature of certificate.**—"There is no provision in the act that the certificate required to be attached to the petition is the same certificate of registry that the commissioners of immigration should cause to be given to the alien. The certificate to be filed with the petition for naturalization provides only that it shall set forth the 'date, place, and manner of his arrival.' The certificate of registry would include, in addition, occupation, personal description in detail, place of birth, last place of residence, and the intended place of residence in the United States." *In re Schmidt*, (W. D. Pa. 1913) 207 Fed. 678.

**Certificate made up from records.**—The certificate mentioned in this section should be made up from records mentioned in section 1 of this act after proper inspection by the proper immigration officers and not merely from the statement made by the appellant. *In re Hollo*, (N. D. Ohio 1913) 206 Fed. 852.

But where it appeared that at the time an alien came to this country, he was not registered at the immigration office but afterwards, for the express and announced purpose of securing naturalization papers, he presented himself for examination before the United States inspector at the port of entry and made a satisfactory showing that he had resided continuously in the United States

from the date of his first landing and made a report to the Department of Commerce and Labor at Washington, which department thereupon issued a certificate showing that the petitioner had arrived at the port on the day claimed, it was held that the certificate was sufficient under this section, the court saying: "This certificate complies with the requirements of the law. This ruling of the court cannot in any way work to the detriment of the rigid enforcement of the emigration laws by the Department of Commerce and Labor. They were not required to issue the certificate; and, having issued it in this case, there is no reason why they must do so in a similar case in the future. The Naturalization Act requires records of entry to be kept by the Emigration Department. The court is of the opinion that they would be warranted in refusing a certificate of entry unless such entry was shown by their records. However, that question is not before this court at this time. If proceedings are ever brought by an alien to compel the issuance of a certificate of entry upon other showing than the records of the emigration office, it will be time enough for the court to pass upon that question. When the Department of Commerce and Labor see fit to issue a certificate showing the entry of an alien, they ought not to be heard to say in

opposition to the admission of the alien to citizenship that, while the certificate is genuine and states the truth, the court ought not to give any weight to it because the official issuing it did not have proper proof before him." In re Page, (E. D. Mich. 1913) 206 Fed. 1004.

**Certificate filed with petition.**—The certificate from the Department of Commerce and Labor must be filed at the time the petition is filed, otherwise the petition will be denied. In re Liberman, (W. D. Wash. 1912) 193 Fed. 301.

**A mistake in the name of a child** is not ground for denying a petition for naturalization, there being an absence of any evidence of bad faith. In re Camaras, (D. C. R. I. 1913) 202 Fed. 1019.

**Limitation of time for filing application.**—The provision as to the time for filing the application is in the nature of a statute of limitation, and, being such a statute, it is well settled by the decisions of all the courts, state as well as national, that, unless the language used is so clear, strong, and imperative that no other meaning can be given to it, or unless the intention of the legislature cannot be otherwise satisfied, the statute ought not to be given retrospective construction. Linger v. Balfour, (Tex. 1912) 149 S. W. 795.

The true intent of Congress was that aliens declaring their intention to become naturalized after the passage of the act must file their application within seven years after the filing of the declaration of intention; and as to those who filed their declaration of intention before the enactment of the statute they must make their final application within seven years from the enactment of the act. Linger v. Balfour, (Tex. 1912) 149 S. W. 795.

**Duplicate petition.**—In United States v. Erickson, (W. D. Mich. 1910) 188 Fed. 747, the court said: "The requirement of a duplicate petition as distinguished from a mere copy cannot be for any purpose excepting

for the convenience and permanence of record, and I do not think the absence of one duplicate, under the conditions here stated, is vital. The department desires to be advised of all the particulars specified in the petition, so that it can make the necessary inquiry and opposition, if there is reason therefor. This substantial purpose was fully satisfied by what was done in this case."

**Verification.**—A petition for naturalization is not void because not verified by each witness on the same day. In re Freeze, (D. C. Ore. 1911) 189 Fed. 1022, wherein the court said: "I can conceive of no theory in law or in reason why a petition may not be partly filled out on one day and completed on the next, provided requisite notice of the application is immediately given. It is no doubt the better practice for both witnesses to sign and verify at the same time, and such should ordinarily be required; but circumstances may arise where it is impossible or impracticable to do so. Where a petition in due form, purporting to be verified by two witnesses, is filed, one of whom is in fact incompetent, it has been held that it cannot be amended by being verified by another witness, and should be dismissed. United States v. Martorana, (C. C. A. 3d Cir. 1909) 171 Fed. 397. But where the petition is properly verified by the requisite number of competent witnesses prior to the posting of notice, there is no occasion for amendment; for the petition is complete and conformable to the law before any official action is taken thereon."

**Amending petition.**—Section 76 of the Penal Law, Fed. Stat. Annot. 1909 Supp. p. 425, makes it an offense for any one to apply for naturalization in a fictitious or assumed name. In view of this statute a petition for naturalization which does not contain the petitioner's right name cannot be amended but he must be left to make a new declaration in his right name. In re Boorvis, (S. D. N. Y. 1913) 205 Fed. 401.

## 1909 Supp., p. 368, sec. 4, cl. fourth.

**Good moral character.**—An applicant who made false answers to questions of the clerk of the court as to whether he had ever been arrested cannot be said to have behaved himself as a man of good moral character. In re Talarico, (W. D. Pa. 1912) 197 Fed. 1019.

In the case of In re Trum, (W. D. Mo. 1912) 199 Fed. 361, a bartender in the state of Kansas, which had a prohibitory law, was held not to be a person of good "moral character," he having been arrested and sentenced to imprisonment for selling liquor illegally. The fact that he had been paroled following his conviction was held not sufficient again to give him a good character. The court said: "It is fundamental that every state has, in general, the right to prescribe the terms upon which it will admit aliens to citizenship, and compliance with these terms is a condition precedent to the power of the court

to enter its decree. As governing this case, Congress has provided that it shall be made to appear to the satisfaction of the court that during the five years immediately preceding the date of application the applicant shall have behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. What, then, constitutes good moral character, within the meaning of the Naturalization Act? The question has been infrequently discussed by the courts. Cases involving conduct evil in itself would present little difficulty. Discussion arises where the offense is merely *malum prohibitum*. In the case of In re Spenser, 5 Sawyer 193, Fed. Cas. No. 13,234, perjury is cited as falling within the former class, and an isolated case of the prohibited sale of spiritu-

ous liquors as belonging to the latter. Concerning this, however, the court says: 'And yet it is clear that anything like habitual gaming or vending of liquors under such circumstances would constitute bad behavior—immoral behavior—and be a bar under the statute to admission to citizenship.' Such, I think, must be thoughtful view of any court. The laws of the state of Kansas prohibit the local sale of spirituous liquors. The courts of that state, when appealed to, enjoin such sales upon specific premises. The applicant, by engaging in such business in that state and upon such premises, exhibited a willful disregard, not only for the laws of the state, but the orders of the court. His act was that of the lawbreaker—not of one well disposed to the good order and happiness flowing from attachment to the principles of the Constitution of the United States. The court is not satisfied that such is the behavior of a man of good moral character. Defiance of the established order, and of the mandates of legal tribunals declaratory thereof, constitutes bad citizenship, bad behavior, and, if willfully persisted in, indicates a perverted moral character. It may well be doubted if a tendency in this direction would not menace the public welfare more than individual cases of immoral conduct as commonly understood. No court would directly set the seal of its approval or condonation upon such behavior, nor should it do so by indirection. A subsequent parole, like a subsequent pardon, does not obliterate the offense, but merely abates the penalty imposed under the law that has been violated."

**Scope of examination.**—"The naturalization act makes the applicant for citizenship a witness in his own behalf. His testimony as to being attached to the principles of the Constitution of the United States and his disposition with relation to our theory of government, and his position in and relation to society and beliefs pertaining to organized government, and disposition as to public officers, is the very essence of the inquiry. These are matters of growth and development, and a conclusion as to some of these requirements can only be arrived at by a discovery of the mental relation and bearing as to these functions and institutions; and any condition or practices of the applicant during his previous life would be material as bearing upon the truthfulness of the statements made. The examination, since the applicant is a witness in his own behalf, should not be limited to the time within which he may have resided in the United States, but should cover a broader period of his life, as that would be a very material criterion by which the court could judge his present and probable future conduct. It would be material to know the sacredness with which human life is regarded, his relation to organized society pertaining to governmental functions, and, if such examination should develop a standard of life and living at some time which would be considered outside the limits which religion and

society and the law have long established for the best welfare of government, it would be of the most material character to guide the court in its conclusions in determining whether a person who had ruthlessly violated that standard upon which good qualities are dependent should be the recipient of the highest privilege this government can confer—citizenship." *United States v. Bressi*, (W. D. Wash. 1913) 208 Fed. 369.

"Continuously" is not used in this paragraph literally as requiring the applicant to remain at all times physically within the jurisdiction, but applies to change of domicile only. *In re Deans*, (W. D. Ark. 1913) 208 Fed. 1018.

**Meaning of "resided."**—In *United States v. Cantini*, (W. D. Pa. 1912) 199 Fed. 857 the court commenting on the meaning of the word "resided" as used in the section said: "It was clearly not the purpose of Congress to intend that an alien seeking citizenship should not leave the territorial limits of the United States within a period of five years preceding his application. Had that been the intention, Congress would have used some language like that used in the Naturalization Act of March 3, 1813 (2 St. at Large, 811, c. 42, § 12), there being in that act a provision that the applicant should 'for the continued term of five years next preceding his admission as aforesaid have resided within the United States without being at any time during the five years out of the territory of the United States.' But, apart from that, to hold that the language of the present act has the same meaning as is expressed in the act of 1813 would be a conclusion wholly unjustified. At the date of the former act opportunities for communication between residents of foreign states were few, and the expense and perils of travel were great. Under those circumstances, the uninterrupted continuance of the applicant's stay within the limits of the United States demanded by the act of 1813 might not be deemed unreasonable. If that were the law to-day, the alien who gratified his desire to see Niagara Falls from the Canadian side of the river must forego his application for citizenship for a period of five years thereafter. In the present case, however, the United States does not insist that there shall be no departure from the territory of the United States during the period of five years, but urges that the departure for the length of time in which the defendant was absent from the United States is an unreasonable departure, and therefore, because his departure was unreasonable, the court had no jurisdiction to admit him to citizenship. The court does not believe that the question of the reasonableness or the unreasonableness of an applicant's absence from the United States is a fact which should be determined by it, except in connection with the fact of residence. The fact of residence and the continuity of that residence must be determined by the court, and in determining the fact of residence there must be a consideration of the facts which express the intention of the

applicant. If the facts do not clearly show an intention on the part of the applicant to abandon a residence which he has acquired in this country, he must be deemed to be continuing to reside here. In the present case it appears that the defendant had been in this country for considerably over nine years when he returned to Italy to visit his parents for a period of three months; that he requested his employers to retain his place for him, and that, owing to his marriage and the birth of a child and other circumstances, his stay was prolonged; that he never abandoned, nor intended to abandon, his residence here and establish a permanent residence elsewhere; that those facts were proven, not alone by the declaration of the defendant, which is unsafe to rely upon in questions of this kind, but by the oaths of other witnesses at the hearing. This case is somewhat analogous to *In re Schneider*

(C. C.) 164 Fed. 335. That was the case of a sailor, who it was held did not abandon his residence by going to sea. The learned judge held in that case that the word 'continuously' cannot be construed literally. It is probable that the word was used to prevent a change of domicile or change of residence within that period, as in the case of one who abandoned his intention to reside in the United States, and left this country to take up his residence elsewhere, and who, after finding that conditions were not satisfactory to him in the new place, returns again and seeks to make use of a formerly abandoned privilege." See also p. 743, *supra*, this title, Vol. V, p. 208, sec. 2170.

That a minor daughter is held as an alien afflicted with trachoma is not ground for denying the father's petition for naturalization. *In re Camaras*, (D. C. R. I. 1913) 202 Fed. 1019.

## 1909 Supp., p. 370, sec. 9.

Provision as to evidence mandatory.—The provision of this section requiring the hearing on the petition to be in open court, and that the applicant and his witnesses shall be examined under oath, "before the court and in the presence of the court," is specific and

mandatory, and, except as provided in the tenth section, the court is not authorized to receive or consider evidence taken by depositions. *United States v. Kolodner*, (M. D. Pa. 1912) 199 Fed. 809.

## 1909 Supp., p. 371, sec. 10.

"District" as used in this section refers to the District of Columbia, one of the three geographical names enumerated in section 3, to describe the habitat of the courts upon which exclusive naturalization jurisdiction is

conferred. The order in which the words are used is the same,—state, territories, and district. *United States v. Kolodner*, (C. C. A. 3d Cir. 1913) 204 Fed. 240, *reversing* (D. C. Pa. 1912) 199 Fed. 809.

## 1909 Supp., p. 372, sec. 13.

State laws.—A country clerk who is a state officer and who receives a salary from the state declared by statute to be in "full compensation for all services rendered," must account to the state for all naturalization fees received by him. *Mulcrevy v. San Francisco*, (1914) 231 U. S. 669, 34 S. Ct. 260, wherein the court said: "The act does not purport to deal with the relations of a state officer with the state. To so construe it might raise serious questions of power, and such questions are always to be avoided. We do not have to go to such lengths. The act is entirely satisfied without putting the officers of a state in antagonism to the laws of the state—the laws which give them their

official status. It is easily construed and its purposes entirely accomplished by requiring an accounting of one-half of the fees to the United States, leaving the other half to whatever disposition may be provided by the state law." See also *Franklin County v. Barnes*, (1912) 68 Wash. 488, 123 Pac. 779. Compare *Fields v. Multnomah County*, (1913) 64 Ore. 117, 128 Pac. 1045, 44 L.R.A. (N.S.) 322.

This section determines the question of fees in naturalization proceedings, and any state statute attempting to regulate fees in such proceedings is invalid. *State v. Quill*, (Ind. 1913) 102 N. E. 106.

## 1909 Supp., p. 373, sec. 14.

Effect of failure to comply with section.—The provisions of this section of the naturalization act providing that declarations of intention and petitions for naturalization shall be bound in chronological order, merely define the duties of the officers having such matters in charge, and if they have so pre-

pared and bound the applications that the provisions of the section cannot be observed it should not affect the right of the applicant, who has complied with all the formalities of law and has shown himself entitled to admission. *In re Freeze*, (D. C. Ore. 1911) 189 Fed. 1022.

## 1909 Supp., p. 373, sec. 15.

**Constitutionality.**—In *Johannessen v. United States*, (1912) 225 U. S. 227, 32 S. Ct. 613, 56 U. S. (L. ed.) 1066, the court upheld the constitutionality of this section. Mr. Justice Pitney, writing the opinion of the court, said: "It was long ago held in this court, in a case arising upon the early acts of Congress which submitted to courts of record the right of aliens to admission as citizens, that the judgment of such a court upon the question was, like every other judgment, complete evidence of its own validity. *Spratt v. Spratt*, (1830) 4 Pet. 393, 408. This decision, however, goes no further than to establish the immunity of such a judgment from collateral attack. It does not follow that Congress may not authorize a direct attack upon certificates of citizenship in an independent proceeding such as is authorized by § 15 of the act of 1906. Appellant's contention involves the notion that because the naturalization proceedings result in a judgment, the United States is for all purposes concluded thereby, even in the case of fraud or illegality for which the applicant for naturalization is responsible. This question may be first disposed of. The Constitution, Art. I, § 8, gives to Congress power 'to establish a uniform Rule of Naturalization.' Pursuant to this authority it was enacted, as above quoted from the Revised Statutes, that an alien might be admitted to citizenship 'in the following manner and not otherwise;' § 2165 requiring proof of residence within the United States for five years at least; and § 2170 declaring a continued term of five years' residence next preceding his admission to be essential. An examination of this legislation makes it plain that while a proceeding for the naturalization of an alien is in a certain sense a judicial proceeding, being conducted in a court of record and made a matter of record therein, yet it is not in any sense an adversary proceeding. It is the alien who applies to be admitted, who makes the necessary declaration and adduces the requisite proofs, and who renounces and abjures his foreign allegiance, all as conditions precedent to his admission to citizenship of the United States. He seeks political rights to which he is not entitled except on compliance with the requirements of the act. But he is not required to make the Government a party nor to give any notice to its representatives."

This section was also declared constitutional in *Luria v. United States*, (1913) 231 U. S. 9, 34 S. Ct. 10, wherein the court through Mr. Justice Van Devanter said: "Several contentions questioning the constitutional validity of § 15 are advanced, but all, save the one next to be mentioned, are sufficiently answered by observing that the section makes no discrimination between the rights of naturalized and native citizens, and does not in any wise affect or disturb rights acquired through lawful naturalization, but only provides for the orderly cancellation,

after full notice and hearing, of certificates of naturalization which have been procured fraudulently or illegally. It does not make any act fraudulent or illegal that was honest and legal when done, imposes no penalties, and at most provides for the annulment, by appropriate judicial proceedings, of merely colorable letters of citizenship, to which their possessors never were lawfully entitled. . . . Objection is specially directed to the provision which declares that taking up a permanent residence in a foreign country within five years after the issuance of the certificate shall be considered *prima facie* evidence of a lack of intention to become a permanent citizen of the United States at the time of the application for citizenship, and that in the absence of countervailing evidence the same shall be sufficient to warrant the cancellation of the certificate as fraudulent. It will be observed that this provision prescribes a rule of evidence, not of substantive right. It goes no farther than to establish a rebuttable presumption which the possessor of the certificate is free to overcome. If, in truth, it was his intention at the time of his application to reside permanently in the United States, and his subsequent residence in a foreign country was prompted by considerations which were consistent with that intention, he is at liberty to show it. Not only so, but these are matters of which he possesses full, if not special, knowledge. The controlling rule respecting the power of the legislature in establishing such presumptions is comprehensively stated in *Mobile, J. & K. C. R. Co. v. Turnipseed*, (1910) 219 U. S. 35, 42, 43, as follows: 'Legislation providing that proof of one fact shall constitute *prima facie* evidence of the main fact in issue, is but to enact a rule of evidence, and quite within the general power of government. Statutes, national and state, dealing with such methods of proof in both civil and criminal cases abound, and the decisions upholding them are numerous. . . . That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presumption of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed. If a legislative provision not unreasonable in itself prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied



him.' Nor is it a valid objection to such legislation that it is made applicable to existing causes of action."

This section is retrospective but it is not therefore void as an *ex post facto* law. *Johannessen v. United States*, (1912) 225 U. S. 227, 32 S. Ct. 613, 56 U. S. (L. ed.) 1066, wherein the court said: "The act in effect provides for a new form of judicial review of a question that is in form, but not in substance, concluded by the previous record, and under conditions affording to the party whose rights are brought into question full opportunity to be heard. Retrospective acts of this character have often been held not to be an assumption by the legislative department of judicial powers."

**Jurisdiction to cancel illegally granted certificate.**—Where a certificate of naturalization is illegally granted by a state court, a district court of the United States for the district in which the naturalized citizen resides has jurisdiction at the instance of the United States to cancel and vacate it. *United States v. Plaistow*, (W. D. N. Y.) 189 Fed. 1006.

**Attacking certificate in court of co-ordinate jurisdiction.**—When a certificate of naturalization is obtained by fraud, or is illegally procured in the sense that it has been issued without authority of law, and is in effect false and spurious, a suit in equity may be maintained for its cancellation. Such a suit is not intended to correct an error of court, but to defeat the fraud of the litigant. But when a certificate is issued as the result of a judicial hearing in good-faith attempt to exercise the jurisdiction conferred by the act of Congress, it is not open to attack in another court of co-ordinate jurisdiction simply by reason of alleged errors which may have occurred in the court pursuant to whose judgment the certificate was issued. Errors of that kind can properly be reached only by appeal or writ of error. *United States v. Lenore*, (D. C. N. D. 1913) 207 Fed. 865.

**Doctrine of res judicata not applicable to prevent revocation of certificate.**—The foundation of the doctrine of res judicata, or estoppel by judgment, is that both parties have had their day in court. A certificate of naturalization, procured ex parte in the ordinary way, has no conclusive effect as against the public. Such a certificate, including the judgment upon which it is based, is in its essence an instrument granting political privileges, and open like other public grants to be revoked if and when it shall be found to have been unlawfully or fraudulently procured. It is in this respect closely analogous to a public grant of land, or of the exclusive right to make, use and vend a new and useful invention. *Johannessen v. United States*, (1912) 225 U. S. 227, 32 S. Ct. 613, 56 U. S. (L. ed.) 1066.

The words "the provisions of this section" occurring in the last paragraph naturally mean every part of it, one paragraph as much as another, and that meaning cannot well be rejected without leaving it uncertain as

as to what those words embrace. *Luria v. United States*, (1913) 231 U. S. 9, 34 S. Ct. 10.

The defendant is not entitled to a trial by jury in an action to cancel his naturalization certificate, as the remedy sought under the section is essentially equitable, being in this respect no different from a suit to cancel a patent for public land or letters patent for an invention. *Luria v. United States*, (1913) 231 U. S. 9, 34 S. Ct. 10.

**False statement as to marriage.**—When an alien in his naturalization petition stated that he was not married, when in fact he had a wife and children in the country from whence he came, but had abandoned them several years before, it was held that his certificate could be cancelled for fraud. *United States v. Albertini*, (D. C. Mont. 1913) 206 Fed. 133.

**"Illegally procured."**—A certificate is "illegally procured," within the meaning of this section, when it is issued by a court without jurisdiction, or in violation of the law's procedure—without a petition or witnesses, or notice, or hearing. *United States v. Albertini*, (D. C. Mont. 1913) 206 Fed. 133.

**A petition for the cancellation of a certificate of citizenship on the ground of fraud must point out specifically in what particular respect the representations were false.** *United States v. Rockteschell*, (C. C. A. 9th Cir. 1913) 208 Fed. 530.

**Certificate of socialist cancelled.**—A certificate of citizenship was cancelled in *United States v. Olson*, (W. D. Wash. 1912) 196 Fed. 562, wherein the court said: "The grounds for the suit, as set forth in the government's petition, are that the respondent on the 10th day of January, 1910, obtained in order from the superior court of Pierce county, Wash., admitting him to become a citizen of the United States of America; that a certificate of citizenship was issued out of said court and delivered to him; that since said date he has claimed and now claims to be a citizen of the United States; that for the purpose of obtaining said certificate of citizenship the respondent intentionally represented to the court on the hearing of his application that 'he was attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same.' Those averments and the jurisdictional facts set forth in the petition are admitted by the respondent's answer. He makes an issue, however, by denying the charge contained in the petition that the representations which he made to the court respecting his attitude toward the Constitution and government of the United States were and are contrary to the truth.

"On the trial of the case the respondent appeared in person and by an attorney, and after the introduction of evidence on the part of the government tending to prove that he is now, and was at and previous to the time of being admitted to be a citizen of the United States, opposed to the form

of government of this country and to the principles of the Constitution, he offered rebutting evidence and gave testimony in his own behalf, which in the opinion of the court materially aided the government's case. Answering direct interrogatories propounded by his own attorney, he denied that he is an anarchist, denied that he is opposed to organized government, and denied that he is in favor of overthrowing this government by force or violence, but omitted to make any declaration affirming his loyalty to the Constitution of the United States, and on the contrary, when tested by cross-examination, his answers to all questions respecting his attachment to the Constitution of the United States were evasive. He admitted that he is a socialist and frequenter of assemblages of socialists in which he participates as a speaker advocating a propaganda for radical changes in the institutions of the country. He claimed to have a clear understanding of the Constitution of the United States and knew that by one of its articles deprivation of life, liberty, or property without due process of law is forbidden, and yet the evidence introduced in his behalf proved that the party with which he is affiliated, and whose principles he advocates, has for its main object the complete elimination of property rights in this country. He expressed himself as being willing for people to retain their money, but insisting that all the land, buildings, and industrial institutions should become the common property of all the people, which object is to be attained, according to his belief, by use of the power of the ballot, and when that object shall have been attained the political government of the country will be entirely abrogated, because there will be no use for it. And he further admitted that his beliefs on these subjects were entertained by him at and previous to the date of the proceedings in the superior court admitting him to become a citizen of the United States.

"The people of this country ordained the Constitution of the United States, to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to themselves and their posterity, and thereby established a national government, to endure permanently. The notion that citizens of this country may absolve themselves from allegiance to the Constitution of the United

States, otherwise than by expatriation, is a dangerous heresy. The nation generously and cordially admits to its citizenship aliens having the qualifications prescribed by law, but recognizing the principles of natural law, called the law of self-preservation, it restricts the privilege of becoming naturalized to those whose sentiments are compatible with genuine allegiance to the existing government as defined by the oath which they are required to take. Those who believe in and propagate crude theories hostile to the Constitution are barred.

"The evidence in this case including the respondent's admissions above recited do not have to be analyzed, interpreted, or weighed in order to determine any doubtful question as to his attitude. He has no reverence for the Constitution of the United States, nor intention to support and defend it against its enemies, and he is not well disposed toward the peace and tranquillity of the people. His propaganda is to create turmoil and to end in chaos. But in order to secure a certificate of naturalization he intentionally made representations to the court which necessarily deceived the court, or his application for naturalization would have been denied. Therefore, by the petition which he was required to file and his testimony at the final hearing of his application and by taking the oath which was administered to him in open court, he perpetrated a fraud upon the United States and committed an offense for which he may be punished as provided by law. The case therefore comes clearly within the provisions of the law requiring the court to set aside and cancel his certificate of naturalization, and it will be so decreed."

Statute cumulative, not exclusive.—This section, it will be observed, simply imposes the duty upon the United States district attorney of the proper district, when cause is shown by affidavit, to institute proceedings for canceling a certificate of citizenship. It does not, directly or inferentially, make the procedure exclusive or prohibit the enforcement of other remedies for striking down fraudulent naturalization certificates. The statute furnishes a new remedy for a wrong for which there was an existing appropriate remedy, and hence it is cumulative and not exclusive. In *re Macoluso's Naturalization*, (1912) 237 Pa. St. 132, 85 Atl. 149.

## 1909 Supp., p. 379, sec. 30.

Citizens of the Philippine Islands.—The provisions of section 2169 Rev. Stat., 5 Fed. Stat. Ann. p. 207, apply to this section, and therefore only such citizens of the Philippine Islands who are free white persons, or persons of African nativity or descent, can be naturalized. In *re Alverto*, (E. D. Pa. 1912) 198 Fed. 688, wherein the court said: "Citizens of the Philippine Islands or of Porto Rico, while not citizens of the United

States, are not aliens, and, prior to the passage of the Act of 1906, were not capable of becoming naturalized for two reasons: First, the naturalization laws of the United States applied only to aliens; and, second, they required a renunciation of former allegiance. . . . The effect of section 30 was to make applicable to citizens of the Philippine Islands and Porto Rico those provisions which had theretofore applied only to aliens. If

the limitations of section 2169 apply to one provision of the naturalization laws, they must apply to all and consequently to section 30 of the Act of 1906. Section 2169 was intended to limit the application of the whole body of the naturalization laws to aliens being free white persons or of the African race. 'Free white persons' includes members of the white, or Caucasian race, as distinct from the black, red, yellow, and brown races. . . . The use of the words 'white persons' clearly indicates the intention of Congress to maintain a line of demarcation between races and to extend the privilege of naturalization only to those of the races named. . . . The petitioner is, ethnologically speaking, one-fourth of the white or Caucasian race and three-fourths of the brown or Malay race. In the case of *In re Camille* (C. C.) 6 Fed. 256, the applicant, a Canadian, with a white father and an Indian mother, was held not to be a white person. In the case of *In re Knight* [(1909 171 Fed. 299)] the petitioner was born on a British schooner in the Yellow Sea. His father was an Englishman, and his mother half Chinese and half Japanese. It was held that the petitioner was not a free white person, and therefore not entitled to naturalization. As was said in the *Knight Case*: 'Naturalization creates a political status which is entirely the result of legislation by Congress, and, in the case of a person not born a citizen, naturalization can be ob-

tained only in the way in which Congress has provided that it shall be granted, and upon such a showing of facts as Congress has determined must be set forth. It must have been within the knowledge and foresight of Congress, when legislating upon this question, that members of other races would serve in the army and navy of the United States under certain conditions, and it must remain with Congress to determine who of this class can obtain, under the statutes, the rights of a citizen of the United States.' Section 4 of the act provides that 'an alien may be admitted to become a citizen of the United States in the following manner and not otherwise.' The Naturalization Act of 1906 expressly repealed many of the then existing provisions of law in relation to naturalization. Section 2169 was not repealed, and, if Congress had not intended its provisions to apply to section 30 of the Act of 1906, such intention would naturally appear in the act. As it has not excepted section 30 of the act from the provisions of section 2169, Revised Statutes, the latter section must be held to be an applicable provision of the naturalization laws. I am therefore of the opinion that Congress did not intend to extend the privilege of citizenship to those who had become citizens of the Philippine Islands under the Act of 1902, unless they were free white persons or of African nativity or descent."

## NAVY.

### Vol. V, p. 302, sec. 5.

Mandamus to compel acceptance of bid.—Where a vessel is offered for sale and the Secretary of the Navy advertises for proposals for purchase, one who makes the highest bid, which is refused, cannot maintain a mandamus proceeding to compel the Secre-

tary to deliver the vessel to him. The primary reason why this cannot be done is that the Secretary cannot be made a party. *United States v. Daniels*, (1913) 231 U. S. 218, 34 S. Ct. 84.

### Vol. 5, p. 310, sec. 1556.

Acting assistant surgeons are not affected by this statute. *Plummer v. United States* (1912) 224 U. S. 137, 32 S. Ct. 267, 56 U. S. (L. ed.) 697.

### Vol. V, p. 322, sec. 13.

Pay of aid to admiral.—See *Wood v. United States*, (1912) 224 U. S. 132, 32 S. Ct. 461, 56 U. S. (L. ed.) 696.

Acting assistant surgeons are affected by this section. *Plummer v. United States*, (1912) 224 U. S. 137, 32 S. Ct. 267, 56 U. S. (L. ed.) 697.

Officers retired for incapacity not resulting from service.—The assimilating clause of *F. S. A. Supp.*—48.

this section applies only to officers on the active list of the Navy, and does not repeal the prior law respecting the pay of that particular class of officers compulsorily retired under section 1454, Revised Statutes, 5 Fed. Stat. Annot. 283, for incapacity not resulting from any incident of the service. *Hannum v. United States*, (1913) 226 U. S. 436, 33 S. Ct. 172, 57 U. S. (L. ed.) 287.

**1909 Supp., p. 386, sec. 1.** [*Officers not above captain advanced one grade, etc.*]

"Disability incident to service."—The statute is not applicable to a naval officer retired for incapacity not incident to the

service. *Morse v. United States*, (1913) 229 U. S. 208, 33 S. Ct. 624, 57 U. S. (L. ed.) 1152, *affirming* (1911) 46 Ct. Cl. 361.

**1909 Supp., p. 390.** [*Act of May 13, 1908.*]

**Longevity pay.**—In *Plummer v. United States*, (1912) 224 U. S. 137, 32 S. Ct. 207, 56 U. S. (L. ed.) 097, a controversy arose as to the sum of the longevity pay of certain commissioned officers due to a part of the above section, reading as follows: "There shall be allowed and paid each commissioned officer below the rank of rear admiral ten per centum of his current yearly pay for each term of five years' service in the Army, Navy, and Marine Corps. The total amount of such increase for length of service shall in no case exceed forty per centum on the yearly pay of the grade as provided by law." The court said: "It is insisted that as the words 'current yearly pay,' as employed in Rev. Stat., § 1262, were construed in *United States v. Tyler*, (1881) 105 U. S. 244, to require that the calculation of the longevity pay should be made, not upon the sum of the base pay, but on the base pay and previous increases thereof, that the same rule must be applied to the words as used in the provision of the statute above quoted. But subsequent to the *Tyler* case, by the act of June 30, 1882, 22 Stat. 118, c. 254, Congress expressly directed that the ten per cent longevity increase provided for in § 1262, Rev. Stat., should be 'computed on the yearly pay of the grade. . . .' That this act was passed for the express purpose of commanding a method of computation which would render inapplicable the construction

adopted in the *Tyler* case is not open to controversy. *United States v. Miller*, (1908) 208 U. S. 32, 38. Indeed, that from the date of the act of 1882 down to the present time the longevity pay of Army officers has been computed by the method directed by the act of 1882 is not controverted. In view of the purpose of Congress to equalize as far as possible the pay of Army and Navy officers, manifested by the adoption of the Navy Personnel Act of 1899 and in all subsequent legislation as to such pay, we think it plainly results that the provisions relied upon must be held to have been adopted with reference to the settled rule prevailing for so many years, a rule consequent upon the act of 1882. In other words, we think it may not be doubted that the intention of Congress in the provision relied upon was that the longevity pay therein prescribed should be computed according to the methods then prevailing, and which had resulted from the enactment of the statute of 1882."

**Aid to admiral.**—This section in terms specifically provides for the pay of every officer in the navy, including the admiral, and embraces extra compensation to aids to rear admirals, but makes no provision whatever for compensation for services which may be rendered by an officer acting as aid to the admiral. *Wood v. United States*, (1912) 224 U. S. 132, 32 S. Ct. 461, 56 U. S. (L. ed.) 696.

## OFFICERS OF MERCHANT VESSELS.

**Vol. V, p. 400, sec. 4442.**

Certain provisions of rule 5 adopted by the board of supervising inspectors have been held to be invalid because in conflict with

this section. *Williams v. Moulther*, (C. C. A. 2d Cir. 1912) 198 Fed. 460.

## PATENTS.

**Vol. V, p. 417, sec. 4883.**

Nature of patent right and privileges.—A patent right and the privileges thereby

granted are incorporeal personal property and are entitled to the same rights and sanc-

tions which attend other property. They may be transferred by oral agreement, and such agreement is not within the statute of frauds, nor within Rev. Stat. § 4898 (5 Fed. Stat. Annot. 531), requiring assignments to be in writing, and will be specifically enforced in equity when properly proved. *Whitcomb v. Whitcomb*, (1911) 85 Vt. 76, 81 Atl. 97.

Letters patent a personal chattel.—In view of the fact that a record of the patent is preserved in the Patent Office, and that all its assignments are there recorded, the pos-

session of the original letters may be comparatively unimportant; nevertheless, they are not valueless, but of intrinsic and substantial worth. The procurement of a copy of them would be attended with some inconvenience and expense. They are, like a title deed, a personal chattel. They are the evidence of their owner's exclusive right to the use of the invention and create a property interest in such invention. *Paine v. Parkhurst*, (C. C. A. 6th Cir. 1913) 205 Fed. 740.

## Vol. V, p. 419, sec. 4884.

History and construction.—“The protection given to inventors and authors in the United States originated in the Constitution, § 8 of Art. 1 of which authorizes the Congress to ‘promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.’ This protection, so far as inventors are concerned, has been conferred by the act of Congress passed April 10, 1790, and subsequent acts and amendments. The act of 1790, 1 Stat. 109, c. 7, granted ‘the sole and exclusive right and liberty of making, constructing, using and vending to others to be used, the said invention or discovery.’ In 1793 (Feb. 21, 1793, 1 Stat. 318, c. 11) the word ‘full’ was substituted for the word ‘sole,’ and in 1836 (July 4, 1836, 5 Stat. 117, § 5, c. 357) the word ‘constructing’ was omitted. This legislation culminated in § 4884 of the Revised Statutes, the part with which we are dealing being practically identical with the act of July 8, 1870, 16 Stat. 198, § 22, c. 230. It provides that every patent shall contain ‘a grant to the patentee, his heirs and assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the invention or discovery.’ The right to make, use and sell an invented article is not derived from the patent law. This right existed before and without the passage of the law and was always the right of an inventor. The act secured to the inventor the exclusive right to make, use and vend the thing patented, and consequently to prevent others from exercising like privileges without the consent of the patentee. It was passed for the purpose of encouraging useful invention and promoting new and useful improvements by the protection and stimulation thereby given to inventive genius, and was intended to secure to the public, after the lapse of the exclusive privileges granted, the benefit of such inventions and improvements. With these beneficent purposes in view the act of Congress should be fairly or even liberally construed; yet, while this principle is generally recognized, care should be taken not to extend by judicial construction the rights and privileges which it was the purpose of Congress to bestow. In framing the act and defining the extent of the rights and privileges secured to a patentee Congress did not

use technical or occult phrases, but in simple terms gave an inventor the exclusive right to make, use and vend his invention for a definite term of years. The right to make can scarcely be made plainer by definition, and embraces the construction of the thing invented. The right to use is a comprehensive term and embraces within its meaning the right to put into service any given invention. And Congress did not stop with the express grant of the rights to make and to use. Recognizing that many inventions would be valuable to the inventor because of sales of the patented machine or device to others, it granted also the exclusive right to vend the invention covered by the latter patent. To vend is also a term readily understood and of no doubtful import. Its use in the statute secured to the inventor the exclusive right to transfer the title for a consideration to others. In the exclusive rights to make, use and vend, fairly construed, with a view to making the purpose of Congress effectual, resides the extent of the patent monopoly under the statutes of the United States.” *Bauer v. O'Donnell*, (1913) 229 U. S. 1, 33 S. Ct. 616, 57 U. S. (L. ed.) 1041.

Fixing retail price.—In *Bauer v. O'Donnell*, (1913) 229 U. S. 1, 33 S. Ct. 616, 57 U. S. (L. ed.) 1041, it was held that a patentee could not by notice limit the price at which future retail sales of the patented article might be made, such article being in the hands of a retailer by purchase from a jobber, who had paid to the agent of the patentee the full price asked for the article sold. The court said: “The real question is whether in the exclusive right secured by statute to ‘vend’ a patented article there is included the right, by notice, to dictate the price at which subsequent sales of the article may be made. The patentee relies solely upon the notice quoted to control future prices in the resale by a purchaser of an article said to be of great utility and highly desirable for general use. The appellee and the jobbers from whom he purchased were neither the agents nor the licensees of the patentee. They had the title to, and the right to sell, the article purchased without accounting for the proceeds to the patentee and without making any further payment than had already been made in the purchase from the agent of the patentee. Upon such

facts as are now presented we think the right to vend secured in the patent statute is not distinguishable from the right of vending given in the copyright act. In both instances it was the intention of Congress to secure an exclusive right to sell, and there is no grant of a privilege to keep up prices and prevent competition by notices restricting the price at which the article may be resold. The right to vend conferred by the patent law has been exercised, and the added restriction is beyond the protection and purpose of the act. This being so, the case is brought within that line of cases in which this court from the beginning has held that a patentee who has parted with a patented machine by passing title to a purchaser has placed the article beyond the limits of the monopoly secured by the patent act." See to the same effect *Free Sewing Mach. Co. v. Bry-Block Mercantile Co.*, (W. D. Tenn. 1913) 204 Fed. 632; *Kellogg Toasted Corn Flake Co. v. Buck*, (S. D. Cal. 1913) 208 Fed. 383.

## Vol. V, p. 421, sec. 4886.

### II. WHAT MAY BE PATENTED.

The term manufacture may include a roof structure. *Aiken v. Riter & Conley Mfg. Co.*, (W. D. Pa. 1912) 205 Fed. 531, *affirmed* 203 Fed. 699.

In *Knight v. Rieger*, (D. C. Md. 1913) 203 Fed. 49, the court said: "The learned author of Walker on Patents (4th ed.) p. 13, contends that the word 'manufacture' as used in the patent law should be given a construction broad enough to cover everything made by the hands of man and not a machine or a composition of matter. The weight of the decided cases is to the contrary."

Principle, idea, etc. — A conception of the mind is not an invention, or a completed invention, until represented in some physical form. *Westinghouse Mach. Co. v. General Elec. Co.*, (N. D. N. Y. 1912) 199 Fed. 907.

The function or result of the operation or combination may not be the subject of a patent. The means by which the function is performed, and these alone, are patentable. *Hildreth v. Lauer & Suter Co.*, (D. C. Md. 1913) 208 Fed. 1005.

Improved combination. — It is a general rule that the improved combination for which a patent is granted must be limited by the elements therein specified. If the old elements were combined in a substantially different way, or if the purifying result be accomplished by a different combination in defendant's apparatus, there might be no infringement. In other words, patents for improved combinations must be construed strictly, there being no legal right to a monopoly in cases where there is a mere improved combination except in respect to what is substantially that very combination, the law leaving it open to all others to make any other combination of old things which is not substantially the same as the one described in the patent. *William R.*

*Rules of interpretation.* — The general rule is that the interpretation to be placed on a patent is to be determined by the language of the grant, and that the proceedings of the Patent Office are immaterial unless, of course, the patentee by his acquiescence has accepted limitations imposed by the rejection of broader claims. *Goodwin Film & Camera Co. v. Eastman Kodak Co.*, (W. D. N. Y. 1913) 207 Fed. 351.

Sale of patented article in territory of licensee other than where purchased. — One who purchases a patented article for resale, without restriction as to manner, place or price of such resale, from an authorized or licensed agent of the patentee or his assignee, may offer for sale and sell said article in a different territory assigned by the patentee or assignee to another and different licensee or agent. *Free Sewing Mach. Co. v. Bry-Block Mercantile Co.*, (W. D. Tenn. 1913) 204 Fed. 632.

*Scaife & Sons Co. v. Falls City Woolen Mills*, (W. D. Ky. 1912) 194 Fed. 139.

Although every element of a combination may be old, yet the combination itself may be patentable. But a combination is not patentable unless it shows invention. *Dilg v. George Borgfeldt & Co.*, (C. C. A. 2d Cir. 1911) 189 Fed. 588.

Combination producing new result as distinguished from mere aggregation. — An aggregation is the mere assembling of separate elements without changing their respective separate functions or accomplishing any result other than the added results of those functions. In order to be patentable, a combination of elements must in their co-relation produce a different force, or effect, or result, from the sum of that which is produced by their separate parts. It is not necessary that each element in performing its own function shall also modify the function performed by the others. It is generally sufficient if there be such coaction that a result is produced which is new, and the result is new if it is substantially a better result than that which has been accomplished by other combinations. *Loom Co. Pelton Water Wheel Co. v. Doble*, (C. C. A. 9th Cir. 1911) 190 Fed. 760.

New terms to describe old process. — The functions performed by certain apparatus, when arranged under certain conditions, cannot be patented as a new method of producing the result, if the so-called "method" is merely a description in new terms of one of the forms of the old process, as carried out by the previously disclosed necessary elements of the device, and where the so-called new method is but a description of an equivalent experimentation with the old device, under conditions recognized as possible, within the knowledge of any mechanic but not previously stated in language. *Siemund*

v. Enderlin, (E. D. N. Y. 1913) 206 Fed. 283.

A mere adjustment is not patentable. *Sie-mund v. Enderlin*, (E. D. N. Y. 1913) 206 Fed. 283.

System for carrying on business. — "In the sense of the patent law an art is not a mere abstraction. A system of transacting business, disconnected from the means for carrying out the system, is not, within the most liberal interpretation of the term, an art. Advice is not patentable." *Berardini v. Tocci*, (S. D. N. Y. 1911) 190 Fed. 329. See also *Fried. Krupp Aktien-Gesellschaft v. Midvale Steel Co.*, (C. C. A. 3d Cir. 1911) 191 Fed. 588.

Product separated from surrounding materials. — No product is patentable, however it be of the process, which is merely separated by the patentee from its surrounding materials and remains unchanged. *Parke-Davis & Co. v. H. K. Mulford Co.*, (S. D. N. Y. 1911) 189 Fed. 95.

### III. INVENTION.

In general. — The presence of patentable invention or its breadth or importance does not depend on the mere extent or completeness with which the inventor has modified or altered pre-existing devices. It depends, rather, on the new and beneficial result accomplished in its particular art, and the smallest and seemingly most obvious changes have often produced the most beneficial results in well-recognized inventions. This also may be the criterion for considering whether an assemblage of elements constitutes a patentable combination or an aggregation. *Mead Morrison Mfg. Co. v. Exeter Mach. Works*, (M. D. Pa. 1912) 196 Fed. 789.

Product of mechanical skill. — To the same effect as the original note, see *Redington v. Office Equipment Co.*, (W. D. Ky. 1911) 189 Fed. 635; *Irrington Mfg. Co. v. Utica Drop Forge & Tool Co.*, (C. C. A. 3d Cir. 1911) 191 Fed. 169; *Hover v. Atherton Mach. Co.*, (C. C. N. J. 1911) 193 Fed. 73; *Western Bottle Mfg. Co. v. Decker*, (C. C. A. 7th Cir. 1911) 193 Fed. 414; *Railroad Supply Co. v. Hart Steel Co.*, (N. D. Ill. 1911) 193 Fed. 418; *Republic Rubber Co. v. Morgan & Wright*, (C. C. A. 2d Cir. 1912) 197 Fed. 549. See *Patents Selling & Exporting Co. v. Dunn*, (S. D. N. Y. 1913) 204 Fed. 99.

Mechanical skill and invention distinguished. — To the same effect as the original note, see *Rose Mfg. Co. v. E. A. Whitehouse Mfg. Co.*, (C. C. A. 3d Cir. 1913) 208 Fed. 564.

In seeking to ascertain on which side of the dividing line between invention and skill a device belongs, if it shall appear that through a new combination a novel and useful result is achieved, the court is not to be misled by the apparent simplicity of the device, nor by the fact that the elements involved are old. *Ferro Concrete Const. Co. v. Concrete Steel Co.*, (C. C. A. 6th Cir. 1913) 206 Fed. 666.

Mere improvement. — To the same effect as the original note, see *Rigby v. Ferrary Bros. Co.*, (C. C. N. J. 1911) 189 Fed. 616, *affirmed* (C. C. A. 3d Cir. 1911) 193 Fed. 413.

Change in materials. — The use of one material instead of another in constructing a known machine is, in most cases, so obviously a matter of mere mechanical judgment, and not of invention, that it cannot be called an invention, unless some new and useful result, an increase of efficiency, or a decided saving in the operation, is clearly attained. *Protector Last Re-enforcing Co. v. Pell*, (D. C. N. J. 1913) 204 Fed. 453. See also *American Thermos Bottle Co. v. American Ever-Ready Co.*, (S. D. N. Y. 1910) 202 Fed. 508; *Archer v. Imperial Mach. Co.*, (C. C. A. 2d Cir. 1913) 207 Fed. 81.

The degree of inventive skill exercised is immaterial. *Poolé v. Isaac H. Blanchard Co.*, (C. C. A. 2d Cir. 1913) 204 Fed. 285.

The simplicity or obviousness of a device is not necessarily a bar to a patent. *Ferro Concrete Const. Co. v. Concrete Steel Co.*, (C. C. A. 6th Cir. 1913) 206 Fed. 666.

Change of size or proportion. — To the same effect as the original note, see *Chicago Fuse Wire & Mfg. Co. v. Harvard Electric Co.*, (N. D. Ill. 1911) 191 Fed. 985; *Hall Mammoth Incubator Co. v. Teabout*, (N. D. N. Y. 1913) 205 Fed. 906; *Edison v. Alsen's American Portland Cement Works*, (S. D. N. Y. 1913) 208 Fed. 20.

New effect by change in size. — To the same effect as the original note, see *Toledo Computing Scale Co. v. Computing Scale Co.*, (C. C. A. 7th Cir. 1913) 208 Fed. 410.

Improvement in degree. — To the same effect as the original note, see *Young v. Burley*, (C. C. A. 6th Cir. 1912) 200 Fed. 258.

Change in form, etc. — To the same effect as the original note, see *Excelsior Drum Works v. Bortel*, (N. D. N. Y. 1911) 190 Fed. 10; *Faultless Rubber Co. v. Star Rubber Co.*, (N. D. Ohio 1911) 191 Fed. 982; *Equitable Asphalt Maintenance Co. v. Parker-Washington Co.*, (W. D. Mo. 1912) 197 Fed. 920.

A mere substitution of one material for another does not constitute invention where there is no change otherwise. *Ambursen Hydraulic Const. Co. v. Hydraulic Properties Co.*, (S. D. N. Y. 1913) 208 Fed. 27.

Equivalents. — Primary inventions are entitled to a looser application of the doctrine of equivalents than secondary inventions; but even a secondary invention is entitled to invoke the doctrine of equivalents, although to a more limited extent. The doctrine of equivalents applies to all classes of inventions. *Lang v. Twitchell-Champlin Co.*, (D. C. Me. 1913) 207 Fed. 363.

The substitution of one well known equivalent for another does not constitute invention. *Peirce Specialty Co. v. Harvard Electric Co.*, (N. D. Ill. 1911) 189 Fed. 628. *Equitable Asphalt Maintenance Co. v. Parker-Washington Co.*, (W. D. Mo. 1912) 197 Fed. 920.

**New combination of old devices.**—To the same effect as the original note, see *United States Light & Heating Co. v. Safety Car Heating & Lighting Co.*, (N. D. Ill. 1911) 191 Fed. 850; *H. J. Heinz Co. v. Cohn*, (C. C. A. 9th Cir. 1913) 207 Fed. 547.

**New combination producing new result.**—To the same effect as the original note, see *Arnold v. Tyden*, (C. C. A. 7th Cir. 1911) 193 Fed. 410; *F. D. Cummer & Son Co. v. Atlas Dryer Co.*, (C. C. A. 8th Cir. 1912) 193 Fed. 993; *Sheffield Car Co. v. D'Arcy*, (C. C. A. 6th Cir. 1912) 194 Fed. 686; *Colman v. Byrd Mfg. Co.*, (E. D. N. C. 1912) 200 Fed. 59; *Oshkosh Grass Matting Co. v. Waite Grass Carpet Co.*, (C. C. A. 7th Cir. 1913) 207 Fed. 937.

When a desired result is sought by those working in the art and skilled therein, but not obtained for lack of efficient means, which such persons are unable to devise, and another comes into the field and by some seemingly simple change and adaptation of an old means or element in a combination of elements to the doing of the work is able to do the desired work, accomplish the desired result, a new result, or a better result, by such new means operating differently from anything known in that art, or an analogous art, and such device proves commercially successful, and largely displaces all others, and is more efficient and just as durable, or even more durable, and is less costly in construction, there is an invention. *Weber Electric Co. v. National Gas & Electric Fixture Co.*, (S. D. N. Y. 1913) 204 Fed. 79.

**Result of combination not aggregate of several results.**—To the same effect as the original note, see *E. H. Freeman Electric Co. v. General Electric Co.*, (C. C. A. 3d Cir. 1911) 191 Fed. 168.

**New and useful result necessary.**—To the same effect as the original note, see *Sheffield Car Co. v. D'Arcy*, (C. C. A. 6th Cir. 1912) 194 Fed. 686.

**Old process applied to analogous subject or use.**—To the same effect as the original note, see *F. E. Myers & Bro. v. Fairbanks, Morse & Co.* (C. C. A. 7th Cir. 1912) 194 Fed. 971.

**Old device producing new result.**—The use of old elements, in the old position, and in the old relationship to each other, to get a "new result" is not invention. *Weir Frog Co. v. Porter*, (C. C. A. 6th Cir. 1913) 206 Fed. 670.

The mere extension of the use of an old combination of the elements is not invention where no new result is provided and no new method is found for producing the old result. *H. J. Heinz Co. v. Cohn*, (C. C. A. 9th Cir. 1913) 207 Fed. 547.

**Commercial success.**—Whether a device discloses invention may be affected by the further question whether it is commercially successful and has displaced similar devices not found satisfactory. *General Electric Co. v. Allis-Chalmers Co.*, (C. C. N. J. 1911) 190 Fed. 165; *Edward Hilker Mop Co. v. United States Mop Co.*, (C. C. A. 6th Cir. 1911) 191 Fed. 613.

The widespread commercial success of a patented device should be taken into consideration in determining the question of invention, and a combination patent for an article which when constructed in accordance with the specifications has proved a great commercial success may not be held devoid of invention because the inventor may not have known all of the forces which he had brought into operation. *Coffield Motor Washer Co. v. A. D. Howe Mach. Co.*, (N. D. W. Va. 1911) 190 Fed. 42.

Persistent effort and judicious and extensive advertising will give commercial success to many things, some meritorious and some not, but not all improvement in any line is invention; and while commercial success is some evidence of utility, and it may be of invention and has turned the scale in doubtful cases, it does not of itself prove invention. *Stillwell v. McPherson*, (N. D. N. Y. 1913) 207 Fed. 837.

**Novelty necessary.**—To the same effect as the original note, see *Monash Younker Co. v. National Steam Specialty Co.*, (C. C. A. 7th Cir. 1913) 208 Fed. 559.

The mere aggregate of several results, each the complete product of one of the combined elements, does not involve inventive faculty. *H. J. Heinz Co. v. Cohn*, (C. C. A. 9th Cir. 1913) 207 Fed. 547.

**Making in one piece something that the inventor made in several, when in practical operation it does not make the slightest difference whether one form of construction or the other is adopted, is not invention.** *Weber v. Automobile & Accessories Mfg. Co.*, (C. C. Md. 1911) 190 Fed. 189; *Gould & Eberhardt v. Cincinnati Shaper Co.*, (C. C. A. 6th Cir. 1912) 194 Fed. 680; *Sheffield Car Co. v. D'Arcy*, (C. C. A. 6th Cir. 1912) 194 Fed. 686; *Bernz v. Schaefer*, (D. C. N. J. 1913) 205 Fed. 49.

**New application of old means.**—Whatever may be the correctness of the theory of operation if a new application of old means is sufficiently described to enable those skilled in the art to produce a new and useful result, that is enough. *Combustion Utilities Corp. v. Worcester Gaslight Co.*, (C. C. Mass. 1911) 190 Fed. 155, *affirmed* (C. C. A. 1st Cir. 1912) 194 Fed. 1023.

**New or substantially changed methods.**—Broadly speaking, a process is a definite combination of new or old elements, ingredients, operations, ways, or means to produce a new, improved, or old result. Any substantial change therein, by omission to the same or better result, or by modification or substitution with different function to the same or better result, is a new and patentable process. New or substantially changed methods whereby the product is bettered, increased, cheapened, may be a new and patentable process. *Minerals Separation v. Hyde*, (D. C. Mont. 1913) 207 Fed. 956.

**Parts taken from prior art.**—The presumption of invention is not overcome by the fact that an expert is able to build up the patented device by selecting parts taken from



the prior art. *Kryptok Co. v. Stead Lens Co.*, (W. D. Mo. 1913) 207 Fed. 85.

Bringing art to highest degree of perfection.—The patent law does not require that an inventor shall have succeeded in bringing his art to the highest degree of perfection; it is enough if the skilled in the art understand the process and the specification points out a practical way of performing it. *Goodwin Film & Camera Co. v. Eastman Kodak Co.*, (W. D. N. Y.) 1913) 207 Fed. 351.

Nonessential changes in machine.—Infringement is not avoided by changes in a patented machine which are nonessential, as by changing the positions of parts, or transferring a function from one part to another, without affecting the principle or mode of operation. *Walker v. Giles*, (N. D. N. Y. 1913) 207 Fed. 825.

Doing substantially the same thing in the same way by substantially the same means with better results is not such invention as will sustain a patent. *Archer v. Imperial Mach. Co.*, (S. D. N. Y. 1913) 202 Fed. 962.

Addition of another element to perform additional function.—One who appropriates another's patented invention, even though he may add thereto another element to perform an additional function, is guilty of infringement. *Stebler v. Riverside Heights Orange Growers' Ass'n.*, (C. C. A. 9th Cir. 1913) 205 Fed. 735.

The inventive act in a combination patent is the making of the component parts, capable of combination, and fit to be united to constitute the combination. The physical putting together of the two parts is no part of the invention. The infringement of a patented combination is complete when the component parts of the combination are made or sold, fitted to be put together and intended to be put together. *Kreplik v. Couch Patents Co.*, (C. C. A. 1st Cir. 1911) 190 Fed. 565.

The considerations of prior demand, unsuccessful attempts to supply the demand, utility, and public favor, are evidence of invention, and in an otherwise doubtful case might turn the scale in favor of its existence. But neither or all of these considerations, regardless of all others, necessarily prove invention, the existence of which is always ultimately a question of fact, to be determined upon a consideration of all applicable facts and conditions. (C. C. A. 6th Cir. 1912) 194 Fed. 680.

Use of part of patented device.—It is a fundamental rule that, to constitute infringement, it is unnecessary to use the entire device, and that if parts thereof are used in substantially the same way and in a similar contrivance, it is infringement. *Union Tank Line Co. v. American Car & Foundry Co.*, (S. D. N. Y. 1913) 202 Fed. 503.

Determination or demurrer.—When a question of invention is to be disposed of upon demurrer, the sources of knowledge are confined to the letters patent and those related matters of which the court may take judicial notice, not to speak of relevant facts well pleaded. When facts of common and

general knowledge tend to show that the patented device is old and so has been anticipated, or, when compared with familiar objects of a kindred character, it appears to be a product of mere mechanical skill, the quality of invention may safely be determined and should be on demurrer; and the court may reinforce its recollection of facts that were of common knowledge at the time the patent was applied for, by antecedent and reliable published matter—always distinguishing, however, between its own special knowledge and what is considered to be the knowledge of others, where the device in question has been in use. *Ferro Concrete Const. Co. v. Concrete Steel Co.*, (C. C. A. 6th Cir. 1913) 206 Fed. 666.

Patent prima facie evidence of invention.—In a suit for infringement of a patent the fact that the alleged infringing device is patented is prima facie evidence that it differs from the patent alleged to be infringed. *Crowe v. Oscar Barnett Foundry Co.*, (D. C. N. J. 1913) 206 Fed. 164.

#### IV. UTILITY.

Necessity of utility.—To the same effect as the original note, see *Malleable Iron Range Co. v. Beckwith*, (C. C. A. 7th Cir. 1911) 189 Fed. 74; *New York Continental Jewell Filtration Co. v. Harrisburg*, (M. D. Pa. 1913) 208 Fed. 10; *20th Century Motor Car & Supply Co. v. Holcomb Co.*, (D. C. Conn. 1913) 208 Fed. 155.

The degree of utility is immaterial.—To the same effect as the original note, see *Decker v. Western Bottle Mfg. Co.*, (N. D. Ill. 1911) 193 Fed. 415.

Patent on evidence of utility.—To the same effect as the original note, see *Superior Hay Stacker Mfg. Co. v. Dain Mfg. Co. of Iowa*, (C. C. A. 8th Cir. 1913) 208 Fed. 549.

Effect of litigation.—The utility of a patented device may be attested by the litigation over it. *Coffield Motor Washer Co. v. A. D. Howe Mach. Co.*, (N. D. W. Va. 1911) 190 Fed. 42.

#### V. NOVELTY AND ANTICIPATION.

Novelty necessary.—To the same effect as the original note, see *Ashley v. Samuel C. Tatum Co.*, (C. C. A. 2d Cir. 1911) 189 Fed. 357; *Dilg v. George Borgfeldt & Co.*, (C. C. A. 2d Cir. 1911) 189 Fed. 588; *Shingle, Slate & Sheathing Co. v. H. W. Johns-Manville Co.*, (S. D. N. Y. 1911) 189 Fed. 608; *Royden Marble Machinery Co. v. Davis*, (E. D. Pa. 1911) 189 Fed. 622; *E. H. Mumford Co.*, (E. D. Pa. 1911) 190 Fed. 179, *affirmed* (C. C. A. 3d Cir. 1911) 191 Fed. 166; *New York Continental Jewell Filtration Co. v. Harrisburg*, (M. D. Pa. 1913) 208 Fed. 10; *Sirocco Engineering Co. v. B. F. Sturtevant Co.*, (S. D. N. Y. 1913) 208 Fed. 147; *Milton Chemical Co. v. Jordan Marsh Co.*, (D. C. Mass. 1913) 208 Fed. 569; *National Electric Signaling Co. v. Telefunken Wireless Tel. Co.* (C. C. A. 3d Cir. 1913) 208 Fed. 679; *L. S. Starrett Co. v. Brown & Sharpe Mfg. Co.*, (C. C. A. 1st Cir. 1913) 208 Fed. 887.

Novelty, however, may consist in transferring a device of one branch of industry to another, so that it may be put to a new use. *H. J. Heinz Co. v. Cohn*, (C. C. A. 9th Cir. 1913) 207 Fed. 547.

Similar device in analogous art.—To the same effect as the original note, see *General Electric Co. v. E. H. Freeman Electric Co.*, (C. C. N. J. 1911) 190 Fed. 34.

Old contrivance for new use.—To the same effect as the original note, see *Newhall v. J. Jacob Shannon & Co.*, (E. D. Pa. 1911) 189 Fed. 396; *William B. Mershon & Co. v. Bay City Box & Lumber Co.*, (E. D. Mich. 1910) 189 Fed. 741.

A combination of old elements, which performs no new function and accomplishes no new results, does not involve patentable novelty. *H. J. Heinz Co. v. Cohn*, (C. C. A. 9th Cir. 1913) 207 Fed. 547.

Substantial identity.—It is not necessary, in determining the question of anticipation, that the process should be identical in all particulars. It is sufficient if in general aspects the two processes are the same and the differences in minor matters are only such as would suggest themselves to a person possessing ordinary skill in the art. *Model Bottling Machinery Co. v. Anheuser-Busch Brewing Ass'n.*, (C. C. A. 8th Cir. 1911) 190 Fed. 573.

The substitution of mechanical equivalents.—To the same effect as the original note, see *Lord Baltimore Press Co. v. Labombarde*, (C. C. A. 4th Cir. 1912) 197 Fed. 739.

Anticipation determined by date of patent.—The date when a patent is actually issued, rather than the date when the application thereof is filed, determines whether or not it anticipates another patent. *General Electric Co. v. Allis-Chalmers Co.*, (C. C. N. J. 1911) 109 Fed. 165.

It is not sufficient to constitute an anticipation, that the devices relied upon might, by a process of modification, reorganization, or combination, be made to accomplish the function performed by the device of the patent. *Stebler v. Riverside Heights Orange Growers' Ass'n.*, (C. C. A. 9th Cir. 1913) 205 Fed. 735.

Invention without patentable change.—The rule is that anticipating patents and publications must disclose the invention without patentable change or alteration to make them anticipatory. *Goodwin Film & Camera Co. v. Eastman Kodak Co.*, (W. D. N. Y. 1913) 207 Fed. 351.

Mistake of draftsman.—It is well settled that it is no anticipation that by a mistaken showing in the figure of a preceding patent, by the error of the draftsman, the structure of the patent appears contrary to the conception of the inventors and the reading of the patent. *Kryptok Co. v. Stead Lens Co.*, (W. D. Mo. 1913) 207 Fed. 85.

Description insufficient to support patent.—A description which is insufficient to support a patent cannot be relied upon as an anticipation. Unless the prior publication describes the invention in such full, clear, and intelligible terms as to enable persons

skilled in the art to comprehend it, and reproduce the process or article claimed, without assistance from the patent, such publication is insufficient as an anticipation. *National Electric Signaling Co. v. United Wireless Telegraph Co.*, (C. C. Me. 1911) 189 Fed. 727.

The meaning of "known," as used in this section, is fully considered in *Westinghouse Mach. Co. v. General Elec. Co.*, (N. D. N. Y. 1912) 199 Fed. 907.

Proof of anticipation.—Anticipation must be proved by evidence so cogent as to leave no reasonable doubt in the mind of the court. *Kryptok Co. v. Stead Lens Co.*, (W. D. Mo. 1913) 207 Fed. 85.

#### VI. PRIOR USE OR SALE.

In general.—To entitle a party to a patent for a new invention or discovery in art, machine, manufacture, or compound, etc., his application must be made within two years of any foreign patent or within two years from the time of its description in any printed publication in this or any foreign country, or within two years from public use or sale in this country. *Model Bottling Machinery Co. v. Anheuser-Busch Brewing Ass'n.*, (C. C. A. 8th Cir. 1911) 190 Fed. 573.

Experimental use to defeat patent.—To the same effect as the original note, see *Edison v. Allis-Chalmers Co.*, (W. D. N. Y. 1911) 191 Fed. 837.

Sale of product of experimental use.—While an inventor is experimenting to complete and perfect his product the utility of which can be determined by use of the thing by others only, he may sell the things made, but he must not sell to the public or allow public use more than two years before his application for a patent of the completed and perfected invention. *Daniel Green Felt Shoe Co. v. Dolgeville Felt Shoe Co.*, (N. D. N. Y. 1913) 205 Fed. 745.

"On Sale."—See p. 766, *infra* this title, vol. 5, p. 567, sec. 4920.

#### VII. ABANDONMENT.

A patentee who limits his claims to the precise construction shown and described, even though not obliged to do so, cannot hold as an infringer one who uses a different construction. *Morse Chain Co. v. Link-Belt Co.*, (C. C. A. 2d Cir. 1911) 189 Fed. 584.

#### VIII. DIVISION OF INVENTIONS.

Process and product.—Normally, process and product form two inventions, not one. *Adrian Wire Fence Co. v. Jackson Fence Co.*, (E. D. Mich. 1911) 190 Fed. 195.

Process and apparatus.—Separate patents for a new and useful process and for a new and useful apparatus to practice it may be sustained, although no other apparatus to practice it is known. *Century Electric Co. v. Westinghouse Electric & Mfg. Co.*, (C. C. A. 8th Cir. 1911) 191 Fed. 350.

**Distinct dependent inventions.**—One who makes several patentable inventions that produce a new and useful process or machine, or both, pertaining to the same subject-matter, has the option to take one patent there-

for or as many separate patents therefor as he makes patentable inventions. *Century Electric Co. v. Westinghouse Electric & Mfg. Co.*, (C. C. A. 8th Cir. 1911) 191 Fed. 350.

## Vol. V, p. 468, sec. 4887.

**Construction of amendment.**—In *Cameron Septic Tank Co. v. Knoxville*, (Iowa 1913) 227 U. S. 39, 33 S. Ct. 209, 57 U. S. (L. ed.) 407, the court commenting on the construction which has been given this section as amended said: "The section coming up for judicial consideration, it was decided that it assumed that the foreign patent previously granted was one granted for a definite term, that the United States patent should expire with that term, and that it was not to be limited by any lapsing or forfeiture of any portion of the term of the foreign patent, by means of the operation of a condition subsequent, according to the foreign statute."

The Treaty of Brussels, which took effect in 1900, does not, by virtue of article 4, *bis*, supersede this section as amended, relating to the duration of a patent previously patented in a foreign country. *Cameron Septic Tank Co. v. Knoxville*, (Iowa 1913) 227 U. S. 39, 33 S. Ct. 209, 57 U. S. (L. ed.) 407.

**Extent of difference necessary in patents.**—The fact that some slight modification is made in the working of the principle involved in the invention will not exempt the patent from the operation of the statute. *Commercial Acetylene Co. v. Searchlight Gas Co.*, (N. D. Ill. 1912) 197 Fed. 908.

**Construction prior to amendment.**—The restrictive clause of the act before it was amended in 1897 provided that "every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent." The patent granted and so limited in this country must have been for an invention previously patented in a foreign country, and must in essential features have been the same. *Acme Acetylene Appliance Co. v. Commercial Acetylene Co.*, (C. C. A. 6th Cir. 1911) 192 Fed. 321.

## Vol. V, p. 472, sec. 4888.

### II. SPECIFICATIONS AND DESCRIPTION.

**Construction by those skilled in art.**—To the same effect as the original note, see *Clark Blade & Razor Co. v. Gillette Safety Razor Co.*, (C. C. A. 3d Cir. 1912) 194 Fed. 421.

**Description of best mode.**—To the same effect as the original note, see *Steiger v. Waite Grass Carpet Co.*, (E. D. Wis. 1912) 194 Fed. 878.

**Amendment of specification.**—Amendments, within the scope of the original oath and of the invention described in the original specification, are allowable and do not require additional verification. In determining whether matter introduced into an application by way of amendment is new matter, the original drawings are to be understood with such variations in form, shape, and proportions as common sense and mechanical skill in that art would suggest. *Mine & Smelter Supply Co. v. Braeckel Concentrator Co.*, (W. D. Mo. 1912) 197 Fed. 897.

### III. CLAIMS.

**Form.**—The patent law not only requires a full and clear description of the manner of making and using an invention, but also that the part improved or combination should be particularly pointed out and distinctly claimed. The claim is the measure of the patentee's monopoly. He is not entitled to all that he invented but only to that which he particularly points out and distinctly

claims. *General Electric Co. v. Allis-Chalmers Co.*, (D. C. N. J. 1912) 199 Fed. 169.

**Construction of claims.**—Unless a patentee has especially limited himself to a specific form of construction, or such limitation is imposed by the state of the prior art, or such limitation was imposed by the action of the Patent Office in rejecting a broad claim and the substitution and acceptance of a narrower claim by the applicant, he is entitled to a broad construction of his claims in accordance with the language thereof. *Ryder v. Lacey*, (N. D. N. Y. 1912) 200 Fed. 966; *Hall Mammoth Incubator Co. v. Teabout*, (N. D. N. Y. 1913) 205 Fed. 906.

Elements in claims should be read with reference both to the structure and the function given in the description of the invention. Dictionary definitions should not be applied to words in claims if the patentee in and by his drawings and descriptions of parts and functions has clearly supplied his own dictionary. *Louden Machinery Co. v. Strickler*, (C. C. A. 7th Cir. 1912) 195 Fed. 751.

**Necessity for operative device.**—A claim is not invalid because not for an operative device. *Clark Blade v. Gillette Razor Co.*, (C. C. A. 3d Cir. 1912) 194 Fed. 421.

**Improved result by refinement of principles.**—When the improved result is due to a more exact or refined application of old principles, care must be taken to limit the claims to those new features which give the better result; otherwise one who has made what is perhaps the best application of old principles may lay too broad a claim to the

use of that which other improvers are also at liberty to apply. *Adams & Westlake Co. v. Gray*, (D. C. Mass. 1913) 206 Fed. 303.

**Introduction of unnecessary element.**—If a patentee introduces an unnecessary element into his claim for his invention, and another discovers that such element is unnecessary, or superfluous, and therefore does not use it, but makes a structure otherwise identical with that of the patent, he is not an infringer. *Loraine Development Co. v. General Electric Co.*, (N. D. N. Y. 1912) 198 Fed. 100.

**Acquiescence in rejection of claims.**—The rule is well settled that where an applicant for a patent acquiesces in the rejection of the claims presented, and amends the same or substitutes others to meet the objections of the Patent Office, he must be deemed to have

surrendered and disclaimed what he thus conceded, and is bound by the limitation so imposed; and that in such case it is immaterial whether the Patent Office was right or wrong in rejecting the original claims. The rule stated, however, rests upon the proposition that an applicant by submitting to the demands of the Patent Office, and thereby surrendering a claim or limiting its breadth, is deemed to have abandoned the feature so surrendered and to have dedicated it to the public, and thereby become estopped from asserting that the claim so allowed has the breadth of the rejected claim. *W. W. Sly Mfg. Co. v. Russell & Co.*, (C. C. A. 6th Cir. 1911) 189 Fed. 61; *Condit Electrical Mfg. Co. v. Westinghouse Electric & Mfg. Co.*, (C. C. A. 1st Cir. 1912) 200 Fed. 144.

## Vol. V, p. 487, sec. 4892.

**Scope of oath.**—The inventor is required to make oath only to that for which he solicits a patent. The usual form of oath should not be construed as narrower than this unless a narrower construction is unavoidable. *Crompton & Knowles Loom Works v. Stafford Co.*, (D. C. Mass. 1913) 205 Fed. 925.

**Officer "authorized by law."**—A notary public of one of the states is an officer "authorized by law" to administer oaths, within the meaning of this section. *Patterson v. United States*, (C. C. A. 9th Cir. 1913) 202 Fed. 208, wherein the court said: "On behalf of the plaintiff in error it is earnestly insisted that Hobson, the notary public, was

not authorized to administer the oath which Patterson took. The Supreme Court, in the case of *United States v. Curtis*, 107 U. S. 671, 2 Sup. Ct. 501, 27 L. ed. 534, held that the provision of section 5392 of the Revised Statutes [5 Fed. Stat. Annot. 701], in respect to the taking of an oath before a "competent tribunal, officer, or person," means some tribunal, officer, or person authorized by the laws of the United States to administer oaths in respect of the particular matters to which it relates. Specific provision, however, is made by Congress in respect to the oath required on the application for a patent in section 4892 of the Revised Statutes, as amended March 3, 1903."

## Vol. V, p. 492, sec. 4895.

**The inchoate right to obtain a patent or the right to an invention not yet patented may be assigned.** *Wende v. Horine*, (N. D. Ill. 1911) 191 Fed. 620.

**Legal title to unpatented invention.**—To the same effect as the original note, see *Consolidated Rubber Tire Co. v. B. F. Goodrich Co.* (N. D. Ill. 1912) 195 Fed. 764.

**Issuance to either assignor or assignee.**—The patent office has full power under this section to issue the patent to either the as-

signor or the assignee. *Thoma v. Perri*, (D. C. Mass. 1913) 205 Fed. 632.

**Legal title to assigned patent when issued.**—The presence of a request to the Commissioner of Patents to issue the patent to the assignee of the inventor, under an assignment made before the issuance of the patent and duly recorded, is not necessary to vest in the assignee the legal title to the patent when issued. *Hildreth v. Auerbach*, (S. D. N. Y. 1912) 200 Fed. 972.

## Vol. V, p. 507, sec. 4915.

**Rules governing.**—To the same effect as the original note, see *Greenwood v. Dover*, (C. C. A. 1st Cir. 1911) 194 Fed. 91.

**Jurisdiction.**—A suit brought under this section being under the patent right laws of the United States, is therefore within the exclusive jurisdiction of the federal courts. It is also a proceeding differing in character in some respects from ordinary suits of a civil nature at law or in equity, and this section does not make the right to bring it depend in any way upon diverse citizenship of the parties, or upon the amount involved.

**The defendant may be sued in the district where he is found.** *Thoma v. Perri*, (D. C. Mass. 1913) 205 Fed. 632.

**Assignee as party plaintiff.**—The applicant is the person who files the applications for a patent, and this statute makes no provision for the substitution of the name of the assignee as applicant. *Wende v. Horine*, (N. D. Ill. 1911) 191 Fed. 620.

**Adverse parties must have notice, and it necessarily follows if the defeat of the applicant has been the outcome of an interference proceeding, or based upon a**

determination that some other applicant is the original inventor or is entitled to the patent, that the successful applicant is a necessary party to the bill in equity, and a decree therein in favor of the plaintiff will carry a determination of invalidity or lack of right in the record patentee. The resultant proceedings in the Patent Office will necessarily be the issuance of a patent to the plaintiff and a cancellation of the grant by letters patent previously issued. *General Electric Co. v. Steinberger*, (E. D. N. Y. 1913) 208 Fed. 699.

**Testimony taken de novo.**—On appeal to the Circuit Court of Appeals of the District of Columbia from a decision of the Commissioner of Patents, the case is heard in the nature of a review, and the finding of fact of the Commissioner must be considered from the standpoint of the record as made on the appeal. But in a proceeding under this section the testimony is taken de novo, and, while the record may be identical with that in the Patent Office, nevertheless the court

must make its own findings upon the testimony. In so doing, it must treat the conclusions of the Commissioner of Patents and of the Court of Appeals as findings of a tribunal having jurisdiction with respect to the matters determined in the Patent Office, or upon appeal therefrom, and in so far as these determinations are shown to have been made upon the same facts as those presented to the court in the action under this section they should not be disturbed unless shown to be plainly and unmistakably erroneous. *General Electric Co. v. Steinberger*, (E. D. N. Y. 1913) 208 Fed. 699.

A stay of suit for infringement was granted to await the outcome of suit under this section in *Steinberger v. General Electric Co.*, (N. D. N. Y. 1913) 207 Fed. 114.

Relief against an interfering patentee must be obtained, not under this section, but under section 4918 (5 Fed. Stat. Annot. 526). *General Electric Co. v. Steinberger*, (E. D. N. Y. 1913) 208 Fed. 699.

## Vol. V, p. 511, sec. 4916.

**Enlargement of invention.**—To the same effect as the original note, see *Sirocco Engineering Co. v. B. F. Sturtevant Co.*, (S. D. N. Y. 1913) 208 Fed. 147.

**Broadened claims.**—To the same effect as the original note, see *Coldwell-Gildard Co. v. Stafford Co.*, (D. C. Mass. 1912) 197 Fed. 568; *A. D. Howe Mach. Co. v. Coffield Motor Washer Co.*, (C. C. A. 4th Cir. 1912) 197 Fed. 541.

A reissue is not necessarily void because it contains broadened claims, or because it contains claims which more accurately and precisely cover the invention as described in the original patent. *Weber v. Automobile & Accessories Mfg. Co.*, (C. C. Md. 1911) 190 Fed. 189.

**Effect of disclaimer.**—In *Fisher v. Automobile Supply Mfg. Co.*, (E. D. N. Y. 1912) 201 Fed. 543, the court said: "It may be assumed that a patentee is not entitled by a disclaimer to obtain a reissue, and thus to avoid the scrutiny of the Patent Office."

**For same invention only.**—The question whether the reissue is for the "same invention" should be considered not merely as a verbal question, but as a substantial question to be solved by reference to the structure itself, as well as to the specification and claims. The reissue may properly correct insufficiency of description of what is clearly shown in drawings as an obvious feature of the structure, and may add claims adequate to protect the substance of an invention or inventions that fairly appear in the original, and which the inventor sought to protect. A proper distinction is to be drawn between cases of this character and cases in which it is sought to make over an old patent, and by ingenious afterthought, either with the assistance of new matter or by a new version of old matter, put into a patent what was

not there before. *Coldwell-Gildard Co. v. Stafford*, (D. C. Mass. 1912) 197 Fed. 568.

**Errors regarding prior art.**—The Circuit Court is without power to correct errors or mistakes that have been made in the Patent Office either by the Commissioner of Patents in erroneously considering patents cited by him as belonging to the prior art or by the patentees' inadvertence in failing to draw the examiner's attention thereto. Such relief must be sought in the Patent Office by application for reissue. *Long v. Nove Mfg. Co.*, (W. D. N. Y. 1911) 192 Fed. 566.

**Laches.**—It has been held that, in the absence of special circumstances, a reissue should not be granted after a delay of more than two years. This rule is strictly followed, when, during the delay, other inventors have taken out new patents in the same art, which would infringe the reissue. *Specialty Mach. Co. v. Ashcroft Mfg. Co.*, (S. D. N. Y. 1913) 205 Fed. 760.

In order to relieve against "inadvertence, accident or mistake" there must be clear and positive proof that there was such "inadvertence, accident or mistake," and that the party asking for relief acquires no more than he was originally entitled to. The burden of maintaining the facts to which these requirements relate is of a character that requires clear and positive proof, in harmony with the universal rules of equity not to disturb the existing status except by proof of that character. No mere inferences can take the place of such proof. Ordinarily, what is called for by the words "same invention" should appear in some way on the face of the original patent, and it cannot be gathered from mere inferences or suggestions with reference to what the patentee might or might not have conceived. *Stafford Co. v. Coldwell-Gildard Co.*, (C. C. A. 1st Cir. 1913) 202 Fed. 744.

## Vol. V, p. 523, sec. 4917.

**Effect of disclaimer.**—The language disclaimed is no longer a part of the specifications. *Simplex Railway Appliance Co. v. Pressed Steel Car Co.*, (C. C. A. 2d Cir.) (1911) 189 Fed. 70.

## Vol. V, p. 529, sec. 4923.

**Amount of foreign knowledge or use.**—Under this section an American inventor who in good faith believes that he is the first inventor cannot be deprived of his right to a patent by reason of any similar invention made by another person in a foreign country, unless it has been patented or described in a printed publication before the American application, and the fact that it was invent-

ed in a foreign country earlier is immaterial. *Vacuum Engineering Co. v. Dunn*, (S. D. N. Y. 1912) 202 Fed. 967; *Westinghouse Mach. Co. v. General Electric Co.*, (C. C. A. 2d Cir. 1913) 207 Fed. 75.

The meaning of "known" as used in this section is considered at length in *Westinghouse Mach. v. General Elec. Co.*, (N. D. N. Y. 1912) 199 Fed. 907.

## Vol. V, p. 531, sec. 4898.

## III. ASSIGNMENTS.

## 3. Form and Requisites.

**Seal.**—An assignment of an application for a patent need not be under seal. *United States Light & Heating Co. v. J. B. M. Electric Co.*, (W. D. N. Y. 1911) 189 Fed. 382.

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## 5. Nature and Effect.

**No right to sue for past infringement.**—To the same effect as the original note, see *Auto Spring Repairer Co. v. Grinberg*, (S. D. N. Y. 1912) 196 Fed. 52.

**Estoppel of assignor.**—To the same effect as the original note, see *Peelle Co. v. Ras-kin*, (E. D. N. Y. 1912) 194 Fed. 440; *Roesing-Ernst Co. v. Coal & Coke By-Products Co.*, (C. C. A. 3d Cir. 1913) 208 Fed. 990.

**Effect of assignment.**—"It seems to be plain that legal title to a patent does not completely vest in the assignee until the patent is issued. Before that, an assignment of the right to the patent gives the assignee merely legal title to such rights as the patentee may have. As between the assignee and the United States these rights are equitable; that is, subject to all equities or legal objections which could be urged by the government against the applicants themselves. It is like enforcing specific performance of a contract; that is, it is the carrying out of a statutory provision which if granted will result in contractual relations between the government and an individual. . . . That being the case, an application filed within the statutory time, by an alleged prior inventor, or by another applicant claiming to be the real inventor, would be examined, and the government would not issue a patent to an assignee, who might be an innocent purchaser of rights under an invalid application, but would recognize the man with the earliest equity; that is, the right to the earliest claim of invention. The statute protects the priority of assignment of the subject-matter assigned. It does not indicate that the first person filing an assignment will be recognized as having greater rights than the applicant himself, but protects, as

to subsequent assignees, and also forecloses those who are required by the statute to file an assignment within the period of three months. The assignee gets no greater title, by reason of his good faith, unless the record of his title has protected him, and, of course, a knowledge of lack of title would deprive the assignee of any benefit by recording an assignment, against any one who could succeed against the applicant himself." *Thompson v. Automatic Fire Protection Co.*, (E. D. N. Y. 1912) 197 Fed. 750.

## 6. RESCISSION.

**Failure to use patent.**—Where the assignee fails to make use of a patent after a reasonable time to test the same the assignor has a right to rescind the assignment: the assignor not having any adequate remedy at law. *Neenan v. Otis Elevator Co.*, (C. C. A. 2nd Cir. 1912) 194 Fed. 414.

## IV. LICENSES.

## 4. Construction.

**Conditional and unconditional sale of patented article.**—An unconditional or unrestricted sale by the patentee, or by a licensee authorized to make such sale of an article embodying the patented invention or discovery, passes the article without the limits of the monopoly, and authorizes the buyer to use or sell it without restriction; but to the extent that the sale is subject to any restriction upon the use or future sale the article has not been released from the monopoly, but is within its limits, and, as against all who have notice of the restriction, is subject to the control of whoever retains the monopoly. This results from the fact that the monopoly is a substantial property right conferred by law as an inducement or stimulus to useful invention and discovery, and that it rests with the owner to say what part of this property he will reserve to himself and what part he will transfer to others, and upon what terms he will make the transfer. *Henry v. A. B. Dick Co.*, (1912) 224 U. S. 1, 32 S. Ct. 364, 56 U. S. (L. ed.) 645, Ann. Cas.

1913D, 880; *Edison v. Ira M. Smith Mercantile Co.*, (W. D. Mich. 1911) 188 Fed. 925. See also *Winchester Repeating Arms Co. v. Buengar*, (E. D. Wis. 1912) 199 Fed. 786; *Waltham Watch Co. v. Keene*, (S. D. N. Y. 1911) 191 Fed. 855. Compare *Waltham Watch Co. v. Keene*, (S. D. N. Y. 1913) 202 Fed. 225.

**Restriction for purpose of evading Anti-Trust Act.**—If the license restriction is imposed, not for the purpose of protecting the patent or for securing its benefits, but for the purpose of evading the provisions of the Anti-Trust Act, then it is void, because such restriction is not "a reasonable condition imposed upon the licensee of a patent by the owner thereof," nor is it "a condition suitable to protect the use of a patent and secure its benefits." *Ingersoll v. M'Coll*, (D. C. Minn. 1913) 204 Fed. 147.

**Loss of protection of license.**—When a licensee, who is entitled to use a patented machine under certain conditions only, undertakes to use the machine otherwise than in conformity with those conditions, he loses the protection of his license and he becomes an infringer. *Indiana Mfg. Co. v.*

*Nichols & Shepard Co.*, (E. D. Mich. 1910) 190 Fed. 579.

Where part of a patented article is capable of use separate from the complete article, as well as in connection therewith, a purchase of the part only does not carry with it the right to use the part in combination with the rest of the patented article. *Davis v. Hall Mammoth Incubator Co.*, (C. C. A. 1st Cir. 1912) 200 Fed. 958.

**Conditions as to distinguishing marks of licensed machines.**—A condition that the license shall not attach to any machines except those of a certain quality of material or those painted a certain color or those bearing certain distinguishing marks would seem to be well within the patentee's right of total exclusion. *Indiana Mfg. Co. v. Nichols & Shepard Co.*, (E. D. Mich. 1910) 190 Fed. 579.

#### 5. Operation and Effect.

**Estoppel.**—The licensee may not deny the patentee's title to the monopoly, and the patentee may not deny the licensee's right to act under that monopoly. *Indiana Mfg. Co. v. Nichols & Shepard Co.*, (E. D. Mich. 1910) 190 Fed. 579.

## Vol. V, p. 547, sec. 4900.

**Failure to mark.**—While the provisions of this section deprive a complainant of the right to recover damages by reason of failure to mark, he is not thereby deprived in a

proper case of his right to an accounting for the defendant's profits. *Rollman Mfg. Co. v. Universal Hardware Works*, (E. D. Pa. 1913) 207 Fed. 97.

## Vol. V, p. 552, sec. 4919.

### III. JOINING OR SPLITTING CAUSES OF ACTION.

**In general.**—The patentee, in the case of an infringement, has a right to bring either an action at law to recover damages or a suit in equity for an injunction, with incidentally a right to an accounting for damages or profits. But if either course be adopted the complainant is not at liberty to split up causes of action for the infringement of the patent which had accrued up to that time against the defendant sued, but is bound to include all such causes of action in the suit, and, if he omits to include existing causes of action in any such suit, the judgment in it is a bar against his maintaining any subsequent action upon the omitted causes of action. *Panoulis v. National Equipment Co.*, (S. D. N. Y. 1912) 198 Fed. 493.

### V. RECOVERY.

**Recovery of damages for unfair competition.**—In a suit for an infringement of a patent damages are recoverable for unfair competition where the patent is found to be valid and infringed and the evidence of sales to prove the infringement of the mechanical principles of the patent establishes also that the defendants unlawfully made their article in form to imitate the plaintiffs. *Ludwigs v. Payson Mfg. Co.*, (C. C. A. 7th Cir. 1913) 206 Fed. 60.

**Nominal damages.**—When an action at law is brought to recover damages for infringement of a patent, and validity, title, and infringement are proved, but the plaintiff is unable to prove some specific amount of actual damages, he can recover nominal damages. *Reis v. Rosenfeld*, (C. C. A. 2d Cir. 1913) 204 Fed. 282.

## Vol. V, p. 566. [Act of March 3, 1897.]

**Both infringement and place of business necessary.**—To the same effect as the original note, see *Edison v. Allis-Chalmers Co.*, (W. D. N. Y. 1911) 191 Fed. 837.

**Ancillary jurisdiction of unfair competition.**—Where the plaintiff and defendant are citizens and inhabitants of the same state the

jurisdiction of the court over a cause of action for infringement of a patent does not give the court ancillary jurisdiction of unfair competition of trade. *Woerheide v. H. W. Johns-Manville Co.*, (E. D. Pa. 1912) 199 Fed. 535, wherein the court said: "Although there are some cases holding that,

where the court has jurisdiction of a patent controversy, it may determine under the same bill a cause of action for unfair competition arising out of the same acts, the weight of the authorities is in support of Judge Holland's decision in *Mecky v. Grabowski*, supra [177 Fed. 591]. While cases might arise in which the acts constituting the unfair competition were so closely allied to the patent controversy as to justify the court in disposing of the whole controversy in the one suit, the case at bar does not, in my opinion, come within that class of cases. I do not think that the alleged unfair competition in trade is so allied to the patent controversy as to draw to the jurisdiction of this court under the patent cause jurisdiction of that part of the controversy involving unfair competition."

The word "defendant" covers more than one party defendant if there are joint infringers who can be sued in the same district. *Cheatham Electric Switching Device Co. v. Transit Development Co.*, (E. D. N. Y. 1911) 191 Fed. 727.

Party not a resident of district.—An action for the infringement of a patent can

be brought against a party not a resident of the district, but infringing therein, and having a regular place of business therein. *Cheatham Electric Switching Device Co. v. Transit Development Co.*, (E. D. N. Y. 1911) 191 Fed. 727.

A suit seeking to reverse a decision of the District of Columbia Supreme Court in interference proceedings is not governed by this act, not being a suit for infringement. *Thoma v. Perri*, (D. C. Mass. 1913) 205 Fed. 632.

"Regular and established place of business."

—The facts in *Smith v. Farbenfabriken of Elberfeld Co.*, (C. C. A. 6th Cir. 1913) 203 Fed. 470, were held to show that the defendant kept a "regular and established place of business" within the jurisdiction of the court.

Alien.—This act manifestly embraces an alien, as well as a citizen—who maintains through his own agency a regular and established place of business within our territorial limits—quite as certain as if it were in express terms so stated. *Smith v. Farbenfabriken of Elberfeld Co.*, (C. C. A. 6th Cir. 1913) 203 Fed. 476.

## Vol. V, p. 567, sec. 4920.

### I. PLEADING AND PROOF IN GENERAL.

Counterclaim.—Under Rule 30 of the Federal Equity Rules adopted by the Supreme Court, and within reasonable limits of convenience, the defendant in a patent infringement suit may set up a counterclaim for an infringement by the plaintiff of a patent of the defendant's relating to the same subject matter as the plaintiff's patent. *Marconi Wireless Telegraph Co. of America v. National Electric Signaling Co.*, (E. D. N. Y. 1913) 206 Fed. 295.

License as defense.—A license to use a patented article is a good defense to a suit for an infringement although the licensee has not paid the consideration agreed. *Luten v. MacAfee*, (M. D. Pa. 1913) 206 Fed. 175.

Monopoly as a defense.—That the plaintiff is guilty of an infraction of the Anti-Trust Act, and in appropriate proceedings will be dissolved, is not a good defense to a bill of complaint charging infringement of certain patents. *United States Fire Escape Counterbalance Co. v. Joseph Halsted Co.*, (N. D. Ill. 1912) 195 Fed. 295; *Motion Picture Patents Co. v. Eclair Film Co.*, (D. C. N. J. 1913) 208 Fed. 416. In the former case the court said: "It is, however, argued that, even though a trespasser cannot defend his act by showing that his adversary is guilty of *malum prohibitum*, yet patent infringement suits stand on a somewhat different ground. A person bringing an infringement suit must show title to the patent, while the mere possessor of tangible property, though without title, may sue for trespass. Therefore, it is said, it is always open to defendant in an infringement

suit to attack plaintiff's title. If he relies on an assignment, defendant may show its invalidity. A transfer, it is further argued, made in aid of unlawful combination, is absolutely void, passing no title of any kind. So the conclusion is reached that in any and all patent infringement suits defendant may raise the question of trust or no trust, good or bad trust, reasonable or unreasonable restraint of trade, whenever there was a patent transfer in aid of the combination. The United States Steel Corporation, for instance, is the owner by assignment of hundreds of patents. In all its infringement suits may defendants raise the question now in litigation by the government whether it is or is not within the Sherman Act? The question would seem to suggest the answer, to the effect that an infringement suit may be disposed of without touching the question of trust or combination, and that the court, in adjudging infringement, would not thereby approve a possible illegal combination. A patent transfer is valid to pass title, even though made pursuant to unlawful combination. A fraudulent sale is still a sale, good until set aside, and can be attacked only by some one injured. Neither grantor nor grantee may question it. It is voidable as to those intended to be injured, but good as to all others."

The burden of proof is on the defendant to establish the defense that a patent is void for want of invention or discovery. *San Francisco Cornice Co. v. Beyrle*, (C. C. A. 9th Cir. 1912) 195 Fed. 516; *Colman v. Byrd Mfg. Co.*, (E. D. N. C. 1912) 200 Fed. 59; *H. J. Feinz Co. v. Cohn*, (C. C. A. 9th Cir. 1913) 207 Fed. 547.



## II. STATUTORY DEFENSES.

**Unsupported oral testimony.**—To the same effect as the original note, see *De Laval Separator Co. v. Iowa Dairy Separator Co.*, (C. C. A. 8th Cir. 1912) 194 Fed. 423.

**Reduction to practice.**—Drawings and verbal description of the invention, however completely they may show conception, are insufficient to establish reduction to practice unless filed as an application for a patent, when they are accepted as a constructive reduction to practice. *M'Creery Engineering Co. v. Massachusetts Fan Co.*, (C. C. A. 1st Cir. 1912) 195 Fed. 498.

**Place where used.**—When a notice is deemed insufficient because it does not state where the alleged patent or process was used the complaint should except to the answer for insufficiency, and failing to do so the defect is waived. *United States Consol. Seeded Raisin Co. v. Selma*, (C. C. A. 9th Cir. 1912) 195 Fed. 264.

**Knowledge without use.**—If the record shows knowledge without use of a device identical with the patented article, it is not necessary to prove actual use. If the device known to others was competent and capable of producing the same results as that of the patent, there is sufficient anticipation. *Imperial Brass Mfg. Co. v. Nelson*, (N. D. Ill. 1912) 194 Fed. 165.

**"On Sale."**—"Proof of a mere contract to construct from plans and to deliver in future a machine or manufacture not proven to have been previously completed, falls short of proof that the machine or invention was 'on sale.' The distinction between an executory contract to construct and to pass title in the future and putting an article 'on sale' is substantial and is not merely one of the 'witty diversities' of the law of sales. Especially is that distinction important when such an executory contract is for the manufacture or construction which constitutes the first reduction to practice. That inventors who have reduced their conceptions to the shape of drawings or descriptions and have endeavored to enlist capital by offering to construct and deliver a machine in the future should, by the display of drawings and offers to construct, be regarded as having placed the machine 'on sale,' would involve a departure from the intention of the patent statute as well as from the ordinary significance of language. The opinion of the Circuit Court of Appeals of the Second Circuit in *National Cash Register Co. v. American Cash Register Co.*, 178 Fed. 79, 101 C. C. A.

569, does not support the defendant's contention. That case decides merely that the manufacture of a machine upon an order for its construction followed by its delivery and acceptance constitutes a sale within the patent statute. This is far from supporting the contention that regardless of subsequent delivery and acceptance the article is on sale and that an agreement to construct is a putting on sale. In cases where delivery and acceptance are complete, the distinction between delivery and acceptance upon a previous order and without a previous order has no substantial relation to the purpose of the statute. The completion of the transaction by delivery and acceptance affords evidence that the article was 'on sale' within the meaning of the statute. Neither does the case of sale by sample, or by photograph of an existing thing, aid the defendant. The existence of a sample proves reduction to practice, as does a photograph. . . .

No amount of public use within two years is of any effect even if in pursuance of a contract made before the two years. The putting 'on sale' intended by the statute is more or less analogous to a public use, and has regard to actual and completed transactions, and not to agreements which contemplate both a future production and a future transfer of title." *M'Creery Engineering Co. v. Massachusetts Fan Co.*, (C. C. A. 1st Cir. 1912) 195 Fed. 498.

**Plea that patentee is not original and sole inventor.**—A plea which seeks inter alia to present the defense that the patentee is not the original and sole inventor of the combination set forth in the several claims is bad. This is a defense enumerated as such in this section and should be presented by answer. *Vacuum Cleaner Co. v. Dunn*, (S. D. N. Y. 1911) 189 Fed. 634.

**Proof of anticipation.**—The burden of proving anticipation rests upon the defendant and he must do this by clear and convincing evidence. The publication relied on must describe the invention in such a complete, clear, and precise manner as to enable those skilled in the art to reproduce it without the aid of the patent. If the differences are only those which the skill of the art will readily supply, the publication will not be destroyed as an anticipation, but it will be destroyed if these differences relate to essential features, and independent investigation and experiment are required to explain obscurities and supply omissions. *Ransome Concrete Co. v. German American Button Co.*, (W. D. N. Y. 1912) 197 Fed. 172.

## Vol. V, p. 577, sec. 4921.

## I. GENERAL EQUITABLE JURISDICTION.

**Equitable and legal rights determined in one suit.**—In a suit for injunction and accounting for an infringement of a patent where it appears that since the act of infringement complained of the plaintiff has assigned part of his interest in the patent

to others, and no acts of infringement are claimed to have occurred since the assignment, the court holds that, if all the interested persons are parties, the whole controversy can be settled on the equity side of the court. *Holmes v. Burnett*, (N. D. Ill. 1913) 206 Fed. 66.

**Res judicata as to infringement.**—The question of infringement must be determined on the particular facts in any given case, regard being had to the scope of the claims as governed by their language and the liberality or strictness of construction properly applicable to them. But this is subject to the qualification that where in the earlier adjudication of the patent a rule determining infringement or noninfringement upon a given state of facts has been laid down or recognized by the appellate court, the lower court in subsequently dealing with the same patent on a similar or substantially similar state of facts is as much bound to follow such rule of infringement as to recognize the validity of the patent theretofore upheld by the higher court. *Byerley v. Ellis Co.*, (C. C. Del. 1911) 190 Fed. 772. See also *Schmeiser Mfg. Co. v. Lilly*, (C. C. Ore. 1911) 189 Fed. 631.

**"Suspicion" of infringement** is not enough to justify an order for inspection of the defendant's alleged infringing machines and to compel the defendant to furnish samples of its product. *Eibel Process Co. v. Remington-Martin*, (N. D. N. Y. 1912) 197 Fed. 760.

**Discretion of court.**—The power to grant a preliminary injunction should always be exercised with the greatest of care and caution. An application therefor is always addressed to the sound discretion of the court. *Gillette Safety Razor Co. v. Durham Duplex Razor Co.*, (D. C. N. J. 1912) 197 Fed. 574.

Where the patents sued on are not pioneer patents, and do not embody a primary invention, but are only improvements on the prior art, and defendant's machines can be differentiated, the charge of infringement cannot be maintained. *Johnson v. Johnson*, (C. C. N. J. 1911) 190 Fed. 20.

## II. JOINDER OF CAUSES OF ACTION.

**Patent for apparatus and product.**—A patent for a peculiarly twisted and formed piece of wire, and a patent for a die in which the forming and twisting are done, are patents for the apparatus and for the product, in close analogy to those for process and product. It is proper to join, in one suit, two such patents, since both are infringed by the same act. *Adrian Wire Fence Co. v. Jackson Fence Co.*, (E. D. Mich. 1911) 190 Fed. 195.

## III. PLEADINGS.

**If infringement is charged generally.**—To the same effect as the original note, see *Luten v. Sharp*, (D. C. Kan. 1912) 200 Fed. 151.

A bill may be amended in a proper case. *Jackson Skirt & Novelty Co. v. Rosenbaum*, (W. D. Mich. 1911) 190 Fed. 197.

**Overruling plea.**—Where the defense may be fully saved in connection with an answer and on final hearing a plea may be over-

ruled. *Jackson Skirt & Novelty Co. v. Rosenbaum*, (W. D. Mich. 1911) 190 Fed. 197.

**Duplicity.**—A plea is bad which attempts to unite two defenses where part of the proposed proof relates to one only of the claims of the patent, because, if the issue were joined on the plea and the alleged facts were determined in favor of the defendant, it would not necessarily dispose of the case. A plea to be good should present a single issue which, if decided in favor of the defendant, will dispose of the action. *Vacuum Cleaner Co. v. Dunn*, (S. D. N. Y. 1911) 189 Fed. 634.

**Joinder of parties.**—The patentee may be joined with the holder of an exclusive license although he is not a necessary party. *Havens v. W. R. Ostrander Co.*, (S. D. N. Y. 1911) 190 Fed. 199.

**Negating facts.**—It has been held that a bill for infringement of a patent to state a cause of action must not only allege the facts which are essential to the validity of the patent under sections 4886 and 4887 but must negative those which would defeat it. *Maxwell Steel Vault Co. v. National Casket Co.*, (N. D. N. Y. 1913) 205 Fed. 515.

As to the sufficiency of a bill of complaint under the new equity rules, see *Zenith Carbureter Co. v. Stromberg Motor Devices Co.*, (E. D. Mich. 1913) 205 Fed. 158.

A bill for infringement was held to be sufficient in *Luten v. Dover Const. Co.*, (C. C. N. J. 1911) 189 Fed. 405.

**Demurrer.**—A patent will not be held invalid on demurrer unless the court is entirely satisfied from its face that by no possible proof can patentable invention and validity be made to appear. *Rose Mfg. Co. v. E. A. Whitehouse Mfg. Co.*, (C. C. N. J. 1911) 193 Fed. 69. See also *Burrowes v. Carrom-Archarena Co.*, (W. D. Mich. 1911) 190 Fed. 204.

If there is obviously no patentable invention in the device patented, it is not only within the power of the court, but it is its duty, to sustain a demurrer to the bill for want of invention, and to save the parties from useless costs and litigation. *Towne Steering Wheel Co. v. Lee*, (C. C. A. 9th Cir. 1912) 199 Fed. 777; *Card v. Standard Coal & Coke Co.*, (E. D. Tenn. 1912) 202 Fed. 351.

On such demurrer the court, in determining the questions of novelty and invention, may take judicial notice of facts of common or general knowledge. *Card v. Standard Coal & Coke Co.*, (E. D. Tenn. 1912) 202 Fed. 351.

In *Havens v. W. R. Ostrander & Co.*, (S. D. N. Y. 1911) 190 Fed. 199, on demurrer to a bill for infringement of a design patent it was contended that the patent was anticipated by a mechanical patent to the same inventor; but the court said: "This patent, however, is not set forth in the bill. The mere fact that it is, with many others, referred to in a license agreement which is annexed to the bill does not make proof of it so that it may be considered as a part of the record on demurrer."

## IV. INJUNCTIONS.

**Discretion of court as to preliminary injunction.**—"As a rule, the grant or refusal of a preliminary injunction is a matter within the sound discretion of the trial court; and where the preliminary record discloses that the validity of the patents was in doubt, that the fact of infringement was uncertain, and that, in view of such doubts and uncertainties, an injustice might be inflicted upon the defendant greater than any benefit that might accrue to complainant from the preliminary decree, the reviewing tribunal will not weigh the conflicting showings with respect to the facts of validity, infringement, or comparative equities, but will let the case go to final hearing undisturbed, because abuse of discretion is not made affirmatively to appear. . . . But discretion (which must be legal discretion, not merely the individual view or will of the particular chancellor) does not extend to a refusal to apply well-settled principles of law to a conceded or indisputable state of facts. If this is not so, Congress did a vain thing in providing at all for appeals from preliminary injunctive decrees." *Winchester Repeating Arms Co. v. Olmstead*, (C. C. A. 8th Cir. 1913) 203 Fed. 493. See also *Fireball Gas Tank & Illuminating Co. v. Commercial Acetylene Co.*, (C. C. A. 8th Cir. 1912) 198 Fed. 650; *Gamewell Fire Alarm Tel. Co. v. Star Elec. Co.*, (N. D. N. Y. 1912) 199 Fed. 188.

"Preliminary injunctions should not be granted when the validity of the patent is conceded, but there is serious doubt as to the existence of the infringement alleged. A party is not entitled to an injunction for the reason he has a valid patent, but for the reasons he has a valid patent and that the defendant plainly infringes his rights thereunder and protected thereby. When there is serious doubt of the existence of both these facts, a preliminary injunction should not be granted. In short, the complainant's case should be reasonably free from doubt on every question necessary for him to establish, in order to obtain the relief demanded, and the case should be established other than by *ex parte* affidavits, where their essential allegations are controverted by others of the same character and of substantially equal credibility." *Gamewell Fire Alarm Tel. Co. v. Hackensack Imp. Com'n*, (D. C. N. J. 1912) 199 Fed. 182.

In a case disclosing long acquiescence, public use, utility of the patented device, as well as clear infringement, a temporary injunction may be issued, without prior adjudication, unless the validity of the patent is challenged in some affirmative or equally specific manner, giving rise to a fair doubt. *Winchester Repeating Arms Co. v. Buengar*, (E. D. Wis. 1912) 199 Fed. 786.

An injunction may be refused, even when there is a decree for an accounting, and the patent is still in life. *Electric Smelting & Aluminum Co. v. Carborundum Co.*, (W. D. Pa. 1900) 189 Fed. 710.

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**Test to be applied.**—Preliminary injunctions have not ordinarily been granted, if there is any substantial doubt regarding either the validity of the patent or infringement. Nor is a preliminary injunction so readily granted against a mere user as against a maker or seller of the patented invention. *Valvona-Marchiony Co. v. Silverstein*, (C. C. Mass. 1910) 207 Fed. 374. See also *Lovell-McConnell Mfg. Co. v. Automobile Supply Mfg. Co.*, (E. D. N. Y. 1911) 193 Fed. 658; *National Electric Signaling Co. v. Telefunken Wireless Telegraph Co. of the United States*, (C. C. A. 2nd Cir. 1912) 200 Fed. 591.

In *Vacuum Cleaning Co. v. Waldorf-Astoria Hotel Co.*, (S. D. N. Y. 1911) 198 Fed. 867, the court said: "While believing, therefore, that the granting of a preliminary injunction upon an unadjudicated patent in any but almost undefended cases is far more likely to involve all parties in idle expense than to benefit even the most meritorious complainant, it is my duty to apply the theory laid down as a rule in the *Newhall Case*, supra, 125 Fed. 921, 60 C. C. A. 631, viz., that the injunction prayed for should be granted, unless there is 'a fair doubt as to invention, anticipation, construction or infringement.'"

**Violation of covenants in license agreement.**—A bill for an injunction to prevent the infringement of a patent cannot be founded on the defendant's violation of covenants, in a license agreement, to pay royalties, to make reports, and to submit his books to the complainant's accountant. *Chadeloid Chemical Co. v. Johnson*, (C. C. A. 7th Cir. 1913) 203 Fed. 993.

**Cutting prices by licensee.**—In *Automatic Pencil Sharpener Co. v. Goldsmith*, (S. D. N. Y. 1911) 190 Fed. 205, a preliminary injunction was granted to restrain the sale at cut rates of patented machines bought under restrictions as to price of which the defendant had full knowledge. The machines and boxes also bore marks, numbers, and notices which the defendant mutilated and erased before offering for sale at the cut rate.

The fact that a patent has but a little while to run will not prevent a court of equity from granting an injunction. *Victor Talking Mach. Co. v. Vitaphone Co.*, (S. D. N. Y. 1911) 191 Fed. 987.

**Questions on appeal.**—Where questions of fact and of mixed law and fact are presented to the appellate court on an appeal from the court below which has issued an injunction upon a prior adjudication of the validity and infringement of the patent, the appellate court will not consider and determine these questions, but will reserve its decision until after the final hearing upon the issues they present below. *Fireball Gas Tank & Illuminating Co. v. Commercial Acetylene Co.*, (C. C. A. 8th Cir. 1912) 198 Fed. 650.

**Issues on motion for preliminary injunction.**—The court will not ordinarily on a motion for a preliminary injunction determine the scope and validity of the claims of a subsequent patent under which a defendant

is operating. Such a defendant is *prima facie* acting within his rights. The presumption is that the later patent substantially differs from the earlier. *Byerley v. Standard Asphalt & Rubber Co.*, (C. C. N. J. 1911) 189 Fed. 759.

**Prior adjudication sustaining patent.**—When there has been a prior adjudication sustaining a patent and the infringement thereof, in the same or in another circuit, where its validity was contested on full proofs, a trial court should, on motion for preliminary injunction, sustain the patent and leave the determination of its validity until after the final hearing. *Fireball Gas Tank & Illuminating Co. v. Commercial Acetylene Co.*, (C. C. A. 8th Cir. 1912) 198 Fed. 650.

#### V. DECREE AND AWARD.

**Infringer as trustee.**—To the same effect as the original note, see *In re Beckwith*, (C. C. A. 7th Cir. 1913) 203 Fed. 45.

**Profits.**—In *Westinghouse Electric & Mfg. Co. v. Wagner Electric & Mfg. Co.*, (1912) 225 U. S. 904, 32 S. Ct. 691, 56 U. S. (L. ed.) 1222, 41 L.R.A.(N.S.) 653, the court laid down the following rules regarding the recovery of profits: "(a) Where the infringer has sold or used a patented article, the plaintiff is entitled to recover all of the profits. (b) Where a patent, though using old elements, gives the entire value to the combination, the plaintiff is entitled to recover all the profits. *Hurlbut v. Schillinger*, (1889) 130 U. S. 456, 472, 9 S. Ct. 584, 32 U. S. (L. ed.) 1011. (c) Where profits are made by the use of an article patented as an entirety, the infringer is liable for all the profits 'unless he can show—and the burden is on him to show—that a portion of them is the result of some other thing used by him.' *Elizabeth v. American Nicholson Pavement Co.*, (1877) 97 U. S. 126, 24 U. S. (L. ed.) 1000. (d) But there are many cases in which the plaintiff's patent is only a part of the machine and creates only a part of the profits. His invention may have been used in combination with valuable improvements made, or other patents appropriated by the infringer, and each may have jointly, but unequally, contributed to the profits. In such case, if plaintiff's patent only created a part of the profits, he is only entitled to recover that part of the net gains. He must therefore 'give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative; or he must show, by equally reliable and satisfactory evidence, that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature.'

**Estimated by advantages gained over other modes.**—To the same effect as the original

note, see *Columbia Wire Co. v. Kokomo Steel & Wire Co.*, (C. C. A. 7th Cir. 1911) 194 Fed. 108, wherein the court said: "A manufacturer who devises a machine that he honestly believes he has a right to use, and who in an injunction suit ultimately is found to be an infringer, as was the case with appellee, is not to be mulcted in punitive damages. Equity is satisfied if he accounts for all the pecuniary benefits he derived from the use of the infringing machine. If there were no other way of obtaining the result, he might rightly be held for all the profits he made from the output of his establishment. But if, as here, other machines for doing the same work, though less effectively, were available at the date of the patent, the whole advantage would lie in the increase of efficiency. As to an infringer who at that stage of the art appropriated the invention, the standard of comparison is clear. He has taken to himself all the advantages that belonged exclusively to the patentee in the field of competition. Fifteen years later, when the art has advanced to include other noninfringing machines, available to manufacturers and more effective than those of the prior art, the patentee cannot avoid their competitive effect. At this stage the only actual advantage of the patented machine is its superiority, if any, over these later machines that are not dominated by the patent. If at this stage one should choose to enter upon the manufacture of barbed wire, he could take the later machines without giving the patentee any cause of action. If, however, he should adopt a machine that finally was adjudged to be an infringement, all that he would actually gain by the infringement would be the excess in effectiveness of the infringing machine over the later, available, competitive machines. To hold him accountable for more, to make him pay for the advantages of the invention over the prior art, would attribute to the patent a virtue it did not really have at the later period, would penalize the infringer simply because he was an infringer, and would mulct him in vindictive damages to the extent of the difference in effectiveness between the open prior art and the open current art."

**Profits for infringement of part of machine.**—Where the plaintiff's patent is only part of a machine, but the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature, then the profits are to be calculated on the whole machine. *Van Brunt v. La Crosse Plow Co.*, (W. D. Wis. 1913) 208 Fed. 281.

**Taxes and insurance premiums** cannot usually be allowed in the computation of profits derived from infringement. In exceptional cases however they will be allowed. *Carborundum Co. v. Electric Smelting & Aluminum Co.*, (C. C. A. 3d Cir. 1913) 203 Fed. 976.

A valid process patent, though for a process only, confers on the patentee a right to exclude all others from using such process for the attainment of its object. Others may

secure the desired result, if they can, by the employment of a different process, if open to them, but they cannot without the leave or license of the patent owner use the patented process with impunity. And on an accounting for profits, and not for damages, in a case of infringement, where profits to the infringer are impossible save through his infringement, he must be treated as a trustee *ex maleficio* and can withhold none of his gains from the patentee. The fact that in such a case the patent is not for the product, but only for the process, is wholly immaterial; for the infringer will not be permitted by a court of equity to take advantage of his own wrong, but will be held accountable as a trustee of the profits. *Carborundum Co. v. Electric Smelting & Aluminum Co.*, (C. C. A. 3d Cir. 1913) 203 Fed. 976.

**Infringement a mere improvement on mechanism.**—It is well settled that, in the case of mechanical inventions, where the infringed patent covers a mere improvement upon mechanism before known and open to the defendant to use, the complainant can recover only the excess of such profits as have been realized through the use of the improvement over what the defendant might have made by the use of such mechanism without such improvement. But it is equally well settled, that where the entire commercial value of the mechanism arises from the patented improvement the owner of the patent will be entitled to recover from the infringer the total profits derived from the manufacture, use or sale of such mechanism. *Carborundum Co. v. Electric Smelting & Aluminum Co.*, (C. C. A. 3d Cir. 1913) 203 Fed. 976.

If a defendant has made no profits from his use of the patented invention, none can be recovered. The rule is that the complainants shall recover the actual profits derived by the infringer from the use of the patented invention; no more, no less. *Conroy v. Penn. Elec. & Mfg. Co.*, (C. C. A. 3d Cir. 1912) 199 Fed. 427.

Although the complainant's patent has expired since the commencement of the suit,

that does not deprive the court of jurisdiction of the case for the purpose of awarding damages. *Schmeiser Mfg. Co. v. Lilly*, (C. C. Ore. 1911) 189 Fed. 631.

**Accounting refused where possible recovery disproportionate to cost.**—Where an inquiry as to damages or profits would yield no compensatory profits or damages proportionate to the cost of the investigation, an order for an accounting will be refused. *Perkins Electric Switch Mfg. Co. v. Yost Electric Mfg. Co.*, (N. D. Ohio 1910) 189 Fed. 625.

A decree for an accounting will not be refused merely because the plaintiff did not in his direct testimony prove that his device was marked "patented," or that he gave notice to the defendant to cease infringement where such facts were developed during plaintiff's cross-examination of defendant's witnesses, and were proved by plaintiff when offering his testimony in rebuttal. *Weber v. Automobile & Accessories Mfg. Co.*, (C. C. Md. 1911) 190 Fed. 189.

**Binding power of decree on third persons.**—See *Hurd v. Woodward Co.*, (N. D. N. Y. 1911) 190 Fed. 28.

#### VI. COSTS.

**Costs and partial success.**—A division of costs proportionate to the final results of the litigation is proper. *Perkins Electric Switch Mfg. Co. v. Yost Electric Mfg. Co.*, (N. D. Ohio 1910) 189 Fed. 625.

#### VII. LIMITATIONS AND LACHES.

**Delay amounting to acquiescence in infringement.**—To the same effect as the original note, see *Hall v. Frank*, (E. D. N. Y. 1912) 195 Fed. 946.

**The defense of laches is not tested by time alone.**—Lapse of time may be well explained; but, on the other hand, even a comparatively short time may constitute laches when the conduct of the slothful is such as to induce others in good faith to expend money and take the risks of enterprise. *General Electric Co. v. Yost Electric Mfg. Co.*, (N. D. Ohio 1913) 208 Fed. 719.

### Vol. V, p. 600, sec. 4929.

**Intent of section.**—To the same effect as the original note, see *Star Bucket Pump Co. v. Butler Mfg. Co.*, (W. D. Mo. 1912) 198 Fed. 857.

**Necessity of invention.**—To the same effect as the original note, see *Mygatt v. M. Schaffer-Flaum Co.*, (C. C. A. 2d Cir. 1911) 191 Fed. 836; *Charles Boldt Co. v. Turner Bros. Co.*, (C. C. A. 7th Cir. 1912) 199 Fed. 139.

A valid design patent demands, as has uniformly been held, an exercise of the inventive faculty the same as a mechanical patent. The design, however, thus invented must be not only new and original, but ornamental. It must exhibit something which appeals to the æsthetic faculty of the ob-

server. *Rose Mfg. Co. v. E. A. Whitehouse Mfg. Co.*, (D. C. N. J. 1913) 201 Fed. 926.

**Mechanical skill.**—To the same effect as the original note, see *Buffalo Specialty Co. v. Art Brass Co.*, (S. D. N. Y. 1912) 202 Fed. 760.

**The true test of identity.**—To the same effect as the original note, see *Phoenix Knitting Works v. Rich*, (W. D. Ohio 1911) 194 Fed. 708.

"To determine whether a design infringes a design patent, we cannot look solely to the elements nor the details in carrying out the parts of the design, but the test, somewhat like that applied in the case of unfair competition, is whether or not the person desiring to obtain an article bearing the original

design would be deceived or induced to purchase the imitation because of its similarity, and whether there is likelihood of users or casual observers not noticing the distinction. Or, again, whether purchasers, not having in mind the details of the design, but having their attention called to either the original or the imitation, would fail to carry away those details in their memory, and having been pleased with the general appearance would, upon seeing the similar pattern, conclude that the plated ware or the imitation design, of a generally similar appearance and at a cheaper price, was a copy of the solid pattern." *Graff v. Webster*, (E. D. N. Y. 1911) 189 Fed. 902.

**Old elements in new arrangement.**—That an element of a patented design, considered separately, is old, and that sometimes two or more of them have appeared combined in prior art, does not invalidate the patent, unless it appears that they were so assembled as to form the designs of the patent. *Graft, Washbourne & Dunn v. Webster*, (C. C. A. 2d Cir. 1912) 195 Fed. 522.

When a design invention consists in nothing more than the bringing together of elements old in the art with slight modification of shape in adapting them or adjusting them to each other, the patentable novelty is only in the slight departures of form, and any subsequent use of the same basic elements with a variation of form of adaptation departing, to the discernment of an ordinary observer, from the slight change employed in the patent, is not an infringement. *Phoenix Knitting Works v. Rich* (N. D. Ohio 1911) 194 Fed. 708.

**New shape or configuration to article of manufacture.**—In *T. W. Foster & Bro. Co. v. Tilden-Thurber Co.*, (C. C. A. 1st Cir. 1912) 200 Fed. 54, the court said: "According to the appellant's contention, the intent of Congress manifested by the amendment is that design patents for the mere shape or configuration of an article of manufacture should no longer be granted. We are not prepared to accept this view. Though the amendment has dropped the word 'useful,'

and the express provision that a new shape or configuration given to an article of manufacture shall be patentable as a design, we are unable to believe it intended by these changes that no design for any article of manufacture shall be considered 'new, original, and ornamental,' within the meaning of the section as it now stands, if the ornamental character consists merely in a new and original shape or configuration given to the article. It is, of course, still true, as was held before the amendment, that 'design patents refer to appearance, not utility.' . . . It is also true now, as before the amendment, that among articles of manufacture there are some incapable of being the subjects of design patents, for want of reason to suppose that their appearance can ever really matter to anybody. . . . But if a design for an article of manufacture not belonging to this class has the requisite novelty, originality, and ornamental character, we think that section 4929, as amended, makes it none the less patentable in virtue of those characteristics, though it may also give the manufactured article a shape or configuration which is new, or which has greater utility than any previously used. Such a patent, indeed, would cover the new shape or configuration only in its ornamental and not in its merely useful aspect, nor would it be infringed by an article securing the same merely useful result through shape or configuration."

**Clothes brush.**—It has been held that a clothes brush is an article subject to a design patent within this section. *T. W. Foster & Bro. Co. v. Tilden-Thurber Co.*, (C. C. A. 1st Cir. 1912) 200 Fed. 54.

Color constitutes no element of a design patent. *Star Bucket Pump Co. v. Butler Mfg. Co.*, (W. D. Mo. 1912) 198 Fed. 857.

**Reproduction of photograph.**—A valid design patent does not necessarily result from photographing a manufactured article and filing a reproduction of such photograph properly certified in the patent office. *Rose Mfg. Co. v. E. A. Whitehouse Mfg. Co.*, (D. C. N. J. 1913) 201 Fed. 926.

## Vol. X, p. 250, sec. 1.

As to the effect of this amendment, see *Commercial Acetylene Co. v. Searchlight Gas Co.*, (N. D. Ill. 1912) 197 Fed. 908.

## 1912 Supp., p. 286. [Act of June 25, 1910.]

**Construction.**—"The situation prior to the passage of the act of 1910 was this: Where it was asserted that an officer of the government had infringed a patent right belonging to another—in other words, had taken his property for the benefit of the government—the power to sue the United States for redress did not obtain unless from the proof it was established that a contract to pay could be implied—that is to say, that no right of action existed against the United States for a mere act of wrongdoing by its

officers. Evidently inspired by the injustice of this rule as applied to rights of the character of those embraced by patents, because of the frequent possibility of their infringement by the acts of officers under circumstances which would not justify the implication of a contract, the intention of the statute to create a remedy for this condition is illustrated by the declaration in the title that the statute was enacted 'to provide additional protection for owners of patents.' To secure this end, in comprehensive terms

the statute provides that whenever an invention described in and covered by a patent of the United States 'shall hereafter be used by the United States without license of the owner thereof or lawful right to use the same, such owner may recover reasonable compensation for such use by suit in the Court of Claims.' That is to say, it adds to the right to sue the United States in the Court of Claims already conferred when contract relations exist the right to sue even although no element of contract is present. And to render the power thus conferred efficacious the statute endows any owner of a patent with the right to establish contradictorily with the United States the truth of his belief that his rights have been in whole or in part appropriated by an officer of the United States, and if he does so establish such appropriation that the United States shall be considered as having ratified the act of the officer and be treated as responsible pecuniarily for the consequences. These results of the statute are the obvious consequences of the power which it confers upon the patentee to seek redress in the Court of

Claims for any injury which he asserts may have been inflicted upon him by the unwarranted use of his patented invention and the nature and character of the defences which the statute prescribes may be made by the United States to such an action when brought. The adoption by the United States of the wrongful act of an officer is of course an adoption of the act when and as committed, and causes such act of the officer to be, in virtue of the statute, a rightful appropriation by the government, for which compensation is provided. In substance, therefore, in this case, in view of the public nature of the subjects with which the patents in question are concerned and the undoubted authority of the United States as to such subjects to exert the power of eminent domain, the statute, looking at the substance of things, provides for the appropriation of a license to use the inventions, the appropriation thus made being sanctioned by the means of compensation for which the statute provides." *Crozier v. Fried. Krupp Aktiengesellschaft*, (1912) 224 U. S. 290, 32 S. Ct. 488, 56 U. S. (L. ed.) 771.

## PENAL LAWS.

### 1909 Supp., p. 408, sec. 14.

**Arrest and imprisonment.**—In *Ex p. Orozco*, (W. D. Tex. 1912) 201 Fed. 106, the court, having under consideration the power of the President to arrest a person without a warrant, said: "It is said by the respondent that this power of summary arrest and detention is derived from the provisions of section 14 of the Penal Code. This section, forming part of the chapter on the subject of 'offenses against neutrality,' so far as it affects the present inquiry, makes it lawful for the 'President or such other person as he shall have empowered for that purpose, to employ the land and naval forces' for two purposes, to wit: (1) For the purpose of taking possession of and detaining vessels, etc.; and (2) for the purpose of preventing the carrying on of any military expedition or enterprise from the territory or jurisdiction of the United States against the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States are at peace. In analyzing the section, it will be observed that in reference to vessels express power is conferred to seize and detain; but no power is conferred, in terms, authorizing the arrest and imprisonment of persons. The President may employ the army in preventing the carrying on of a military expedition from our own territory against the Republic of Mexico, and his discretion in calling out the

military forces for that purpose is not subject to the review and control of the courts. And it may be further said, in the language of the Supreme Court, that: 'Whenever a statute gives a discretionary power to any person to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the only and exclusive judge of the existence of such facts.' *Martin v. Mott*, 12 Wheat. 31, 32, 6 L. ed. 537; *Luther v. Borden*, 7 How. 45, 12 L. ed. 581. This principle is especially true when applied to the acts of the chief magistrate of the nation, and, when he 'exercises an authority confided to him by law, the presumption is that it is exercised in pursuance of law.' These principles are freely conceded. But in using the army to prevent the carrying on of a military expedition against Mexico may he go further, and arrest without warrant and imprison without the benefit of a trial persons who are suspected of organizing such expeditions? It is manifest that no such extraordinary authority is expressly conferred by the statute; and in *Gelston v. Hoyt*, 3 Wheat. 332, 4 L. ed. 381, a case involving the powers of the President, it was said by Mr. Justice Story that: 'It is certainly against the general theory of our institutions to create great discretionary powers by implication.'

## 1909 Supp., p. 410, sec. 19.

**Construction.**—The statute is highly penal. The punishments prescribed by it are much more severe than many of those which were prescribed for other election offenses. In such a statute doubtful words are not to be extended beyond their natural meaning in the connection in which they are used. Still it remains true that even such a statute, though it should be construed strictly,

must not be so construed as to defeat the legislative will. *United States v. Stone*, (D. C. Md. 1911) 188 Fed. 836.

**"Injure."**—Unlawfully to deprive a citizen of the United States of his right to vote at a congressional election is to injure him in any ordinary use of the word "injure." *United States v. Stone*, (D. C. Md. 1911) 188 Fed. 836.

## 1909 Supp., p. 413, sec. 29.

**Construction of third clause.**—In the case of *United States v. Davis*, (1913) 231 U. S. 183, 34 S. Ct. 112, Mr. Chief Justice White, construing the third clause of this section, said: "Coming to the text of the third paragraph, we think it is at once apparent that its provisions are so comprehensive as to prevent us from holding that they include only documents which are forged or counterfeited and hence exclude all other documents, however fraudulent they may be. The all-embracing words 'any deed, power of attorney, order, certificate, receipt, or other writing, in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited' leave room for no other conclusion. The context of the section reinforces this view, since the contrast between the narrow scope of the first two paragraphs and the enlarged grasp of the third shows the legislative intent, after fully providing in the first two paragraphs for forged and counterfeited documents, instruments, etc., to reach by the provisions of the third paragraph, any and all fraudulent documents, whether forged or not forged, and thus efficiently to deter from committing

the wrong which it was the purpose of the section to prohibit. It is not, however, necessary to fix the true meaning of the provision by a resort as an original question to its text, since its significance has been authoritatively determined contrary to the construction adopted by the court below. The section represents the first section of the act of March 3, 1823, c. 38, 3 Stat. 771, the title of which, 'An act for the punishment of frauds committed on the Government of the United States,' manifests the purpose which Congress had in mind in enacting it. As long ago as 1850, in *United States v. Staats*, (1850) 8 How. 41, the court was called upon to determine whether an indictment charging the transmission of a false (but not forged) affidavit touching a claim for pension was sustainable under the third clause of the section. The court fully analyzed the statute and while conceding that other clauses of the act dealt with forged instruments in a technical sense, concluded that the case was within both the letter and the spirit of the act and therefore that the acts charged in the indictment constituted an offense within the provisions of the law."

## 1909 Supp., p. 414, sec. 32.

This section defines two different offenses. —The first, in the order stated, falsely impersonating an officer or employé of the United States, and acting as such with the intent to defraud either the United States or some person; the second, falsely impersonating an officer or employé of the United States, and in the pretended or assumed character demanding or obtaining either from the United States or from some person any money or valuable thing with intent to defraud. The intent to defraud is an essential element of both crimes. *United States v. Rush*, (E. D. Wash. 1912) 196 Fed. 579, wherein the court said: "The first count of the indictment charges that the defendant did 'unlawfully, feloniously, and with intent to defraud divers persons, among others J. J. Tilton, falsely assume and pretend that he was an employé acting under the authority of the United States, and did then and there take upon himself to act as such employé, and in this, to wit: That he then and there falsely assumed and pretended to said

J. J. Tilton that he was an employé of and authorized by the United States to sell a certain set of books named "Messages and Papers of the Presidents." The second count charges that the defendant did 'unlawfully, feloniously, and with intent to defraud divers persons, among others J. J. Tilton, falsely assume and pretend that he was an employé acting under the authority of the United States for the purpose of selling a certain set of books named "Messages and Papers of the Presidents," and did then and there take upon himself to act as such employé and did in such assumed and pretended character of an employé of the United States as aforesaid, knowingly, willfully, and feloniously obtain from said J. J. Tilton a large sum of money, to wit, the sum of ten dollars.' A demurrer has been interposed to the indictment on the ground, among others, that it does not charge facts sufficient to constitute an offense against the laws of the United States, and the parties have stipulated certain facts which it is agreed shall



be considered by the court in ruling upon the indictment and as a part of the indictment. From the indictment and the stipulated facts it appears that the defendant is an agent of the Army and Navy Magazine of Washington, D. C., for the purpose of soliciting and obtaining subscriptions for a work or compilation known as 'Messages and Papers of the Presidents,' which was first published by authority of Act Cong. June 4, 1897, c. 2, 30 Stat. 61. The \$10 charged to have been obtained by the defendant in the second count was a part of the purchase price of the books in question, and the representations made by the defendant, if any, were so made in the sale of the books and for the purpose of effecting a sale, and not otherwise. The two counts of the indictment are predicated upon the same facts and grow out of the same transaction, and, unless the purchaser of the books was defrauded under the second count, it will not be claimed that there was an intent to defraud under the first count. The case then resolves itself into this simple proposition: Is a prosecutor defrauded when he gets out of a transaction just what he bargained for, simply because his vendor misrepresented the char-

acter or capacity in which he acted in making the sale? On both principle and authority I must hold that he is not." *Morgan v. State*, (1883) 42 Ark. 131, 48 Am. Rep. 55; *State v. Asher*, (1887) 50 Ark. 427, 8 S. W. 179; *People v. Wakely*, (1886) 62 Mich. 297, 28 N. W. 871; *State v. Matthews*, (1890) 44 Kan. 596, 25 Pac. 36, 10 L.R.A. 308.

"In the latter case the court said: 'The charge of committing the offense of obtaining money or property under false pretenses cannot be maintained in any case unless it appears not only that a false pretense was in fact made, but also that it was made with the intention of cheating or defrauding some person, and that such person was in fact cheated or defrauded to his or her injury. These are elementary principles and really require no citation of authorities.' A similar view was taken by Judge Holt in the United States Circuit Court for the Southern District of New York in *United States v. King*, no opinion filed, decided December 5, 1911. However reprehensible the conduct of the defendant may have been, such conduct does not fall within the purview of this statute."

## 1909 Supp., p. 415, sec. 37.

A conviction was sustained under this section and section 215 in *Franklin v. United States*, (C. C. A. 3d Cir. 1912) 193 Fed. 334.

## 1909 Supp., p. 416, sec. 39.

**Indictment.**—An indictment under this section for bribing an officer of the United States with intent to influence his official action must show that the matters about which it was attempted to influence him

were matters in which it was his duty to act. *United States v. Birdsall*, (N. D. Ia. 1912) 195 Fed. 980, (N. D. Ia. 1913) 206 Fed. 818.

## 1909 Supp., p. 418, sec. 48.

**Jurisdiction of federal court.**—In order to give the District Court jurisdiction under this section of the offense of receiving stolen postage stamps the indictment must allege that the stamps were stolen from the United States. *Naftzger v. United States*, (C. C. A. 8th Cir. 1912) 200 Fed. 494.

**Sufficiency of indictment.**—An indictment for receiving postage stamps stolen from the United States should allege the number and denomination of the stamps and the names of the post-offices from which the stamps

were stolen. *Naftzger v. United States*, (C. C. A. 8th Cir. 1912) 200 Fed. 494.

**Variance.**—Where an indictment for receiving stolen stamps alleges that they were stolen from post-offices in a certain state, the government must prove that they were in fact stolen from post-offices in such state, and it will not suffice to prove that they were stolen elsewhere from the government. *Naftzger v. United States*, (C. C. A. 8th Cir. 1914) 200 Fed. 494.

## 1909 Supp., p. 426, sec. 80.

The testimony must be material to make a witness, swearing falsely, liable to punishment under this section. *United States v. Bressi*, (W. D. Wash. 1913) 208 Fed. 369.

## 1909 Supp., p. 426, sec. 82.

**Insufficient information.**—In *United States v. Domingos*, (N. D. Fla. 1911) 193 Fed.

263, an information was held insufficient on demurrer which charged substantially that

the defendant did unlawfully, with intent that the person William Mitchell should perform service and labor on board of a vessel engaged in trade and commerce with foreign nations, to wit, on board the Uruguayan steamship *Oriental*, and while said William Mitchell was in an intoxicated condition, procure and induce said Mitchell to go on board said steamship *Oriental* with intent that said Mitchell should perform labor and service thereon as a seaman. The court said: "The defendant interposes a demurrer to the information on the ground that it does not allege that said Mitchell was procured or induced by force or threats, or by representations which defendant knew or believed to be untrue. However reprehensible may be the practice of inveigling drunken seamen aboard ship for the purpose of signing them in contracts which they are incapable of comprehending, and whatever may have been the intention of Congress by this legislation to protect the unwary seamen from falling hapless victims to the in-

genious snares of hospitable *runners*, if the legislative purpose was to prohibit the mere inducing of drunken seamen aboard ship for the purpose of shipping them in the service of the vessel, the statute falls lamentably short of the mark. From an inspection of section 82 in question, it will be seen that the offense denounced by express terms of the statute is the taking of any person aboard while intoxicated, to labor, who had been previously procured or induced to such service by force or threats, or by representations known to be false. The essential element of the offense is taking aboard any person to the service of the vessel who had been procured or induced by force or threats or by false representations to enter such service, and, unless it is charged substantially that the person taken aboard in an intoxicated condition was 'so procured or induced,' it would fail to describe the offense denounced by the statute. The information is bad therefore for omitting to charge the essential elements of the offense."

### 1909 Supp., p. 435, sec. 117.

**Construction of statutes.**—The offense denounced by this section is highly penal and must be construed with reasonable strictness at least; and unless the act charged to have been done by the defendant is a violation of some act of Congress, which declares such act to be an offense, or of some departmental rule or regulation authorized by Congress, the violation of which is declared by Congress to be an offense, no crime is committed. *United States v. VanWert*, (N. D. Ia. 1912) 195 Fed. 974.

It has been held that an indictment for bribery cannot be maintained under this section, against an officer of the Interior Department for receiving money for recommending to his superiors in the department that they approve of an application for executive or judicial clemency, to a person charged with selling intoxicating liquor to Indians, where there is no act of Congress conferring on the Interior Department or the Bureau of Indian Affairs any duty whatever in recommending clemency in such cases, although there may be some departmental rule or custom of that nature: as an offense or crime against the United States can only be declared by the legislation of Congress. *United States v. VanWert*, (N. D. Ia. 1912) 195 Fed. 974; *United States v. Birdsall*, (N. D. Ia. 1913) 195 Fed. 980, (N. D. Ia. 1913) 206 Fed. 818.

**Officer of the United States.**—A special officer, appointed by the Commissioner of Indian Affairs, for the suppression of the liquor traffic among the Indians, is not an officer of the United States within the meaning of this section, for such an officer is one who is either appointed by the President by and with the advice and consent of the Senate, or by the President alone, the courts of law, or the head of some executive department of

the government. *United States v. VanWert*, (N. D. Ia. 1912) 195 Fed. 974.

**Sufficiency of indictment.**—In *Daniels v. United States*, (C. C. A. 6th Cir. 1912) 196 Fed. 459, the indictment recited the defendant's testimony, that he was indebted to one H. in the amount named, that he paid H. that sum of money, and that such payment was a liquidation of such indebtedness, and then continued, "All of which statement the said Daniels did not believe to be true." It was objected that the indictment insufficiently alleged the nonbelief. The court replied to the objection as follows: "The perjury provision of the Penal Code makes it essential to the offense of the respondent that the false oath should be concerning 'matter which he does not believe to be true.' The indictment must therefore sufficiently allege such non-belief. The point made against this indictment is that it charged the giving of testimony upon three matters—the debt, the payment and its application—and by saying 'all of which statement the said Daniels did not believe to be true;' it was not charged that he did not believe any of it to be true, or that he believed each of the three statements to be untrue. It is urged that the language of the indictment is consistent with Daniels' full belief in the truth of one or two out of the recited statements and is, therefore, insufficient; and we are cited to grammatical authority to the effect that 'all' used in a negative sentence, is often ambiguous and is not equivalent to 'each of,' and to many decisions concerning the strictness and accuracy required in indictments for perjury. This criticism upon the indictment is, as a matter of nicety, well taken; but we believe it to be overnice. In such ambiguity as exists, we fail to find any failure to state facts constituting a crime or any tendency to mislead the respondent or any

danger that he will be exposed to a second prosecution on account of any of the subject-matter—and these are the tests which will

in most cases determine the sufficiency of the description of the offense as found in an indictment."

### 1909 Supp., p. 440, sec. 135.

A witness called before the grand jury is a witness in a "court of the United States," within the meaning of this section. *Davey v. United States*, (C. C. A. 7th Cir. 1913) 208 Fed. 237.

### 1909 Supp., p. 441, sec. 138.

A prisoner may be convicted of conspiracy where he conspires with guards to assist him in escaping. *Ex parte Lyman*, (W. D. Wash. 1913) 202 Fed. 303, wherein the court said: "This matter is before the court upon the demurrer to the petition for a writ of habeas corpus. The petitioner is imprisoned in the United States penitentiary at McNeil Island, upon conviction by the District Court for the Northern District of California, of conspiracy, under section 37 of the Penal Code. The indictment, upon which he was convicted, charges that, while the petitioner was held by the United States marshal for the northern district of California, under a commitment issued by a United States commissioner, charging him with the violation of section 215 of the Criminal Code, and while he was in the custody of a certain guard, appointed by said marshal, he conspired with said guard and another to aid, assist, and permit the petitioner to escape from such custody. Among the overt acts charged, it is alleged that the guard assisted petitioner to get into an automobile, secured for the purpose, and permitted him to leave his custody and escape.

"It is contended by petitioner that there is no federal statute punishing a prisoner for escaping, and that, as the petitioner was the escaping prisoner, he was incapable of conspiring with the officer to permit his escape. The cases cited do not support the contention. Cases of bribery, dueling, adultery, and bigamy are not analogous. The reasoning that supports certain of those decisions does not apply to the case now before the court. The participants in a crime that in its execution requires two actors, as dueling, before it can be a crime, it may be plausible to consider, so far as conspiracy is concerned, the same as one person in ordinary crime, and that there can be no conspiracy in such case with less than three, and that, if a punishment was provided for the consummated offense, less severe in its nature than that provided for conspiracy, that a legislative intent was thereby shown to ex-

clude the same from the scope of conspiracy. To voluntarily permit a prisoner to escape does not, necessarily, require a common purpose between the officer and the prisoner. For example: The prisoner escapes through what he deems the 'neglect' of the guard, when, in fact, the officer has been induced by a third person to suffer or permit the escape. In such case, the officer and the third person would be conspirators, and the prisoner not. That a prisoner might conspire with the jail guard for the escape of all of his fellow prisoners, but that, the moment the prisoner himself becomes a benefiting party to the scheme, the conspiracy is destroyed, seems a lame conclusion. *Ash v. State*, 81 Ala. 76, 1 South. 558, cited, was a case in which the statute before the court condemned one for 'aiding the escape of another,' wherein it was held that the prisoner who was aided to escape was not an accomplice. He could not have been prosecuted as a principal or accessory, because he had not aided 'another,' but himself. The statute now before the court condemns the officer who voluntarily suffers 'any prisoner' in his custody, under process, to escape. The words 'any prisoner' are of sufficient scope to include the petitioner, though the word 'another' excludes from its meaning one's self. The prisoner is not condemned for regaining his liberty, but for conspiring with, and thereby causing, the guard to be false to his duty, in voluntarily suffering him to escape. In any event, the judgment of conviction would not be questioned by this court on habeas corpus. The prisoner was convicted of conspiracy, an offense of which the lower court had undoubted jurisdiction. The offense against the United States, defined by section 138, *supra*, is clearly one that persons may conspire to commit. If petitioner could not be held as a party to such a conspiracy, that question is one that could only be corrected on a writ of error, sued out regularly to review the judgment of conviction."

### 1909 Supp., p. 462, sec. 210.

Plea of former conviction.—Defendant having pleaded guilty to the offense of issuing a single money order under this section cannot be put on trial again under the same section for issuing six other orders, where

they were issued at the same time, to the same person, and by a single act. *United States v. Komie*, (N. D. Ill. 1912) 194 Fed. 567.

## 1909 Supp., p. 462, sec. 211.

**Elements of offense.**—To constitute an offense under this section it is not necessary to show that the prohibited matter was actually delivered to the addressee. It is the deposit for mailing that constitutes the offense and when that is done the offense is complete. *Ackley v. United States*, (C. C. A. 8th Cir. 1912) 200 Fed. 217.

**Articles capable of legitimate use.**—The fact that the article about which a letter or circular is sent must be of legitimate use, and in fact may not prevent conception, is not important if the letter or circular is calculated to lead another to use it to prevent conception. *Ackley v. United States*, (C. C. A. 8th Cir. 1912) 200 Fed. 217.

A letter may be innocent and harmless on its face, yet if it in fact gives information to the one receiving it as to matter prohibited by this section, it subjects the sender to criminal liability. *United States v. Breinholm*, (E. D. Wash. 1913) 208 Fed. 492.

**Decoy letters.**—The fact that the information forbidden to be sent by this section is sent in answer to a decoy letter by a post office inspector does not make the inspector an accessory to the crime so that his testimony must be considered as that of an accessory. *Ackley v. United States*, (C. C. A. 8th Cir. 1912) 200 Fed. 217.

**Indictment.**—As to the sufficiency of an indictment under this section, see *Ackley v. United States*, (C. C. A. 8th Cir. 1912) 200 Fed. 217.

**Preliminary determination of character of publication.**—The authority of the court to pass preliminarily upon the meaning and effect of language used in writings under indictments for violation of this section, where the objectionable matter is not copied in the indictment, may be said not to be entirely free from embarrassment, since a demurrer cannot be interposed for the purpose because the alleged obscene matter is not a part of the record. But this difficulty does not arise upon the motion to quash and the filing of the bill of particulars thereunder. A mo-

tion to quash is much broader and less technical, and is addressed to the sound discretion of the court; and in considering the same, with a view of reaching a just conclusion, matters dehors the record or not strictly a part of the record may be considered. Every reason would seem to indicate that relief should be afforded preliminarily as well as at the trial, in a proper case, since the accused is clearly entitled to make his defense by preliminary motion as well as by plea of not guilty and motion in arrest of judgment, and there would seem to be no good reason why the expense and delay of a trial should be incurred if in the end the court would hold there was no case because of the insufficiency of the writing or publication as coming within the statute. The practice is preliminarily to determine the legal sufficiency of the writing or publication as coming within the statute, where the question is timely and appropriately raised. *United States v. Journal Co.*, (E. D. Va. 1912) 197 Fed. 415.

**Question for jury.**—The question of the character of the contents of the paper—namely, whether it comes within the inhibited class named in this section—is one ordinarily to be determined by the jury under appropriate instructions from the court—that is, when there is such doubt as to the meaning and effect of the same, that persons would reasonably differ in respect thereto. *United States v. Journal Co.*, (E. D. Va. 1912) 197 Fed. 415.

**Questions for court.**—If the publication complained of is such that it could not by any reasonable judgment be held to come within the prohibition of the law, then it becomes the duty of the court as matter of law to pass upon the same. *United States v. Journal Co.*, (E. D. Va. 1912) 197 Fed. 415.

For other annotations dealing with questions covered by this section, see under vol. 5, p. 839, sec. 3893.

## 1909 Supp., p. 463, sec. 212.

**Outside cover or wrapper.**—The provision of this section prohibiting the mailing of matter, otherwise mailable by law, upon the "envelope or outside cover or wrapper of which, or any postal card upon which," certain scurrilous and defamatory matter appears, does not apply to a newspaper upon

the outside of which is printed defamatory matter, where the paper is so folded as to bring the matter to view but is mailed without any wrapper or covering, the address being written upon the paper itself. *United States v. Higgins*, (W. D. Ky. 1912) 194 Fed. 539.

## 1909 Supp., p. 463, sec. 213.

**Obtaining loans by chance.**—Where a scheme was operated by which investors in a certain concern were to obtain loans on very attractive terms, the opportunity for obtaining a loan, which was the main feature of the scheme, being determined to a

large extent by the way in which the applications for loans were received at the office of the company; that is to say, if a number of applications for loans were received at the same time, by the same mail, they were put on the records of the company as they were

opened and numbered, it being a mere matter of chance as to which the officer or clerk engaged in the work should take up first as he opened and entered them, it was held that the scheme was a lottery. *United States v. Purvis*, (N. D. Ga. 1912) 195 Fed. 618.

**Indictment.**—In an indictment under this section which alleges that the defendant did then and there unlawfully and knowingly deposit and cause to be deposited in the post office, etc., the word, “knowingly” not only qualifies the verb “deposit” but the succeeding language of the indictment setting out the character of the contents of the inclosure. *United States v. Purvis*, (N. D. Ga. 1912) 195 Fed. 618.

An indictment under this section which charges that the defendants “deposited or caused to be deposited in the post office” the letter set out in the indictment, is not bad for duplicity. *United States v. Purvis*, (N. D. Ga. 1912) 195 Fed. 618.

In *United States v. Ridgeway*, (W. D. Wash. 1912) 199 Fed. 286, the indictment was for using the post office in furtherance of a lottery, and an objection was made to it that there was not a sufficient allegation that the defendants knew that the letter deposited was concerning a “scheme” offering prizes. To this the court said: “A demurrer was, by this court, sustained to a former indictment against these parties which charged that the defendants ‘did then and there willfully, knowingly, unlawfully, and feloniously deposit and cause to be deposited in the post office of the United States of America a certain sealed envelope, . . . and contained within said envelope was a letter’; the court holding that this was not a sufficient allegation that the letter was knowingly mailed. The charge in the present indictment is that the defendants ‘did then and there willfully, knowingly, unlawfully, and feloniously deposit . . . a certain letter and circular concerning a certain scheme.’ This is a sufficient charge that the defendants knew that the letter deposited by them concerned

the scheme, and, as it is charged that the defendants devised this scheme, it cannot but be presumed that they knew its nature. It is further objected that the indictment falls short of charging the necessary scienter in another particular. That portion of the statute involved in this case—section 213 of the Criminal Code of 1910—condemns the sending of a letter concerning ‘a lottery . . . or similar scheme offering prizes, dependent in whole or in part upon lot or chance.’ Section 3894 reads: ‘Other similar enterprise offering prizes, dependent upon lot or chance.’ The objection is that the language does not cover the statute; that ‘a scheme dependent upon lot or chance’ is not ‘a scheme offering prizes dependent upon lot or chance.’ If the language quoted is unaided by any other language in the indictments, the objection is good, and the indictments are defective; but the first count closes as follows: ‘and which said certain scheme hereinbefore referred to was as follows: . . .’ Then proceeds to describe the scheme as above set out. The counts other than the first conclude: ‘And which said scheme was the scheme hereinbefore described in the first count of this indictment, commencing with the words: . . .’ With this express reference to the ‘scheme’ mentioned in the last part of each count, it will be sufficient to cure the loose language used in the beginning of the count, provided the scheme described in closing the count is one ‘offering prizes dependent in whole or in part upon lot or chance.’”

Section 3894 of Revised Statutes superseded.—This section supersedes R. S. sec. 3894 (5 Fed. Stat. Annot. 846). They treat of the same offenses, to wit, using the mails in furtherance of a lottery or similar scheme. This section 213 is somewhat more comprehensive than section 3894. The offenses described are not only of the same class, but they cover the same ground. *United States v. Ridgeway*, (W. D. Wash. 1912) 199 Fed. 286.

## 1909 Supp., p. 464, sec. 215.

**“Scheme to defraud.”**—The statutory “scheme to defraud” may be found in any plan to get the money or property of others by deceiving them as to the substantial identity of the thing which they are to receive in exchange, and this deception may, of course, be by implication as well as by express words. On the other hand, the “scheme” cannot be found in any mere expression of honest opinion as to quality or as to future performance. There must be the underlying intent to defraud. *Harrison v. United States*, (C. C. A. 6th Cir. 1912) 200 Fed. 662.

The mailing of a catalogue accurately descriptive of marked cards and loaded dice is not the execution or attempted execution of a scheme or artifice to defraud. *Stockton v. United States*, (C. C. A. 7th Cir. 1913) 205 Fed. 462, 46 L.R.A.(N.S.) 936.

Each of the words “devise,” “scheme,” and “artifice” embodies elements found in the other two. As understood in the law of crimes or torts, to “devise” conveys the idea of being devious, contriving, disingenuous; a “scheme,” machination, intrigue, or plan whose appearance differs from the reality; an “artifice,” a trick, false pretense or token. *Stockton v. United States*, (C. C. A. 7th Cir. 1913) 205 Fed. 462, 46 L.R.A.(N.S.) 936.

**“Puffing goods.”**—The mere exaggeration of the merits of goods offered for sale, if within reasonable bounds, is not within the prohibition of this statute as a scheme to defraud. *Harrison v. United States*, (C. C. A. 6th Cir. 1912) 200 Fed. 662.

**Belief in truth of statements as defense.**—In an action for using the mails to defraud by means of false and fraudulent statements in advertising matter regarding an article

offered for sale, a belief in the truth of the statements made is a good defense, however inaccurate the statements may turn out to be. *Harrison v. United States*, (C. C. A. 6th Cir. 1912) 200 Fed. 662.

**Opinion of Attorney-General as evidence.**—In a prosecution for using the mails to defraud by means of false and fraudulent statements regarding articles offered for sale, a letter from the Assistant Attorney General for the Post Office Department, written to the defendant in connection with a prior inquiry, which letter showed that such official had decided that the defendant's way of doing business was fraudulent, unless saved by an offer to refund, conditioned only on dissatisfaction, was held not to be admissible in evidence. *Harrison v. United States*, (C. C. A. 6th Cir. 1912) 200 Fed. 662.

**Effect of agreement to refund.**—Although statements made in advertising circulars regarding an article offered for sale are misleading and might of themselves show an intent to defraud, yet if there is also an absolute promise made in good faith to refund all moneys paid, a violation of this section is not shown. The question whether the promise to refund is made in good faith is for the jury. *Harrison v. United States*, (C. C. A. 6th Cir. 1912) 200 Fed. 662.

**Variance between indictment and proof.**—There is no variance between an indictment under this section and the proof, where the indictment charges that the scheme as framed was to defraud certain persons named, and others, some of whose names were unknown, and some of whose names were known but were too voluminous to set out, and the proof, fairly construed, tends to show that if there was intent to defraud any one it was originally a gen-

eral intent to defraud that portion of the public who might answer the advertising or be otherwise reached, and that this intent afterwards, from time to time, localized and attached itself to the individuals named who did answer the advertising. *Harrison v. United States*, (C. C. A. 6th Cir. 1912) 200 Fed. 662.

This section is broader than R. S. sec. 5480 (5 Fed. Stat. Annot. 973), which it supersedes, in that it is only necessary that the scheme to defraud should be devised, or intended to be devised, and a letter placed in the post office "for the purpose of executing such scheme or artifice or attempting so to do." The essential difference between the two statutes is that under the former the scheme or artifice must have contemplated the use of the post office establishment of the United States, and in the latter the scheme or artifice is devised, or intended to be devised, and subsequently the letter placed in the post office for the purpose of executing the scheme: that is, under the first it is necessary that it should be contemplated as a part of the scheme or artifice that the post office establishment should be used, and under the second and present law it is only necessary that the person devise a scheme to defraud, and afterwards place, or cause to be placed, a letter, etc., in the post office for the purpose of executing the same. *Ex parte King*, (N. D. Ga. 1912) 200 Fed. 622; *United States v. Goldman*, (N. D. Ohio 1913) 207 Fed. 1002.

A conviction was sustained under this section and section 37 (1909 Supp. Fed. Stat. Annot. 415), in *Franklin v. United States*, (C. C. A. 3d Cir. 1912) 193 Fed. 334.

This section is cited in *Wilson v. United States*, (C. C. A. 2d Cir. 1911) 190 Fed. 427.

## 1909 Supp., p. 465, sec. 217.

**Constitutionality.**—In *Bruce v. United States*, (C. C. A. 8th Cir. 1912) 202 Fed. 98, the court said: "We are not called upon to decide as to the constitutionality of that part of section 217 of the Criminal Code which authorizes the Postmaster General to permit the transmission through the mails of poisons and articles and compositions con-

taining poison not outwardly or of their own force dangerous or injurious to life, health, or property, as being a delegation of legislative power, for, conceding the provision to be valid, it limits the power to make rules and regulations to the matter of preparation and packing, and no rule or regulation of such a character is alleged to have been violated."

## 1909 Supp., p. 466, sec. 218.

**Conviction of violation of section 210 as a defense.**—A defendant convicted under section 210 of this act for issuing a money order without receiving money therefor may not plead his conviction as a defense to a prosecution under this section for fraudu-

lently issuing money orders without receiving money therefor, as the offense is against a different statute, covering different elements, and requiring additional proof. *United States v. Komie*, (N. D. Ill. 1912) 194 Fed. 567.

## 1909 Supp., p. 468, sec. 225.

For a sufficient indictment charging postmaster with embezzlement, see *Corbin v.*

*United States*, (C. C. A. 8th Cir. 1913) 205 Fed. 278.

## 1909 Supp., p. 471, sec. 233.

**Effect on state laws.**—Congress having passed this law it clearly governs all common carriers who come within its provisions, and takes the place of all local laws and ordinances on the subject. If it did not, a railway company transporting dynamite over a long

railroad system, passing in the trip through various villages, cities, and states, would be subject at every stage of the journey to varying local regulations which probably it could not observe. *The Ingrid*, (S. D. N. Y. 1912) 195 Fed. 596.

## 1909 Supp., p. 473, sec. 239.

**Banks collecting draft.**—This section does not apply to a bank which collects a sight draft attached to a bill of lading for a shipment of liquor. *First Nat. Bank of Ana-*

*moose v. United States*, (C. C. A. 8th Cir. 1913) 206 Fed. 374, 46 L.R.A.(N.S.) 1139, *reversing* (D. C. N. D. 1911) 190 Fed. 336.

## 1909 Supp., p. 481, sec. 272.

**Not applicable to District of Columbia.**—This chapter and necessarily this section which is a part of it, are not applicable to

the District of Columbia. *Johnson v. United States*, (1912) 225 U. S. 406, 32 S. Ct. 748, 56 U. S. (L. ed.) 1142.

## 1909 Supp., p. 493, sec. 323.

**District of Columbia.**—This chapter is not applicable to the District of Columbia. *Johnson v. United States*, (1912) 225 U. S. 406, 32 S. Ct. 748, 56 U. S. (L. ed.) 1142.

**Most of the sections of this chapter are continuations of the sections of the Revised Statutes or of former acts of Congress.** *Johnson v. United States*, (1912) 225 U. S. 405, 32 S. Ct. 748, 56 U. S. (L. ed.) 1142.

## 1909 Supp., p. 494, sec. 328.

**Who is an "Indian."**—In *United States v. Gardner*, (E. D. Wis. 1911) 189 Fed. 690, which was a case brought under this section, the court said: "The first contention of the defendant is that he is not an Indian within the meaning of the statute; that his father was a white man, and that his mother was a part blood Indian who was never enrolled in the tribe. There is no virtue in this contention. The defendant is a mixed blood Indian who for many years has been enrolled as a member of the Stockbridge and Munsee tribe in Wisconsin, and recognized as such by the tribe and by the government.

As such Indian, so enrolled, he became an allottee. For many years he had lived within the limits of the reservation which was under the care of an Indian agent and policed by the Indian police. The situation as to blood and enrollment was almost identical in *State v. Campbell*, (1893) 53 Minn. 354, 55 N. W. 553, 21 L.R.A. 169, and it was held that Belonge was an Indian within the meaning of the 'crimes act,' so called. Under these circumstances, the defendant cannot be heard to say that he is not an Indian within the meaning of the statute."

## 1909 Supp., p. 494, sec. 329.

**After extinguishment of Indian title.**—The provisions of this section do not apply to the territory of any reservation within the district of South Dakota after the extinguish-

ment of the Indian title to such reservation. *United States v. LaPlant*, (S. D. S. D. 1911) 200 Fed. 92.

## 1909 Supp., p. 495, sec. 332.

**In general.**—This section is partly taken from R. S. secs. 5323 and 5427 (Fed. Stat. Annot., vol. 2, p. 361; vol. 5, p. 213), but is enlarged and made of general application. In it there is no distinction made between misdemeanors and felonies, and it is applicable alike to both classes of offenses. The doctrine at common law was that as to misdemeanors all persons who aid-

ed and abetted, or who commanded, advised, or encouraged another to commit an offense, were principals, and could be indicted, tried and convicted as such, but this doctrine did not apply to felonies. The effect of this section is to abolish the distinction between principals and accessories in offenses defined in the laws of the United States, whether the same be felonies or misdemeanors. Prior to

the enactment of this section, similar statutes had been adopted in many of the states, and the section under consideration is a recognition by Congress that the old distinction between principals and accessories which pertained to felonies is generally abrogated, and that a charge against one formerly known

as an accessory is good against him as principal. *Rooney v. United States*, (C. C. A. 9th Cir. 1913) 203 Fed. 928; *Davey v. United States*, (C. C. A. 7th Cir. 1913) 208 Fed. 237.

This section is cited in *Wood v. United States*, (C. C. A. 4th Cir. 1913) 204 Fed. 55.

## 1909 Supp., p. 495, sec. 335.

Applicability to internal revenue laws.—In *Wood v. United States*, (C. C. A. 4th Cir. 1913) 204 Fed. 55, it was held unnecessary

to decide whether this section was applicable to breaches of the internal revenue laws.

## PERJURY.

### Vol. V, p. 701, sec. 5392.

Unless the oath is authorized or required by law the statute is not applicable, and the fact that it is required by some administrative rule is immaterial, if no statute empowered the making of the rule. *United*

*States v. George*, (1913) 228 U. S. 14, 33 S. Ct. 412, 57 U. S. (L. ed.) 712.

This section is cited in *United States v. Nelson*, (D. C. Idaho, 1912) 199 Fed. 464.

### Vol. V, p. 705, sec. 5393.

Subornation of perjury in bankruptcy proceedings was covered by this section. *Epstein v. United States*, (C. C. A. 7th Cir. 1912) 196 Fed. 355, wherein the court said: "In the Bankruptcy Act no denunciation or punishment is found for one who suborns another to make 'knowingly and fraudulently a false oath or account in, or in relation to, any proceeding in bankruptcy.' Therefore, the argument runs, Congress in enacting section 29 of the Bankruptcy Act took out from the definition of perjury as given in the earlier section 5392 the making of a false oath in a bankruptcy proceeding; and since section 5393 covers only those who procure others to commit 'perjury' as defined in section 5392, and since subornation of false swearing in bankruptcy proceedings is nowhere specifically condemned, Congress intended that such subornation might be indulged in with impunity. In our judgment false swearing in bankruptcy proceedings is perjury, nothing more or less. Section 5392 (section 125 of the Penal Code) clearly covers that and every other way of committing the crime. Section 29 of the Bankruptcy Act

simply singles out that one form for a milder punishment. Two sections cover the offense, one generically, the other specifically. So the specific section has effect only in restricting punishment. Combined, the effect is exactly as if there were only one section denouncing and punishing perjury, as follows: Whoever, having taken an oath . . . shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than \$2,000 and imprisoned not more than five years: Provided, that if the perjury be committed in a bankruptcy proceeding the guilty person shall be punished by being imprisoned not more than two years. And upon this, which is the legal effect of the two sections, there would be no room for claiming that section 5393 (section 126 of the Penal Code) does not embrace subornation of every sort of perjury."

Sufficiency of indictment.—See *Hendricks v. United States*, (1912) 223 U. S. 178, 32 S. Ct. 313, 56 U. S. (L. ed.) 394.

## PHILIPPINE ISLANDS.

### Vol. V, p. 719, sec. 5.

"Right to be heard by himself and counsel."—In *Diaz v. United States*, (1912) 223

U. S. 442, 32 S. Ct. 250, 56 U. S. (L. ed.) 500, Ann. Cas. 1913C 1138, the court, con-



struing the provision in this section, securing to the accused in all criminal prosecutions "the right to be heard by himself and counsel," said: "An identical or similar provision is found in the constitutions of the several states, and its substantial equivalent is embodied in the Sixth Amendment to the Constitution of the United States. It is the right which these constitutional provisions secure to persons accused of crime in this country that was carried to the Philippines by the congressional enactment, and, therefore, according to a familiar rule, the prevailing course of decision here may and should be accepted as determinative of the nature and measure of the right there. . . . As the offense in this instance was a felony, we may put out of view the decisions dealing with this right in cases of misdemeanor. In cases of felony our courts, with substantial accord, have regarded it as extending to every stage of the trial, inclusive of the empaneling of the jury and the reception of the verdict, and as being scarcely less important to the accused than the right of trial itself. And with like accord they have regarded an accused who is in custody and one who is charged with a capital offense as incapable of waiving the right; the one because his presence or absence is not within his own control, and the other because, in ad-

dition to being usually in custody, he is deemed to suffer the constraint naturally incident to an apprehension of the awful penalty that would follow conviction. But where the offense is not capital and the accused is not in custody, the prevailing rule has been, that if, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present."

Deportation of aliens. — "Sovereign states have inherent power to deport aliens. Congress is not deprived of this power by the Constitution of the United States, and since this is so the Philippine Government cannot be prevented by the Philippine Bill of Rights alone." *Tiaco v. Forbes*, (1913) 228 U. S. 549, 33 S. Ct. 585, 57 U. S. (L. ed.) 953.

The provision against double jeopardy, in this section of the Philippine Civil Government Act is in terms restricted to instances where the second jeopardy is "for the same offense" as was the first. *Diaz v. United States*, (1912) 223 U. S. 442, 32 S. Ct. 250, 56 U. S. (L. ed.) 500, *Ann. Cas.* 1913C 1138.

## Vol. V, p. 722, sec. 9.

Liability for official acts. — Philippine Supreme Court judges, like other judges of the United States courts, cannot be held liable for their judicial acts in a civil action. *Alzua v. Johnson*, (1913) 231 U. S. 106, 34 S. Ct. 27, wherein the court said: "Whatever

may have been the Spanish law this is a principle so deep seated in our system that we should regard it as carried into the Philippines by implication as soon as we established courts in those islands."

## Vol. V, p. 722, sec. 10.

Value in controversy must exceed twenty-five thousand dollars. *Enriquez v. Enriquez*, (1911) 222 U. S. 123, 32 S. Ct. 62, 56 U. S.

(L. ed.) 122; *Enriquez v. Enriquez*, (1911) 222 U. S. 127, 32 S. Ct. 64, 56 U. S. (L. ed.) 124.

# PILOTAGE.

## Vol. V, p. 747, sec. 4235.

Concurrent authority of the states. — Immediately upon the adoption of the Constitution, Congress recognized the propriety of local action with respect to pilotage, in view of the local necessities of navigation. And even now, while it has full power over the subject, and to a certain extent has prescribed rules, it is still in a large measure subject to the regulations of the states. *Minnesota Rate Cases*, (1913) 230 U. S. 352,

403, 33 S. Ct. 729, 57 U. S. (L. ed.) 1511, 48 L.R.A.(N.S.) 1151

In *Anderson v. Pacific Coast Steamship Co.*, (1912) 225 U. S. 187, 32 S. Ct. 626, 56 U. S. (L. ed.) 1047, the court said: "When the Constitution of the United States was adopted, each state had its own regulations of pilotage. While this subject was embraced within the grant of the power 'to regulate commerce with foreign nations, and among

the several states' (Art. 1, § 8), Congress did not supersede the state legislation, but by the Act of August 7, 1789, c. 9, § 4 (1 Stat. 53, 54; R. S., § 4235), it was enacted that 'all pilots in the bays, inlets, rivers, harbors, and ports of the United States, shall continue to be regulated in conformity with the existing laws of the states respectively wherein such pilots may be, or with such laws as the states may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress.'

This was 'a clear and authoritative declaration by the first Congress, that the nature of this subject is such, that until Congress should find it necessary to exercise its power, it should be left to the legislation of the states,' and it has long been established by the decisions of this court that although state laws concerning pilotage are regulations of commerce they fall within that class of powers which may be exercised by the states until Congress shall see fit to act."

### Vol. V, p. 750, sec. 4444.

This section is a part of section 51 of the Act of February 28, 1871, 16 Stat. L. 440, c. 100. The other part of section 51 will be found in Rev. Stat. sec. 4401, 7 Fed. Stat. Annot. 162. *Anderson v. Pacific Coast Steamship Co.*, (1912) 225 U. S. 187, 32 S. Ct. 626, 56 U. S. (L. ed.) 1047.

State statutes regulating pilots are applicable to a registered steam vessel bound from one American port to another, but stopping en route at a foreign port. *Anderson v. Pacific Coast Steamship Co.*, (1912) 225 U. S. 187, 32 S. Ct. 626, 56 U. S. (L. ed.) 1047.

## PORTO RICO.

### Vol. V, p. 762, sec. 1.

In general. — This act, called the "Foraker Act," provided a civil government for Porto Rico, which prior thereto was under a provisional government. *Ochoa v. Hernandez y Morales*, (1913) 230 U. S. 139, 33 S. Ct. 1033, 57 U. S. (L. ed.) 1427.

Taxation of machinery and boats in harbor of San Juan. — In *Gromer v. Standard Dredging Co.*, (1912) 224 U. S. 362, 32 S. Ct. 499, 56 U. S. (L. ed.) 801, it was held that Porto Rico had power to tax certain machinery and boats which at the time of the levy of the taxes were in the harbor of San Juan, engaged in dredging work. The court said: "We have seen that by § 1 of the Foraker Act all of its provisions are made applicable to a certain defined area, and that the name Porto Rico 'shall be held to include not only

the island of that name, but all adjacent islands and waters of the islands.' The governmental powers conferred upon Porto Rico must be coextensive with that area, subject to the reservation that all laws passed shall not be in conflict with the laws of the United States, and the power of enacting such laws is conferred upon the legislative assembly. There is precaution against abuse. They must be reported to Congress, which has the power to annul them. The purpose of the act is to give local self-government, conferring an autonomy similar to that of the states and territories, reserving to the United States rights to the harbor areas and navigable waters for the purpose of exercising the usual national control and jurisdiction over commerce and navigation."

### Vol. V, p. 763, sec. 3.

Internal revenue tax. — This section provides that tariff duties shall cease, but the internal revenue tax upon Porto Rican articles remains as that imposed "upon the

like articles of domestic manufacture." *Jordan v. Roche*, (1913) 228 U. S. 436, 33 S. Ct. 573, 57 U. S. (L. ed.) 908.

### Vol. V, p. 765, sec. 7.

Suits against the government of Porto Rico. — The words "to sue and be sued," as used in this section, do not apply to the government of Porto Rico, which cannot be sued without its consent. *Porto Rico v. Rosal y Castillo*, (1913) 227 U. S. 270, 33

S. Ct. 352, 57 U. S. (L. ed.) 507, wherein the court said: "It is not open to controversy that aside from the existence of some exception the government which the Organic Act established in Porto Rico is of such nature as to come within the general

rule exempting a government sovereign in its attributes from being sued without its consent. In the first place, this is true because in a general sense so far as concerns the framework of the Porto Rican government and the legislative, judicial and executive authority with which it is endowed there is, if not a complete identity, at least in all essential matters, a strong likeness to the powers usually given to organized territories, and moreover a striking similarity to the Organic

Act of the Hawaiian Islands (Act of April 30, 1900, chap. 339, sections 6, 55, 31 Stat. 114, 142 and 150). But as the incorporated territories have always been held to possess an immunity from suit and as it has been moreover settled that the government created for Hawaii is of such a character as to give it immunity from suit without its consent, it follows that this is also the case as to Porto Rico."

### Vol. V, p. 765, sec. 8.

**Orders in excess of authority.**—This section was not intended to validate any order of a military governor in excess of the authority conferred upon him by the President.

*Ochoa v. Hernandez y Morales*, (1913) 230 U. S. 139, 33 S. Ct. 1033, 57 U. S. (L. ed.) 1427.

### Vol. V, p. 773, sec. 35.

This section has been superseded by § 244 of the Judicial Code of March 3, 1911, c. 231, 26 Stat. 1087, 1157, Fed. Stat. Annot. Supp. 1912, p. 233; *Ochoa v. Hernandez y Morales*, (1913) 230 U. S. 139, 33 S. Ct. 1033, 57 U. S. (L. ed.) 1427.

**Scope of review.**—The jurisdiction of the Supreme Court of the United States under this section is confined to determining whether the facts found by the Supreme Court of Porto Rico support its judgment, and whether there was material and prejudicial error in the admission or rejection of evidence, manifested by exception duly certified. *Rosaly v. Graham y Frazer*, (1913) 227 U. S. 584, 33 S. Ct. 333, 57 U. S. (L. ed.) 655.

In *Gonzales v. Buist*, (1912) 224 U. S. 126, 32 S. Ct. 463, 56 U. S. (L. ed.) 693, the court construing this section said: "By § 35 of the Porto Rican Act of April 12, 1900, 31 Stat. 85, writs of error and appeals from final decisions of the Supreme Court for the District of Porto Rico shall be allowed and may be taken to this court 'in the same manner and under the same regulations . . . as from the Supreme Courts of the territories of the United States.' Now, as held in *Young v. Amy* (1898) 171 U. S. 179, 183: 'It is settled that on error or appeal to the Supreme Court of a territory this court is without power to re-examine the facts and is confined to determining whether the court below erred in the conclusions of law deduced by it from the facts by it found, and to reviewing errors committed as to the admis-

sion or rejection of testimony when the action of the court in this regard has been duly excepted to, and the right to attack the same preserved on the record.' But whether the court adopts an agreed statement of facts or itself finds the facts, the agreed statement or findings must be of the ultimate facts, and if they be merely a recital of testimony or evidentiary facts, it brings nothing before this court for consideration."

**Amount in controversy.**—When jurisdiction of the United States Supreme Court to review the decisions of the Porto Rico courts below depends upon amount, five thousand dollars is the criterion. *Aran v. Zurrinach*, (1912) 222 U. S. 395, 32 S. Ct. 162, 56 U. S. (L. ed.) 246.

**Review when right under Act of Congress asserted and denied.**—It is settled that the provision of this section which gives a right to bring to the United States Supreme Court from the District Court of Porto Rico by writs of error or appeal all final decisions of such court in all cases where "an act of Congress is brought in question and the right claimed thereunder is denied" does not contemplate that the right to review thus conferred be confined solely to cases where the validity of an act of Congress is called in question or its interpretation is necessarily involved, but also gives power to review where a right under an act of Congress was asserted and denied in the court below. *Aran v. Zurrinach*, (1912) 222 U. S. 395, 32 S. Ct. 162, 56 U. S. (L. ed.) 246.

### Vol. V, p. 777, sec. 3.

**Diverse citizenship.**—The District Court of the United States for Porto Rico has no jurisdiction of a case on the ground of diverse citizenship where the complainant is a Porto Rican and, of the three defendants, one is a citizen of the United States, but the other two are Porto Ricans. *Cuebas y Arredondo v. Cuebas y Arredondo*, (1912) 223 U. S. 376, 32 S. Ct. 277, 56 U. S. (L. ed.) 481, wherein the court said: "It is not and cannot be claimed that the complainant's bill asserted any right, title or claim arising under the laws or Constitution of the United States. If, therefore, the District Court had jurisdiction, it must depend upon diversity of citizenship alone. It is claimed that the

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fact that one of the three defendants was a citizen of the United States conferred jurisdiction, although the other two were Porto Ricans, with a citizenship identical with that of the complainant. That this would not have been so under the Foraker Act of 1900 is conceded. That act gave to the District Court for Porto Rico the jurisdiction of the United States District Courts, and added to that the jurisdiction of cases cognizable in Circuit Courts of the United States. The contention is that this extraordinary stretch of jurisdiction is conferred by the third section of the Act of March 2, 1901, c. 812, 31 Stat. 953. . . . Shortly stated, the construction placed upon this section is, that the word 'parties' is not used collectively, meaning all of the litigants on the one side or the

other, but is intended as if the word 'litigants' had been used, and that the words 'or either of them' means 'any of them,' and that the jurisdiction conferred embraces all controversies in which any litigant on either side is a citizen of the United States or a subject of a foreign country. The construction contended for is out of accord with that placed upon the act in *Vallecillo v. Bertran*, 2 Porto Rico Fed. Rep. 46, a construction constantly adhered to by the court below since 1906. It is also a construction out of harmony with a long line of decisions of this court construing the jurisdictional clauses in the various statutes dealing with the question of jurisdiction dependent upon diversity of citizenship."

### Vol. V, p. 778, sec. 1.

**Effect of reservations.**—The provision of this section allowing the Federal Government to reserve certain public properties for its use in Porto Rico and providing that "And all the public lands and buildings, not including harbor areas and navigable streams and bodies of water and the submerged lands underlying the same, owned by the

United States in said island and not so reserved," etc., only provide for proprietary reservations and dispositions and not for limitations upon the exercise of government. *Gromer v. Standard Dredging Co.*, (1912) 224 U. S. 362, 32 S. Ct. 499, 56 U. S. (L. ed.) 801.

## POSTAL SERVICE.

### Vol. V, p. 794, sec. 3834.

Where a postmaster embezzles money contained in registered letters the sureties on his bond are liable irrespective of whether the United States Government is liable to the persons sending the letters. *Gibson v. United States*, (C. C. A. 1st Cir. 1913) 208 Fed. 534.

The United States Government is a proper party to a suit on the bond, without suggestion that it is at the relation, or for the use or benefit, of any other party. *Gibson v. United States*, (C. C. A. 1st Cir. 1913) 208 Fed. 534.

### Vol. V, p. 830, sec. 14.

**"Periodicals and books."**—In *Smith v. Hitchcock*, (1912) 226 U. S. 53, 33 S. Ct. 6, 57 U. S. (L. ed.) 119, the words "periodicals and books" as used in this section and section 17 were under consideration by Mr. Justice Holmes, who said: "It must be taken as established that not every series of printed papers published at definite intervals is a periodical publication within the meaning of the law, even if it satisfies the conditions for admission to the second class set forth in § 14. *Houghton v. Payne*, (1904) 194 U. S. 88, 96. It is established by the same authorities, that books, that are expressly embraced in mail matter of the third class by § 17 and so made liable to a higher rate of postage, cannot be removed from that class and brought into the second

by the simple device of publishing them in a series at regular intervals of time. . . . The noun periodical, according to the nice shade of meaning given to it by popular speech, conveys at least a suggestion if not a promise of matter on a variety of topics, and certainly implies that no single number is contemplated as forming a book by itself. . . . The word book also, of course, has its ambiguities, and may have different meanings according to the connection in which it is used. For purposes of copyright the common monthly magazines may be books, yet they are not so under the present § 17. As books are not turned into periodicals by number and sequence, the magazines are not brought into the third class by having a considerable number of pages stitched together.

Without attempting a definition we may say that generally a printed publication is a book when its contents are complete in themselves, deal with a single subject, betray no need of continuation, and, perhaps, have an appreciable size. There may be exceptions, as

there are other instances of books. It hardly would be an exception if, where the object is information and the subject-matter is a changing one, a publication periodically issued giving information for the time should be held to fall into the second class."

## Vol. V, p. 831, sec. 17.

Periodicals and books.—See *supra*, this title, vol. V, p. 830, sec. 14.

## Vol. V, p. 834, sec. 1. [*Second-class mail privileges annulled only after hearing.*]

Sufficiency of hearing.—The only duty of the official at the hearing is to hear, and if the interested parties are given a chance to offer evidence they are not denied a hearing

within the meaning of the section. *Smith v. Hitchcock*, (1912) 226 U. S. 53, 33 S. Ct. 6, 57 U. S. (L. ed.) 119.

## Vol. V, p. 839, sec. 3893.

Constitutionality of statute.—In *United States v. Journal Co.*, (E. D. Va. 1912) 197 Fed. 415, the court in answer to the contention of the defendant that the indictment should not be sustained because it was in derogation of its constitutional rights and privileges as the publisher of a daily newspaper, said: "This position cannot be successfully maintained, as the constitutional guaranty of a free press cannot be made a shield from violation of criminal laws, which are not designed to restrict the freedom of the press, but to protect society from acts clearly immoral or otherwise injurious to the people. The postal service is one of the agencies of the federal government that it has the right under the Constitution to maintain, and under it, and the laws passed in pursuance thereof, as well as what may be termed its police authority respecting the subject, it has the right to determine the manner and the method of conducting the same, and to exclude therefrom what may be considered injurious to public morals, and is so doing it neither restricts nor deprives the press of any constitutional privilege or right. It simply declines to become an agency for the distribution and circulation of printed and other matter which it considers of an objectionable character; and it is doubtless within the power of the government to withdraw or discontinue its postal system entirely."

The words "obscene," "lewd," and "lascivious," as used in the statute have invariably been held to mean the use of such words as would tend to deprave and corrupt the morals of those whose minds are open to such influences, by arousing and implanting therein obscene, lewd, or lascivious thoughts and desires, relating to sexual impurity. *United States v. Journal Co.*, (E. D. Va. 1912) 197 Fed. 415.

Description of obscene matter.—While it is true that ordinarily a document or writing essential to the charge of crime must be sufficiently described to make known its con-

tents, or the substance thereof, there is a well recognized exception in the pleading of printed or written matter which is alleged to be too obscene or indecent to be spread upon the records of the court. It is well settled that such matter may be identified by a reference sufficient to advise the accused of the letter or document intended, without setting forth its contents. *Bartell v. United States*, (1913) 227 U. S. 427, 33 S. Ct. 383, 57 U. S. (L. ed.) 583, wherein the court said: "The present indictment specifically charged that the accused had knowingly violated the laws of the United States by depositing on a day named, in the post office specifically named, a letter of such indecent character as to render it unfit to be set forth in detail, enclosed in an envelope bearing a definite address. In the absence of a demand for a bill of particulars we think this description sufficiently advised the accused of the nature and cause of the accusation against him. This fact is made more evident when it is found that this record shows no surprise to the accused in the production of the letter at the trial and no exception to its introduction in evidence, and there is no indication that the contents of the letter, when it was produced did not warrant the description of it given in the indictment."

Sufficiency of allegations.—As to the sufficiency of indictment upon a charge of depositing in the mail a letter giving information directly or indirectly where or by whom any act for the procuring or producing of abortion would be done or performed or how or by what means abortion might be produced, see *United States v. Kline*, (E. D. Pa. 1913) 201 Fed. 954.

In *Clark v. United States*, (C. C. A. 8th Cir. 1912) 202 Fed. 740, an indictment under this section was held sufficient. The court said: "The defendant below was convicted and sentenced for depositing in the mail a letter giving information where, from whom, and by what means articles designed, adapt-

ed, and intended for procuring abortion could be obtained, in violation of section 3893 of the Revised Statutes. The first specification of error is that the court erred in refusing to sustain the demurrer to the indictment. The indictment charged that about February 13, 1911, the defendant was a practicing physician and surgeon at Kansas City, Mo., and that E. A. McBride on February 10, 1911, addressed to him a letter, which is set forth in full in the indictment. That letter was dated 'Garden City, Kansas, Feby. 10, 1911,' was addressed to 'S. M. Clark, No. 4 E. 10th St., Kansas City, Mo.,' was signed 'Miss E. Alexander,' contained a statement that the writer was in trouble, that she was pregnant and must have relief soon, and a request that he would write and tell her whether or not he could get her out of this trouble, and how long it would take and how much it would cost. Following this letter the indictment contains an allegation that in answer to it the defendant, for the purpose of giving the information requested therein, knowingly deposited for mailing and delivery an envelope addressed to 'Miss E. Alexander, P. O. Box 891, Garden City, Kansas,' which contained a written letter, dated 'Kansas City, Mo., Feb. 11, 1911,' addressed to 'Miss E. Alexander,' and signed by the defendant, in which he wrote that her case could be treated with perfect success, and that if she had no place to stay she could come direct to his office, northeast corner Tenth and Main. This letter was also set forth in full. And the indictment contained the further averment that the defendant deposited for mailing this letter giving information where, how, from whom, and the means by which articles and things designed, adapted, and intended for producing abortion could be obtained, and where and by whom acts and operations for the producing of abortions could be done and performed. The ground of the demurrer to this indictment was that it did not state facts sufficient to show wherein the letter to Miss E. Alexander gave information where, or from whom, or by what means articles designed, adapted, and intended to produce abortion could be obtained; that is, that it did not state what articles or things were to be used, or how they were to be used, or when or by whom they were to be used. But the letter to Miss Alexander and the letter to which it was an answer, must be read and considered together, and when so considered they give unmistakable information that the articles and things to be used to procure abortion could be obtained at the defendant's office in Kansas City from him, and that they were to be used and applied by him. No further information was requisite to violate the statute. Nor would any discussion or argument make the fact that this indictment clearly charged the offense denounced by the statute more manifest than the reading of the indictment itself, and the conclusion is that there was no error in overruling the demurrer to it."

*As to identity of letter.*—To the same effect as the original note, see *Winters v. United States*, (U. C. A. 8th Cir. 1912) 201 Fed. 845.

*Connecting defendant with letter.*—In an indictment for mailing a letter giving prohibited information it is not necessary to connect the defendant with the letter, as it is the mailing of the letter that is denounced by the statute and not the writing of it or causing it to be written. *United States v. Currey*, (D. C. Ore. 1913) 206 Fed. 322.

*As to articles relied on for conviction.*—Where an indictment under this section alleges the mailing of an envelope containing a letter giving prohibited information as to where certain articles can be obtained, the prosecuting officer is not required to point out which article or articles are relied upon for a conviction, as it is enough that the letter gives information as to where the prohibited articles may be had. *United States v. Currey*, (D. C. Ore. 1913) 206 Fed. 322.

*As to knowledge or belief that articles would accomplish certain results.*—On an indictment for mailing a letter giving information as to where prohibited articles may be obtained it is not necessary to allege that the defendant knew or believed the articles mentioned in the letter were designed and intended to accomplish certain results; it being sufficient to allege that the defendant knew that the envelope contained a letter giving the inhibited information. *United States v. Currey*, (D. C. Ore. 1913) 206 Fed. 322.

*As to knowledge of unavailability.*—In an indictment for mailing a letter giving prohibited information as to where articles for the prevention of conception can be obtained it is not necessary to allege that the defendant knew that the articles mentioned in the letter were unavailable, as when it is shown that they are designed and intended for preventing conception the defendant is presumed to know that they are unavailable. *United States v. Currey*, (D. C. Ore. 1913) 206 Fed. 322.

*As to knowledge of purpose of letter.*—Where an indictment for mailing a letter giving information as to where certain prohibited articles could be obtained charged that "the defendant did knowingly deposit for mailing a certain envelope, which said envelope, as defendant then and there well knew, contained therein the letter (describing it), which said letter advertised and described certain articles, instruments, etc." and that the defendant "well knew that the envelope deposited contained a certain letter of a date specified, addressed to a named person and signed by a party designated, and further identified as the one which is set out in count 1," it was held that, by all reasonable intentment, the indictment averred knowledge on the part of the defendant of the purpose of the letter contained in the envelope. *United States v. Currey*, (D. C. Ore. 1913) 206 Fed. 322.

Newspapers containing transcript of judicial trials.—"While the right of Congress to determine what shall be carried in the mails

is clearly and indisputably settled by the authorities cited, it should nevertheless be said as respects publications of the character mailed in this case, namely, accurate contemporaneous reports of testimony taken in open court, during the progress of judicial trials, published in reputable journals (no case involving a similar state of facts having been found by or brought to the attention of the court, though diligent search has been made by counsel), that only clear and palpable infractions of the statute should be noticed, since in the nature of things a large discretion must exist in the publisher, who generally acts through others, and most frequently under great stress in the matter of time, and it should not be lightly assumed either that a court would allow undue publicity to be given to what occurred of the character in question in its presence, or that reputable newspapers would purposely wish to publish and disseminate through the mails what would be destructive of social order. The delicacy of the subject, the great desirability of maintaining the efficiency and purity of the mail, and the necessity that the freedom of the press shall at all times be preserved make it manifest that in considering this particular class of infractions, or

supposed infractions, of the law, those having to administer the same should be actuated by the highest sense of right and justice to all, never losing sight of the fact that in carrying out the purposes of government the rights of the citizen and of the public, especially as defined and given by the Constitution, must be observed and respected, and that the guaranty of freedom of the press was granted, not alone because of the necessity therefor for its protection, but that thereby many of the dearest and most essential rights and privileges of the citizen might be assured and protected." *United States v. Journal Co.*, (E. D. Va. 1912) 197 Fed. 415.

**Not applicable to description of prohibited articles.**—This section does not apply to a letter describing and advertising certain articles in a manner calculated to lead another to use and apply such articles for the prevention of conception, if it does not give information as to where they can be obtained. *United States v. Currey*, (D. C. Ore. 1913) 206 Fed. 322.

**For other annotations dealing with questions covered by this section, see under Penal Law, 1909 Supp., p. 462, sec. 211.**

## Vol. V, p. 846, sec. 3894.

**Construction.**—The words "or concerning schemes devised for the purpose of obtaining money or property by false pretenses," as used in this section, are to be limited to schemes having a similitude to the lottery

and other like schemes particularly described by the particular words of the section. *United States v. Stever*, (1911) 222 U. S. 167, 32 S. Ct. 51, 56 U. S. (L. ed.) 145.

## Vol. V, p. 871, sec. 3926.

This section is cited in *United States v. Atlantic Coast Line R. Co.*, (E. D. N. C. 1910) 189 Fed. 779.

## Vol. V, p. 872, sec. 3929.

**Review by courts.**—*Certiorari* does not lie to review a ruling of the Postmaster General that a fraud order should issue. *Degge v. Hitchcock*, (1913) 229 U. S. 162, 33 S. Ct. 639, 57 U. S. (L. ed.) 1135, wherein the court said: "The appellant insists that under these common law principles the writ should issue here because, having to act 'upon evidence satisfactory to him' (Rev. Stat. § 3929), and notice and a hearing having been given, the Postmaster General acted in a judicial capacity in making the order, which was therefore subject to review on *certiorari*, because he exceeded his jurisdiction and, without any proof of fraud in the use of the mails, deprived appellants of the valuable right to receive letters and money through the post office. It is true that the Postmaster General gave notice and a hearing to the persons specially to be affected by the order and that in making his ruling he may be said to have acted in a quasi-

judicial capacity. But the statute was passed primarily for the benefit of the public at large and the order was for them and their protection. That fact gave an administrative quality to the hearing and to the order and was sufficient to prevent it from being subject to review by writ of *certiorari*. The Postmaster General could not exercise judicial functions, and in making the decision he was not an officer presiding over a tribunal where his ruling was final unless reversed. Not being a judgment, it was not subject to appeal, writ of error, or *certiorari*. Not being a judgment, in the sense of a final adjudication, the appellants were not concluded by his decision, for had there been an arbitrary exercise of statutory power or a ruling in excess of the jurisdiction conferred, they had the right to apply for and obtain appropriate relief in a court of equity."

What might otherwise be a legitimate business or profession may be so conducted as to

render it a vehicle of fraud and deception and within the purview of this section.

*Branaman v. Harria*, (W. D. Mo. 1911) 190 Fed. 461.

### Vol. V, p. 893, sec. 3962.

Right of government to sue contractor for loss of mail.—Where a penalty has been imposed by the Postmaster General on a contractor under this section for failure to carry the mail, the United States cannot thereafter sue the contractor for the loss of mail car-

ried, as neither the government nor the contractor is liable to the owner or addressee of mail lost, and consequently such loss could not have been within the contemplation of the parties. *United States v. Atlantic Coast Line R. Co.*, (E. D. N. C. 1913) 206 Fed. 190.

### Vol. V, p. 900, sec. 3964.

Condemnation of railroad right of way for telegraph line.—This section does not interfere with the right of a state to authorize telegraph companies to condemn part of a railroad's right of way for a telegraph line. *Western Union Telegraph Co. v. Louisville N. R. Co.*, (W. D. Ky. 1912) 201 Fed. 946, wherein the court said: "Only a small part

of the right of way of the defendant is involved. There is no pretense, and there could be none, that such part of the property of the defendant as is sought to be condemned here would prevent the railroad company from operating its railroad and carrying the mails over it while so operating it."

### Vol. V, p. 901. [*Public roads and highways.*]

The term "post-routes" as used in this act means the same as the term "post roads" as used in Rev. Stat. sec. 5263 (7 Fed. Stat.

Annot. 205). *New England Telegraph Co. of Massachusetts v. Essex*, (D. C. Mass. 1913) 206 Fed. 926.

### Vol. V, p. 901, sec. 3965.

Purchase or inventions relating to pneumatic transportation.—This is one of the sections that prescribe the general duties of the Postmaster General, and cannot be fairly treated as authority for making a contract

to purchase certain inventions and letters patent pertaining to pneumatic transportation. *Beach v. United States*, (1912) 226 U. S. 243, 33 S. Ct. 20, 57 U. S. (L. ed.) 205.

### Vol. V, p. 911, sec. 3995.

Knowledge of the presence of mail on a train.—Every one is charged with knowledge that all railways in the United States are mail routes and that all passenger trains on such railways ordinarily carry the United States mail. Persons, therefore, who by violence, or otherwise, unlawfully stop the operations and movements of such trains on the railways, are as a matter of law charged with knowledge that they may and are likely to arrest the operations of the Post Office Department of the United States which this criminal statute is intended to protect. *United States v. Hall*, (S. D. Ga. 1913) 206 Fed. 484.

Sufficiency of indictment.—An indictment for obstructing the mails is sufficient which charges that the accused unlawfully, knowingly, and wilfully obstructed and retarded the passage of the United States mail, and a certain car carrying the same, by unlawfully, knowingly, and wilfully assaulting and beating the engineer and fireman, although it does not charge that the accused knew that there was mail on the particular train. *United States v. Hall*, (S. D. Ga. 1913) 206 Fed. 484.

### Vol. V, p. 916, sec. 4000.

Not common carrier in relation to mail.—A railroad company, in carrying the mails, is not hauling freight, nor is it acting as a common carrier, with corresponding rights and liabilities; but in this respect it is serving as an agency of government, and as much subject to the laws and regulations as every other branch of the post office. *United*

*States v. Atlantic Coast Line R. Co.*, (E. D. N. S. 1913) 206 Fed. 190.

Relationship of carrier and passenger between company and postal clerk.—Where a carrying company accepts a postal clerk in charge of mail carried by it under its contract with the government to carry such mail, the relationship of carrier and passen-



ger is created between such postal clerk and such company, while such mail is being so carried with such person in charge thereof.

Southern Ry. Co. v. Utz, (Ind. 1912) 98 N. E. 375.

### Vol. V, p. 954, sec. 4057.

**Good faith as a defense.**—Where money of the Post Office Department has been paid to persons through the misconduct of an officer or employee of the postal service, the government is entitled to recover the same; the

good faith of the persons receiving the money affording them no protection. *Bolognesi v. United States*, (C. C. A. 2d Cir. 1911) 189 Fed. 335, 36 L.R.A.(N.S.) 143.

### Vol. V, p. 956, sec. 4058.

The postal regulations provide, in pursuance of this section, for the deposit of all moneys recovered, by suit or otherwise, on account of moneys taken from the mail or losses therein, with a department official—for the determination of the proper person

or persons to whom such moneys shall be restored—and for payment in accordance with such determination. These provisions date from 1908. *Gibson v. United States*, (C. C. A. 1st Cir. 1913) 208 Fed. 534.

### Vol. V, p. 965, sec. 5469.

**Single penalty for all the offenses.**—The sentence of a defendant, convicted under separate counts of an indictment under this section of larceny of a mail pouch containing registered letters and of letters, and also of larceny of registered letters and embezzlement of their contents, committed at the same time and place and as parts of a continuous criminal act to separate punish-

ments, is beyond the jurisdiction of the court and void as to the excess above the maximum punishment that may be imposed for a single offense; and, after the defendant has satisfied such a sentence, he is entitled to his release by habeas corpus. *Stevens v. McClaughry*, (C. C. A. 8th Cir. 1913) 207 Fed. 18.

### Vol. V, p. 968, sec. 5470.

**Necessity of alleging essential ingredients of larceny.**—In prosecuting offenders for violation of this section it is not necessary to allege in the indictment, or to prove on the trial, all the essential ingredients of the crime of larceny. *Thompson v. United States*, (C. C. A. 9th Cir. 1913) 203 Fed. 401, 47 L.R.A.(N.S.) 206, wherein the court said: "It is contended that the court erred in overruling the demurrer to the indictment, that the indictment is faulty, in that it fails to charge the intent with which the money was received, or from whom it was concealed, or the name of the owner thereof. The defendant was indicted under section 5470 of the Revised Statutes which provides that: 'Any person who shall buy, receive or conceal, or aid in buying, receiving or concealing . . . any bank note, bank post bill, bill of exchange, etc. . . . knowing any such article or thing to have been stolen or embezzled from the mail or out of any

post office . . . shall be punishable,' etc. The indictment charges that the defendant did wilfully, knowingly, unlawfully, and feloniously receive from Altorre the bank notes which were therein described, and states the value thereof, and charges that they had been knowingly, unlawfully, and feloniously stolen and taken and carried away from the mails of the United States in a post office of the United States at Los Angeles by the said Altorre, and that the defendants at the time and place of receiving and concealing, and aiding in concealing said articles, knew the same to have been unlawfully and feloniously stolen, taken, and carried away from the mails of the United States. These allegations clearly import that the concealment by the defendants was criminal, and done with an unlawful intent, and they cover all the elements of the crime which is described in section 5470."

### Vol. V, p. 969, sec. 5472.

A conviction was sustained under this section in *Matthews v. United States*, (C. C. A. 8th Cir. 1911) 192 Fed. 490.

### Vol. V, p. 972, sec. 5478.

**Sentence in gross.**—A sentence to ten years in gross and a fine of two thousand

dollars where the defendant is convicted under an indictment charging separate of-

fenses in different count is erroneous. The court should specify the sentence under each count. But a sentence in gross is irregular merely and not void and cannot be corrected by habeas corpus. *Howard v. Moyer*, (N. D. Ga. 1913) 206 Fed. 555, followed by *Blake v. Moyer*, (N. D. Ga. 1913) 206 Fed. 559, (C. C. A. 5th Cir. 1913) 208 Fed. 678.

**Conviction on separate counts of burglary and larceny.**—The sentence of a defendant, convicted on two separate counts of an indictment, under this section and section 5456 [see 4 Fed. Stat. Ann. 790] or 5475, Revised Statutes, of burglary of a post office building with intent to commit larceny and of larceny committed at the same time and as a part of a continuous criminal act, to separate punishments for the burglary and the larceny, is *ultra vires* and void as to the sentence for the larceny, and after the defendant has satisfied the sentence for the burglary he is entitled to his release on habeas corpus. *Munson v. McClaughry*, (C. C. A. 8th Cir. 1912) 198 Fed. 72, wherein the court said: "A criminal intent to commit larceny of property of the government is an indispensable element of each of the offenses of which the petitioner was convicted, and there can be no doubt that where one attempts to break into or breaks into a post office building with intent to commit larceny therein, and at the same time commits the larceny, his criminal intent is one, and it inspires his entire transaction, which is itself in reality but a single continuing criminal act. It seems to be unauthorized, inhumane, and unreasonable to divide such a single intent and such a criminal act into two or more separate offenses, and to inflict separate punishments upon the various steps in the act or transaction, such as one for breaking, or for the attempt to break with the criminal intent, and another for a larceny with the same intent, or such as one for the attempt to break, a second for the breaking, a third for the entering, a fourth for the taking of stamps, a fifth for the taking of other property, a sixth for the conversion of the property, and a seventh for carrying it away, all with the same single criminal intent. And there is evidently no limit to the number of offenses into which a single criminal transaction inspired by a single criminal intent may be divided, if this rule of division and punishment is once firmly established. The theory that such an act and intent could be punished as two separate offenses seems to have taken its rise in the federal courts in the decision of Circuit Judge McCrary in *Ex parte Peters* (C. C.) 12 Fed. 461. At that time the Supreme Court of Connecticut had held in *Wilson v. State*, 24 Conn. 57, that a conviction of larceny at the same time that a burglary was committed constituted no defense to a charge of the burglary. Chief Justice Waite, however, in an able opinion which has commended itself to the judgment of many courts, dissented from this conclusion and declared that: 'Whenever, in any criminal transaction, a felonious intent is essential to render it a crime, and without proof of which no conviction can be had, two informations, founded upon the same intent, cannot be maintained.' Judge McCrary, in his opinion in the *Peters* Case, said that the reasoning of Chief Justice Waite was so strong that if it were a question of first impression he would be inclined to adopt his opinion, but that he found the law very well settled to the contrary, and he cited *Bishop's Criminal Law*, § 1062, *Josslyn v. Commonwealth*, 6 Metc. (Mass.) 236, *State v. Ridley*, 48 Iowa 370, and *Breese v. State*, 12 Ohio St. 146, 80 Am. Dec. 340. A careful examination of these authorities discloses the fact that they fail to support his statement that they settle the question in favor of his decision."

**When offense complete.**—A violation of this section is complete when a person breaks into a post office or building used in whole or in part as a post office with intent to commit therein larceny or other depredation. The evidence need only show the breaking and entering with the intent named in the statute as to the post office, and the person need not have committed larceny at all in order to be convicted if the jury trying him believe, and the evidence is sufficient to justify this belief, that he broke or attempted to break into the post office with the intent stated. *Anderson v. Moyer*, (N. D. Ga. 1912) 193 Fed. 499.

**a scheme or artifice to defraud.** *Wilson v. United States*, (C. C. A. 2d Cir. 1911) 190 Fed. 427.

This section is cited in *Colt v. United States*, (C. C. A. 8th Cir. 1911) 190 Fed. 305.

## Vol. V, p. 973, sec. 5480.

### I. IN GENERAL.

The purpose of this statute was the broad one of preventing the use of the mails to despoil the public, whether such result was intended to be accomplished by means of plain falsehoods, or by the most glittering, alluring and complicated contrivances. *Wilson v. United States*, (C. C. A. 2d Cir. 1911) 190 Fed. 427.

**Three essential elements.**—To the same effect as the original note, see *Smith v. United States*, (C. C. A. 8th Cir. 1913) 208 Fed. 131.

**Damage is not made an essential element of the offense of using the mails to execute**

**a scheme or artifice to defraud.** *Wilson v. United States*, (C. C. A. 2d Cir. 1911) 190 Fed. 427.

This section is cited in *Colt v. United States*, (C. C. A. 8th Cir. 1911) 190 Fed. 305.

### II. SCHEME OR ARTIFICE TO DEFRAUD.

**What constitutes.**—To the same effect as the original note, see *United States v. Stever*, (1911) 222 U. S. 167, 32 S. Ct. 51, 56 U. S. (L. ed.) 145.

A person who induces others by "false and fraudulent representations and pretenses" to part with their property is guilty of devis-

ing "a scheme or artifice to defraud" within the meaning of the statute. *Wilson v. United States*, (C. C. A. 2d Cir. 1911) 190 Fed. 427.

#### V. INDICTMENT AND SENTENCE.

Several indictments may be consolidated by virtue of section 1024 Rev. Stat. (2 Fed. Stat. Annot. 337), although where consolidated the offenses charged are more than three in number. *Emanuel v. United States*, (C. C. A. 2d Cir. 1912) 196 Fed. 317, wherein the court said: "This is no new question, and the decisions in different districts are not uniform. But this court in *Booth v. U. S.*, 154 Fed. 836, 83 C. C. A. 552, expressly decided the precise question, holding that in cases like this the court had the power under section 1024 to consolidate; and we are of the opinion that the new authorities which defendant here presents do not call for the overruling of that decision. The clause in section 5480 which is relied on by defendant is omitted from Criminal Code, § 215 (Act March 4, 1909, c. 321, 35 Stat. 1130), so that the question now presented will not arise in the future. The question is one of practice rather than of substantial right and we are satisfied that our former decision should be followed here."

A single sentence for several offenses committed within the same six calendar months and charged in the same indictment may exceed the maximum of the punishment prescribed for a single offense under this section. *Hyde v. United States*, (C. C. A. 8th Cir. 1912) 198 Fed. 610, wherein the court said: "The indictment contained three counts which charged three separate offenses committed within six months pursuant to the same scheme to defraud. The defendant was found guilty of each offense charged and sentenced for each offense to imprisonment for 15 months and to pay a fine of \$500; the imprisonment for each of the three offenses to run concurrently. It is specified as error that this sentence was in excess of the power of the court. Section 5480 prescribes for each offense punishment by a fine of not more than \$500 and by imprisonment for not more than 18 months, or by both such punishments, and declares that 'the indictment, information or complaint may severally charge offenses to the number of three when committed within the same six calendar months; but the court shall give a single sentence and proportion the punishment especially to the degree in which the abuse of the post office establishment enters as an instrument into such fraudulent scheme and device.' It is insisted that this paragraph of the section prohibits a sentence of more than a fine of \$500 and an imprisonment of 18 months for any three separate offenses committed within the same six calendar months and charged in the same indictment. . . . While in the case of *In re De Bara*, 179 U. S. 316, 21 Sup. Ct. 110, 45 L. ed. 207, the sentence of imprisonment for three years there in question was based on many counts of eleven indictments which had been con-

solidated for trial, our conclusion is that the following statement in the opinion of the Supreme Court in that case was intended to, and does, state the rule upon this subject in the case of separate offenses charged in the same indictment as well as in the case of such offenses charged in different indictments under section 5480. Speaking of the power of the court to inflict punishment under this section, the Supreme Court said: 'To it is confided the power to adapt the punishment to the degree of crime. It may sentence the full penalty upon one offense. It may, though it is not required to, do more upon three offenses, and in a single sentence of one day, or of eighteen months, or three times eighteen months, it may express its views of the criminality of a defendant, and, to use the language of the statute, "proportion the punishment especially to the degree in which the abuse of the post office establishment" enters as an instrument "in the defendant's fraudulent scheme and device." Under this rule the sentence in this case was not excessive, and the judgment below must be affirmed.'

A sentence to one year's imprisonment at McNeil's Island with hard labor was held erroneous in *Mitchell v. United States* (C. C. A. 9th Cir. 1912) 196 Fed. 874, wherein the court said: "Error is assigned to the sentence, in that, first, imprisonment in the penitentiary was imposed, which it is contended is unauthorized except in cases where the sentence is for a longer time than one year; and, second, that the sentence was to 'hard labor,' whereas, by the statute, the penalty prescribed is imprisonment only. Section 5541 of the Revised Statutes [6 Fed. Stat. Annot. 36], is cited as sustaining these assignments. In reply to this counsel for the defendant in error points to the fact that at the time when section 5541 was adopted, which was on March 3, 1865, the United States maintained no places of imprisonment, and that by Act March 3, 1891, c. 529, 26 Stat. 839 [6 Fed. Stat. Ann. 24] provision was made for the purchase of sites and the erection of buildings thereon 'for the confinement of all persons convicted of any crime whose term of imprisonment is one year or more at hard labor,' and that under that act the penitentiary at McNeil's Island was erected, and he contends that the sentence which consigned the plaintiff in error to imprisonment there was in compliance with the law. We do not think that the language of the Act of March 3, 1891, is susceptible of that construction, or that it was intended thereby to amend section 5541. The language of the act, 'for the confinement of all persons convicted of crime whose term of imprisonment is one year or more at hard labor,' must be held to refer to sentences imposed on conviction of crimes for which punishment in the penitentiary at hard labor is prescribed by the statute. Said Mr. Justice Harlan (*In re Mills*, 135 U. S. 263, 10 Sup. Ct. 762, 34 L. ed. 107): 'There are offenses against the United States for which the statute in terms prescribes punishment by imprisonment at hard

labor. There are others the punishment of which is imprisonment simply. But in cases of the latter class the sentence of imprisonment—if the imprisonment be for a longer period than one year (section 5541)—may be executed in a state prison or penitentiary, the rules of which prescribe hard labor.' The court in that case held that, where a statute of the United States prescribing a punishment by imprisonment does not require that the accused shall be confined in a penitentiary, a sentence of imprisonment cannot be executed by confinement in a penitentiary, unless the sentence is for a period longer than one year. The same was held in *Re Bonner*, 151 U. S. 242, 14 Sup. Ct. 323, 34 L. ed. 149. In that case Mr. Justice Field,

referring to imprisonment in the penitentiary, said: 'To such an imprisonment infamy is attached, and a taint of that character can be cast only in the cases mentioned.' The offense of which the plaintiff in error was convicted is punishable 'by a fine of not more than \$500 or by imprisonment of not more than eighteen months, or by both.' But the error in the judgment does not entitle the plaintiff in error to his discharge, as it might if the question were presented on a writ of habeas corpus. The case having come to this court on writ of error, this court, while reversing the judgment of the court below, may remand the cause to that court, with directions to enter the appropriate judgment."

### 1909 Supp., p. 523. [*Readjustment of rates for transportation of mail.*]

Construction same as sec. 4004, R. S.—Section 4004, R. S. (5 Fed. Stat. Annot. 923), was construed to give the Postmaster-General authority to make the same price for 60-foot cars as for 50-foot cars, and authority to abolish full lines, or establish "half lines," and adjust rates accordingly, and there is

nothing in the language of the Act of 1907 indicating any intent to change the construction previously given to section 4004: *Atchison, T. & S. F. R. Co. v. United States*, (1912) 225 U. S. 640, 32 S. Ct. 702, 56 U. S. (L. ed.) 1236.

## PRISONS AND PRISONERS.

### Vol. VI, p. 24, sec. 1.

Imprisonment at hard labor.—The language of the act "for the confinement of all persons convicted of crime whose term of imprisonment is one year or more at hard labor" refers to sentences imposed on conviction of crimes for which punishment in the penitentiary at hard labor is prescribed by

the statute. *Mitchell v. United States*, (C. C. A. 9th Cir. 1912) 196 Fed. 874.

This act was not intended to amend section 5541, 6 Fed. Stat. Annot. 36, in any particular. *Mitchell v. United States*, (C. C. A. 9th Cir. 1912) 196 Fed. 874.

### Vol. VI, p. 33, sec. 5536.

Duty of sheriffs.—Where a state has passed a law authorizing the use of the county jails for the detention of United States prisoners and providing that the sheriff shall by himself, or deputy, perform such duties as may be required of him by law, and receive all prisoners lawfully committed to his custody and keep them by himself or by his deputy or jailer, until discharged by law, it is the duty of the sheriff of said counties as the keepers of such jails to receive and detain therein such prisoners until their terms of imprisonment expire, or they

are otherwise discharged from the prison by authority of the United States, and, therefore such jails may be deemed jails of the United States for this purpose, and the keepers thereof, though not strictly officers of the United States, are keepers for the United States of the prisoners committed to said jails by the courts of the United States, and are subject to punishment for contempt for disobedience or disregard of the warrants or orders committing such prisoners to their custody. *Ex parte Shores*, (N. D. Ia. 1912) 195 Fed. 627.

### Vol. VI, p. 36, sec. 5541.

Separate sentences on different counts.—The designation of separate periods under different counts of the same indictment, the

second to commence coincident with the expiration of the first, does not constitute separate sentences, but a single sentence.

made up of the aggregate period specified, and constitutes but one punishment, evidenced by one and the same judgment. *United States v. Thompson*, (N. D. Cal. 1912) 202 Fed. 346, *affirmed* (C. C. A. 9th Cir. 1913) 204 Fed. 973.

This section was not repealed and its terms were not affected by Act of March 4, 1909, c. 321, § 335, Fed. Stat. Annot. 1909 Supp. p. 495, which defines a felony. *Thompson v. United States*, (C. C. A. 9th Cir. 1913) 204 Fed. 973,

wherein the court said: "The provisions of section 5541 were not based upon any distinction between felonies and misdemeanors. It was a statute to prescribe the place of imprisonment for crimes, whether misdemeanors or felonies. The determining factor was to be the length of the sentence, and that alone. If the sentence were for a longer period than one year, the place of imprisonment was a penitentiary; otherwise, it was a jail."

### 1912 Supp., p. 304, sec. 3.

"Legal custody" and "control," as used in this act, do not contemplate actual custody or confinement, for the act provides that the paroled prisoner "shall be allowed to go on parole outside of said prison and in the discretion of the board to return to his home." And, again: "The transportation furnished

shall be to the place to which the paroled prisoner has elected to go, with the approval of the board of parole." *Ex p. Marcil*, (W. D. Wash. 1913) 207 Fed. 809.

The only effect of a broken parole is provided for by this section. *Ex p. Marcil*, (W. D. Wash. 1913) 207 Fed. 809.

### 1912 Supp., p. 305, sec. 7.

Forfeiture of time earned for good conduct.—Time earned by good conduct before parole is forfeited where the prisoner, out

on parole, is returned to prison for misconduct. *Halligan v. Marcil*, (C. C. A. 9th Cir. 1913) 208 Fed. 403.

## PUBLIC CONTRACTS.

### Vol. VI, p. 119, sec. 3733.

In every government contract it is implied that the amount to be paid shall not exceed the appropriation. *United States v. McMullen*, (1912) 222 U. S. 460, 32 S. Ct. 128, 56 U. S. (L. ed.) 269.

### Vol. VI, p. 125, sec. 1.

"Labor or materials in the prosecution of the work."—In *United States Fidelity & Guaranty Co. v. United States*, (C. C. A. 2d Cir. 1911) 189 Fed. 339, it was held that "labor or materials in the prosecution of the work," required by this section to be covered by the bond of a public contractor, covered in the case of a bond given by one building a breakwater for the government, labor required in getting out stone at the quarry and loading it for transportation.

Jurisdiction of state courts.—State courts formerly had jurisdiction of the suits provided for by this section but their jurisdic-

tion was taken away by an amendment thereto contained in the Act of Feb. 24, 1905, c. 778, 32 Stat. 1, 911, 10 Fed. Stat. Annot. 343. *United States v. Schofield Co.*, (1913) 239 Pa. St. 582, 87 Atl. 14.

Venue of action on bond.—Suit upon the bond of a contractor executed by a surety company may be brought in the district where the principal office of the defendant is located by virtue of section 5 of the act of Aug. 13, 1894, 7 Fed. Stat. Annot. 202. *Title Guaranty & Surety Co. v. United States*, (1913) 228 U. S. 567, 33 S. Ct. 614, 57 U. S. (L. ed.) 969.

### Vol. VI, p. 132, sec. 3744.

Nature of statute.—This statute is mandatory and in effect prohibits and renders unlawful any contract not signed by both parties at the end thereof. *New York & P. R. Steamship Co. v. United States*, (C. C. A. 2d Cir. 1913) 206 Fed. 443, *reversing* 197 Fed. 995. *Coxe*, Circuit Judge, in writ-

ing the opinion of the Circuit Court of Appeals, said: "The contention that the statute is made only for the protection of the government is, we think, contrary to good law and good morals as well. There is nothing in the language of the act to warrant such an interpretation. If it had been the

intention of Congress to make the signature of one of the parties evidence of a contract, it surely would have so said. Instead of doing so, it says that the writing must be signed by the contracting parties with their names at the end thereof. We cannot believe that it was the purpose of Congress to permit the government to enforce, as against the citizen, an oral agreement or one partly evidenced by writing, but which violates all the requirements of the statute, and refuse all relief when a citizen seeks to enforce a similar contract against the government. It cannot be that the validity of a contract depends upon whether the party of the first part or the second part is seeking to enforce it. Such a construction would enable the

government, in cases like the one at bar, to enforce an unsigned agreement if favorable to it and repudiate it if favorable to the other party. We have nothing to do with the policy of the law, whether wise or unwise; we take it as we find it and construe it according to the obvious meaning of the language employed. The question is not what the law should be but what it is, and that question, in view of the interpretation of the Supreme Court, is not in our opinion open to doubt. If Congress wishes the agreements between the Navy Department and individuals to depend on oral testimony, it has only to repeal or modify the statute in question; this court can do neither."

### Vol. X, p. 343. [Act of Feb. 24, 1905.]

In general. — "It will be noticed that the act of 1905, which takes up the entire subject covered by the act of 1894 and therefore is to be treated as a substitute act, repealing the former, materially changes the former act of 1894. Under the last-mentioned act, a suit on the bond could only be maintained against the sureties on the bond in the district where the defendants resided.

. . . The first act gave no priority to the government of the United States, while the later act provides for such priority. There was nothing in the act of 1894 requiring all claims to be determined in one action, nor is there any limitation as to when the action is to be commenced, except such as may be prescribed by the laws of the state where the suit may be instituted. By the act of 1905 no suit can be instituted by a creditor on the bond of the contractor until after the complete performance of said contract and final settlement thereof, and it limits the time within which the suit is to be brought to one year, and then only if the government has failed to institute a suit within six months from the completion and final settlement of said contract. The action is to be brought by creditors in a court of the United States in the district in which the contract was to be performed and executed, irrespective of the amount in controversy, and not elsewhere. The act further provides that only one action shall be instituted by a creditor or creditors, but any other creditor may file his claim in such action and be made a party thereto within one year from the completion of the work under said contract, and not later. It also provides that the government shall have priority for any sum found to be due it, and the residue shall go to the other creditors, and if this balance recovered on the bond shall be inadequate to pay the amounts found due to all said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery. The surety was also permitted by that act to pay into court for distribution among said claimants and creditors the full amount of his liability, to wit, the penalty named in the bond, less any amount which said surety

may have had to pay to the United States, and thereupon the surety was to be relieved from all further liability. Upon the institution of a suit by a creditor under that act, personal notice of the pendency of such suit is required to be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the state or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor." *Eberhart v. United States*. (C. C. A. 8th Cir. 1913) 204 Fed. 884.

This act is not retroactive in its operation. *Title Guaranty & Surety Co. v. United States*, (1913) 228 U. S. 567, 33 S. Ct. 614, 57 U. S. (L. ed.) 969; *United States v. Scofield Co.*, (N. D. Pa. 1911) 191 Fed. 944; *United States v. McPhee*, (1911) 51 Colo. 425, 118 Pac. 996; *United States v. Scofield Co.*, (1913) 239 Pa. St. 582, 87 Atl. 14.

When right of action complete. — "The true intent and purpose of this act is to give an action to the government as soon as the public work is completed and settled for, without regard to guaranties or stipulations for repairs, and to the subcontractor six months later. The statute and the bond itself secure 'prompt payment,' which they could not do if no suit could be brought until all collateral covenants were performed." *United States v. Illinois Surety Co.*, (N. D. Ill. 1912) 195 Fed. 307.

Condition precedent to suit on bond. — In *United States v. Massachusetts Bonding & Ins. Co.*, (W. D. Wash. 1912) 198 Fed. 923, which was a suit on a bond under this section, the court said: "The language of the statute that after giving the affidavit the party should be furnished with a certified copy of the contract and bond, 'upon which he or they shall have a right of action,' etc., may be read as meaning 'upon which bond' as easily as 'upon doing which,' and hardly can be construed as making a condition precedent."

Jurisdiction of state courts. — This amendment takes away from state courts the jurisdiction they formerly had over suits on

the bonds of government contractors. But it is only applicable to suits on bonds executed subsequently to its passage. *United States v. Schofield Co.*, (1913) 239 Pa. St. 582, 87 Atl. 14.

**Venue.**—In *United States v. Congress Const. Co.*, (1911) 222 U. S. 199, 32 S. Ct. 44, 58 U. S. (L. ed.) 163, the court, construing the statute with respect to place of suit, said: "The statute, whilst authorizing persons holding unpaid demands for labor or materials to bring such an action in the name of the United States, expressly requires that it be brought 'in the Circuit Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy, and not elsewhere,' and also provides that only one such action shall be brought and that it shall be so instituted and conducted, in point of notice and otherwise, that all demands of that class may be adjudicated therein and included in a single recovery. Considering the purpose of the statute, as manifested in these provisions, we think the restriction respecting the place of suit was intended to apply, and does apply, to all actions brought in the name of the United States for the purpose only of securing an adjudication and enforcement of demands for labor or materials, whether instituted by the United States or by the creditors themselves. The reasons for the restriction are as applicable in the one instance as in the other, and it is difficult to believe that it was intended that it should be less potent when the United States acts for the creditors than when they act for themselves. The contention to the contrary is rested largely upon the supposition that, in instances like the present, where the defendants, or some of them, are inhabitants of another district, there is an insuperable barrier to the maintenance of the action in the district wherein the contract was to be performed. But this supposition is a mistaken one, for the provision restricting the place of suit operates pro tanto to displace the provision upon that subject in the General Jurisdictional Act. 25 Stat. 433, c. 866, § 1, and amply authorizes the Circuit Court in the district wherein the action is required to be brought to obtain jurisdiction of the persons of the defendants through the service upon them of its process in whatever district they may be found." See also *Baker Contract Co. v. United States*, (C. C. A. 4th Cir. 1913) 204 Fed. 390.

**Necessity for notice.**—The provision in this act requiring notice to known creditors and a publication for three successive weeks, the last publication to be at least three months before the expiration of a year after final settlement on the contract, is mandatory. *United States v. Stannard*, (M. D. Pa. 1913) 206 Fed. 326. Compare *United States v. United Surety Co.*, (N. D. Cal. 1912) 192 Fed. 992.

**Amounts due on bond a trust fund.**—The provision of this act that only one suit shall be instituted by a creditor or creditors and for notice to other creditors of their rights

to intervene, with the further provision that if the recovery on the bond is inadequate to pay the amounts due all creditors judgment shall be given to each creditor pro rata of the amount of the recovery, has the effect of making the amount due on the bond a trust fund which can only be properly administered in equity and distributed among creditors in an equitable proceeding. *United States v. Wells*, (E. D. Tenn. 1913) 203 Fed. 146.

**Action at law.**—The action authorized by this act is one at law and not one in equity. *United States v. Stannard*, (N. D. N. Y. 1913) 207 Fed. 198.

**Limitation of action.**—The provision of this act that like actions "shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later," creates a right, liability, and remedy in behalf of those in like situation to the beneficiaries, conditioned upon action commenced within a stipulated time. It is in its nature remedial and to be liberally construed, but the condition must be performed or the right, liability, and remedy expire. The prescribed time involves two events—performance and final settlement—and it is only after both have occurred that the time begins to run. "Performance" and "final settlement" are not synonyms. The first is the agreed work done; the second is the ascertainment or adjustment of the balance of rights and liabilities arising therefrom. This latter is not accomplished until the contractor's accounts are settled and certified by an auditor of the treasury department. *United States v. Bailey*, (D. C. Mont. 1913) 207 Fed. 782. See also *Baker Contract Co. v. United States*, (C. C. A. 4th Cir. 1913) 204 Fed. 390.

**Discharge of corporate surety in bond.**—A corporate surety in a contractor's bond given pursuant to this act, is not discharged from liability to a sub-contractor for default of payment by the contractor for materials supplied by the sub-contractor and used in the prosecution of the work provided for in the contract, by reason of a binding extension by the sub-contractor without the knowledge of the surety, of the time of payment notwithstanding, resulting loss to the surety, where the extension is bona fide and not in excess of a reasonable, usual or customary credit. *United States v. Lynch*, (D. C. Del. 1912) 192 Fed. 364.

**Nature of work and material covered by statute.**—Where the contract relates to the building of a stone breakwater, the work done at the quarry and the hauling and delivering of stone at the breakwater are within the terms of the contract and bond, as work done or material furnished in prosecution of work provided for in the contract. *United States Fidelity & Guaranty Co. v. United States*, (1913) 231 U. S. 237, 34 S. Ct. 88.

The application of this act was considered in *United States v. Empire State Surety Co.*, (S. D. Miss. 1912) 197 Fed. 429.

## PUBLIC LANDS.

### Vol. VI, p. 212, sec. 452.

A United States mineral surveyor is within the prohibition of this section. *Waskey v. Hammer*, (1912) 223 U. S. 85, 32 S. Ct. 187, 56 U. S. (L. ed.) 359.

### Vol. VI, p. 212, sec. 453.

Administrative and not legislative power is conferred by this section. *United States v. George*, (1913) 228 U. S. 14, 33 S. Ct. 412, 57 U. S. (L. ed.) 712.

### Vol. VI, p. 223, sec. 2223.

This section was cited in *Scully v. United States* (D. C. Nev. 1912) 197 Fed. 327.

### Vol. VI, p. 233, sec. 2246.

Administrative and not legislative power is conferred by this section. *United States v. George*, (1913) 228 U. S. 14, 33 S. Ct. 412, 57 U. S. (L. ed.) 712.

### Vol. VI, p. 281, sec. 2265.

This statute is construed in *Svor v. Morris*, (1913) 227 U. S. 524, 33 S. Ct. 335, 57 U. S. (L. ed.) 623.

### Vol. VI, p. 285, sec. 2289.

Homestead for benefit of family and not individual. — In *Buchser v. Morse*, (C. C. A. 9th Cir. 1913) 202 Fed. 854, it was held that land held in the state of Washington, acquired under the homestead laws of the United States, was the community property of the entryman and his wife. The court said: "But it is urged that the question is not to be determined by the law of the state, but by the law of the United States, and that the state law is powerless to control the plain provisions of the homestead laws of the United States which give the title to the homestead entryman as his separate property, and in support of that contention the appellant cites *Hall v. Russell*, (1879) 101 U. S. 503, 25 U. S. (L. ed.) 829; *Bernier v. Bernier*, (1893) 147 U. S. 242, 13 S. Ct. 244, 37 U. S. (L. ed.) 152, and *McCune v. Essig*, (1905) 199 U. S. 382, 26 S. Ct. 78, 50 U. S. (L. ed.) 237. Those cases, however, do not sustain the contention. They are all cases in which the court was called upon to construe the land laws, and the rights of settlers thereunder, prior to the time when the right to the title had matured under the settlement. They have no relation to the question which is pre-

sented in this case, which is the question of the authority of a state legislature to make community property of land which has passed from the United States to the homestead entryman. In *Hall v. Russell* all that was decided was that under Donation Act Sept. 27, 1850, c. 76, 9 Stat. 496, the title to the grant did not vest in the settler before the conditions had been fully performed, and that an unmarried man who had settled upon a half section of public land in Oregon, and after residing thereon less than a year died, had no devisable interest in the land, and that on his death his heirs, not by inheritance, but by the terms of the act, became qualified grantees, with the right to continue the residence and settlement, and to acquire title. In *Bernier v. Bernier*, it was held that, where a homestead entryman dies a widower and without having acquired a patent, the right to complete the proofs and acquire the patent passes under Revised Statutes, § 2291, [6 Fed. Stat. Annot. 292], to all his children equally. And in *McCune v. Essig*, it was held that upon the death of the homestead entryman before final proof, the right to complete the proof and obtain the patent was given by the



homestead law to the surviving widow, and not to the widow and children, under the community property laws of the state of Washington. In that case the question before the court was not one of the descent of property, but one of the construction and application of the homestead laws of the United States, which laws expressly gave to the widow the right to complete the settlement in compliance therewith, and to receive the title. In other words, the court held that the widow became, under the facts and the law applicable thereto, the grantee of the land from the United States, and that all the right of her husband was extinguished by his death. The principle which governs the present case is found in *Wilcox v. McConnel*, (1839) 13 Pet. 498-516, (10 U. S. (L. ed.) 264): 'We hold the true principle to be this: That whenever the question in any court, state or federal, is whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that, whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to the state legislation, so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States.' So in *Bernier v. Bernier*, (1893) 147 U. S. 246, 13 S. Ct. 245, 37 U. S. (L. ed.) 152, the court said: 'The object of the sections in question was, as well observed by counsel, to provide the method of completing the homestead claim, and obtaining a patent therefor, and not to estab-

lish a line of descent or rules of distribution of the deceased entryman's estate.'"

**Who may enter homestead.**—The husband's residence is in law the residence of the wife, and the homestead law neither permits nor contemplates that both husband and wife shall take advantage of its provisions. *Anderson v. United States*, (C. C. A. 9th Cir. 1913) 202 Fed. 200.

The land laws should be administered liberally to fulfill their purpose. *United States v. Mills*, (C. C. A. 5th Cir. 1911) 190 Fed. 513, 42 L.R.A.(N.S.) 752.

**Right to perfect claim after alienation or contract therefor.**—The homestead law not only proceeds upon the theory that the land is to be acquired for the exclusive benefit of the entryman, but contains provisions which make it impossible for him to perfect his claim, after alienation or contract therefor, without committing perjury. Entering into a forbidden agreement ends his right to make proof and payment, and renders him incompetent to further proceed with the entry. *Bailey v. Sanders*, (1913) 228 U. S. 603, 33 S. Ct. 602, 57 U. S. (L. ed.) 985.

**Residence on contiguous land.**—When the applicant is a person who, owning less than 160 acres, seeks to enlarge his homestead by an entry of other land, he will not be required to move from the land owned by him to the contiguous land which he seeks to enter. In such case residence on the land sought to be added to his homestead is not necessary. Cultivation for the required length of time is sufficient. *United States v. Mills*, (C. C. A. 5th Cir. 1911) 190 Fed. 513, 42 L.R.A.(N.S.) 752.

## Vol. VI, p. 290, sec. 2290.

**No entry for benefit of another.**—The title to the land entered cannot inure to the benefit of any other person than the entryman, nor can trust relations legally exist between the entryman and any other person in respect to the land entered. *Carroll v. Draughon*, (1911) 173 Ala. 327, 56 So. 207.

## Vol. VI, p. 292, sec. 2291.

**Title conferred by final certificate.**—The final certificate vests the entryman with an equitable title to the land, and shows, *prima facie*, that he is entitled to a patent conveying to him the legal title. The legal title remains in the government till the issuance of the patent. *United States v. Kennedy*, (C. C. A. 5th Cir. 1913) 206 Fed. 47; *Moses v. Long-Bell Lumber Co.*, (C. C. A. 5th Cir. 1913) 206 Fed. 51.

**Control of certificate by land department.**—The equitable right, conferred by the certificate is entirely within the jurisdiction and control of the Land Department, and the courts, as a general rule, will not interfere with the procedure of the Land Department before the issuance of the patent.

**Sufficiency of title to support ejectment.**—The receiver's certificate, issued to one in possession of public land claiming it as a homestead under this act, constitutes a title which will support an action of ejectment for cutting and removing timber from the land. *Methodist Episcopal Camp Ground Ass'n v. Brown*, (Miss. 1913) 62 So. 276.

*Moses v. Long-Bell Lumber Co.*, (C. C. A. 5th Cir. 1913) 206 Fed. 51.

**Power of land office to cancel final certificate.**—The Land Department, as a special tribunal, has confided to it the administration and execution of the laws for the disposition of the public lands. It has the power to review its prior rulings, and to cancel existing entries and all proceedings prior to the issuance of the patent. This power is not arbitrary nor unlimited, and can be exercised only after notice to parties in interest, who must have opportunity to defend. *United States v. Kennedy*, (C. C. A. 5th Cir. 1913) 206 Fed. 47.

**Rights of purchaser from final certificate holder.**—A person, purchasing from one who

holds, not a patent, but a final certificate, is chargeable with notice that the legal title is in the government, and that the certificate, for cause, is subject to cancellation. *Moses v. Long-Bell Lumber Co.*, (C. C. A. 5th Cir. 1913) 206 Fed. 51.

The purchaser of turpentine rights from an entryman holding a final certificate, who enters on the homestead and boxes the pine trees and takes from them the turpentine, cannot defend, when sued by the government for conversion, on the ground that he is an innocent purchaser without notice; the final certificate, without the knowledge of the purchaser, having been canceled. *United States v. Kennedy*, (C. C. A. 5th Cir. 1913) 206 Fed. 47.

**Proof required to obtain patent.**—The facts to be proved to obtain a patent are (1) cultivation of and residence upon the land and (2) non-alienation and allegiance; the means of proof of the first being two credible witnesses; of the second, affidavit of the claimant. In other words, the section is not only explicit as to what is to be proved but in what manner proved; and what is required of the claimant himself, to wit an affidavit, is distinguished from what he must establish by others, to wit two credible witnesses. *United States v. George*, (1913) 228 U. S. 14, 33 S. Ct. 412, 57 U. S. (L. ed.) 712.

**Residence and cultivation.**—This section, standing alone, would indicate that both residence and cultivation were not required to obtain a patent, because the applicant is required to prove that he has "resided upon or cultivated" the land for which he seeks the patent. But the previous section contains language which tends to show that "residence and cultivation" are necessary to acquire title. *United States v. Mills*, (C. C. A. 5th Cir. 1911) 190 Fed. 513, 42 L.R.A. (N.S.) 752.

**Vacation of proceedings.**—Up to the time

the patent is issued, the proceedings in the Land Office, like interlocutory judgments of courts, may, for cause, be vacated and annulled. After the patent is issued and delivered, resort must be had to the courts by the government or by an adverse claimant who would annul the patent. *United States v. Kennedy*, (C. C. A. 5th Cir. 1913) 206 Fed. 47.

**Control of land by state.**—“Until the title is completed the laws of the United States control. But when the title has passed then the land ‘like all other property in the state is subject to state legislation.’ If the United States could impress a peculiar character upon land within a state after parting with all title to it, at least the clearest expression would be necessary before such a result could be reached. But it has not tried to do anything of the sort” *Buchser v. Buchser*, (1913) 231 U. S. 157, 34 S. Ct. 46.

The policy of the statute is to enable the settler and his family to secure a home. *Buchser v. Buchser*, (1913) 231 U. S. 157, 34 S. Ct. 46.

**Title of widow.**—A patent, issued to the widow of a homestead settler upon her making final proof, in accordance with the provision of the homestead law, conveys the land to her absolutely; and no interest therein passes by inheritance to the children of her husband. *Nelson v. Oberg*, (1912) 38 Kan. 14, 127 Pac. 767.

**Succession to land entered by widow with children.**—Where a widow, the mother of two children, filed on government land under the homestead law and afterwards married a second husband, and died without further children; final proof being made after her death, and the land patented to her heirs, it was held that under this section the patent inured to the benefit of her heirs and not merely her children. *Anderson v. Muhr*, (1912) 36 Okla. 184, 128 Pac. 296.

## Vol. VI, p. 300, sec. 1. [*Act of May 14, 1880.*]

This section is cited in *Dohr v. Wolfgang*, (1912) 151 Wis. 95, 138 N. W. 75.

## Vol. VI, p. 301, sec. 3.

No vested interest in the land is obtained by the settler until he has fully complied with the provisions of the homestead law and submitted proof at the local office. Prior to that time his right is essentially

inchoate and exclusively within the operation of the laws of the United States. *Watkins v. Producers Oil Co.*, (1913) 227 U. S. 308, 33 S. Ct. 380, 57 U. S. (L. ed.) 551.

## Vol. VI, p. 303, sec. 2292.

**Rights of children of former marriage.**—This section does not give the children of a former marriage the fee of a homestead

entry, as against the second husband of their mother. *Anderson v. Muhr*, (1912) 36 Okla. 184, 128 Pac. 296.

## Vol. VI, p. 304, sec. 2294.

**Construction of section.**—The purpose of this section was to permit persons, desiring

to initiate or complete proceedings for the acquisition of title to public lands, for the

sake of convenience, to go before the judges or clerks of the local courts, for the purpose of making the oaths and proofs mentioned in the statute, with the same effect as if those things were done before the officers of the general government. Congress, in recognizing the validity of certain acts of these local state officials, exercised the indisputable right to regulate the compensation for the services rendered to individuals availing themselves of the provisions of the statute by limiting the fees to be paid for such services, and, in order to make such limitation

effective, to impose a penalty for any excessive charge. That penal provision, however, does not at all affect the proposition that the prescribed fees are to be collected by the officer for acts done by him in and by virtue of his office. The federal statute confers no new official character upon the officers therein mentioned; nor does it, with respect to the acts authorized, have the effect to segregate the officer from his office. *Glaister v. Board of Com'rs of Kit Carson County*, (1912) 22 Colo. App. 326, 123 Pac. 955.

## Vol. VI, p. 307, sec. 2296.

**Judgment after patent on antecedent debt.**—A judgment against the patentee is not a lien upon land acquired under the homestead laws, if the debt for which the judgment is rendered was contracted prior to the issuing of a patent for such land. *Ash v. Eriksson*, (1911) 115 Minn. 478, 132 N. W. 997.

**Right to mortgage before issuance of patent.**—This section is intended as a prohibition on the involuntary appropriation of the homesteader's land by way of execution or attachment, and does not contemplate a restriction upon his power to voluntarily mortgage his interest therein, and a release of such a mortgage may constitute a valid consideration for the execution of another by another person and upon a different piece of land. *Englert v. Dale*, (1913) 25 N. D. 587, 142 N. W. 169.

**Exemption when patentee reacquires land after sale thereof.**—It is well settled that the exemption of this section does not protect one who has parted with title to the land and subsequently acquired that title. *Cooper v. Miller*, (1913) 165 Cal. 31, 130 Pac. 1048.

**The time when a debt was contracted, within the meaning of this statute, is the time when the consideration was received, and the obligation to pay was assumed by the patentee, even though thereafter renewal notes were given and by assignments and**

**distribution of the debt the creditor was changed.** *Ash v. Eriksson*, (1911) 115 Minn. 478, 132 N. W. 997.

**Not applicable after final proof made and certificate issued.**—The exemption from liability for debts, as provided by this section, no longer applies to such homestead after final proof has been made and receiver's final certificate has been issued therefor. *Hobb v. J. I. Case Threshing Mach. Co.*, (1913) 39 Okla. 383, 135 Pac. 395.

**No other restrictions than those contained in this section.**—Congress has placed no limitations or restrictions on titles acquired under the homestead laws, except the single one that lands so acquired shall in no event become liable to the satisfaction of any debt contracted prior to the issuance of patent therefor. Beyond this prohibition there is nothing in the laws of Congress indicating in the remotest way that lands acquired in the several states under the homestead and other settlement laws should be held by a different tenure or subject to different rules than other lands in private ownership. Congress has never concerned itself with purely local and domestic relations such as the interest a wife shall have in property acquired by her husband either before or during the existence of the marital relation. *Buchser v. Morss*, (E. D. Wash. 1912) 196 Fed. 577.

This section is cited in *Doran v. Kennedy*, (1913) 122 Minn. 1, 141 N. W. 851.

## Vol. VI, p. 310, sec. 2297.

**This section prescribes the procedure for the cancellation of a homestead entry, where the entryman has failed to comply with the law; and in case a contest is instituted against a homestead entry, and is successfully prosecuted, upon the cancellation of such entry, the land so entered reverts to**

**the government, with a preference right to the contestee to enter the same as a homestead, under the rules and regulations of the department, after the cancellation of the contested entry.** *King v. Great Northern R. Co.*, (1911) 20 Idaho 687, 119 Pac. 709.

## Vol. VI, p. 324, sec. 2306.

**Assignability.**—The right given by this section was intended as compensation and assignable. When assigned, however, it is the right of the soldier which is transferred. *F. S. A. Supp.*—51.

**ferred and which must be used to make an entry. Necessarily the right must exist before it can be exerted either by him or his assignee. Or, to put it in another way, a**

baseless or fraudulent claim cannot initiate or sustain a right. *Robinson v. Lundrigan*,

(1913) 227 U. S. 173, 33 S. Ct. 255, 57 U. S. (L. ed.) 468.

## Vol. VI, p. 326, sec. 1. [*Act of June 16, 1880.*]

**Liberal construction.**—This act proceeds upon equitable principles and is intended to be administered accordingly. Like other highly remedial statutes, it should be in-

terpreted with appropriate regard to the spirit which prompted it. *United States v. Colorado Anthracite Co.*, (1912) 225 U. S. 219, 32 S. Ct. 617, 56 U. S. (L. ed.) 1063.

## Vol. VI, p. 326, sec. 2.

**"Assigns."**—It is settled that an assign, within the meaning of this act, is one who becomes invested with the entryman's right in the land through some voluntary act of

his. *United States v. Colorado Anthracite Co.*, (1912) 225 U. S. 219, 32 S. Ct. 617, 56 U. S. (L. ed.) 1063.

## Vol. VI, p. 329, sec. 1.

**Construction.**—The Act of March 3, 1875, c. 132, 18 Stat. 420, 6 Fed. Stat. Annot. 329, sec. 15, extending the privilege of the homestead laws to Indians who had abandoned their tribal relations, fixed the period of alienation at five years. The Act of July 4, 1884, c. 180, 23 Stat. 96, 6 Fed. Stat. Annot. 329, sec. 1, enlarged this period to 25 years. It provided for the issuance of two patents; one when a person entitled to it under the

act had consummated his right and which patent should declare a trust under which the United States would hold the land for the period of 25 years for the sole use and benefit of the patentee and his heirs, and the other to be issued upon the expiration of 25 years, conveying the whole title discharged of the trust and of all charge or incumbrance whatsoever. *Felix v. Yaksum*, (Wash. 1914) 137 Pac. 1037.

## Vol. VI, p. 344, sec. 2387.

### NATURE OF TRUST AND TITLE AND AUTHORITY OF TRUSTEES.

**Nature of trust.**—The trust provided for by this section is dual in its nature. It exists for the benefit of the occupants as individuals, and also collectively as a community. The title to occupants of lots vested in the mayor trustee, for their benefit severally, when the entry was made. The title to lots to which no valid claims are held by individuals is taken in trust by the trustee for the occupants of the town site collectively. *Hodges v. Lemp*, (1913) 24 Idaho 399, 135 Pac. 250.

### OCCUPANCY AND RIGHTS OF OCCUPANTS.

**Only occupants beneficiaries.**—When a town site is entered by the probate judge under this and the following section and the town-site laws of the state of Kansas extended to and put in force in Oklahoma by the act of March 3, 1891, (26 Stat. at Large, 1026, c. 543) he takes the title in trust for the benefit of the occupants, and when a lot is continuously in the actual possession and occupancy of one party, who is shown to be a prior settler thereon, he is not deprived of his right thereto by an award of the town-site commissioners and a subsequent

deed from the probate judge to another party. *Walter Realty Co. v. Jones*, (1913) 35 Okla. 272, 129 Pac. 840.

### LEGISLATIVE REGULATIONS.

**Disposal of lots for benefit of occupants.**—There is no statute in force in Oklahoma which authorizes the president and board of trustees of towns or villages to dispose of the lots remaining unsold in said town site, which was entered under this section for the benefit of the occupants, or to convey the same for school purposes, after deeds have been issued to such occupants severally for all lots proved up by them under said town-site law. *School Dist. No. 160, Caddo County v. Alcott*, (1912) 31 Okla. 122, 120 Pac. 562.

**Town sites in Cheyenne and Arapaho country.**—The devolution of title to lots on town sites in the Cheyenne and Arapaho country reserved for county seat purposes by Secretary of the Interior is governed by this and the following section and the town-site laws of the state of Kansas, as modified by the act of Congress of March 3, 1891, c. 543, § 17, 26 Stat. 1026, 6 Fed. Stat. Annot. 119. *League v. Taloga*, (1913) 35 Okla. 277, 129 Pac. 702; *Foot v. Watonga*, (1913) 37 Okla. 43, 130 Pac. 597.

## Vol. VI, p. 367, sec. 2396.

This section is inapplicable to a controversy relating to the riparian rights of owners of fractional lots in a fractional town-

ship abutting upon a lake in Minnesota. *Burton v. Isaacson*, (1913) 122 Minn. 483, 142 N. W. 925.

## Vol. VI, p. 379, sec. 2412.

Application of section to claimed land.—This section is but one of the safeguards which Congress has enacted for the purpose of enabling the Commissioner of the General Land Office to more effectually carry out and perform the powers, authorities, and duties vested in him relating to the public lands of the United States, one of which is the power, authority, and duty to enter upon the public

lands for the purpose of making survey thereof. This power, authority, and duty is in no respect restricted or limited by the fact that the land upon which the survey is to be made has been located and claimed under the laws of the United States applicable to such locations or claims. *United States v. Fickett*, (C. C. A. 9th Cir. 1913) 205 Fed. 134.

Vol. VI, p. 392, sec. 1. [*Act of March 3, 1877.*]

Water subject of appropriation.—By this act the general government made the water, not only of lakes and rivers, but also other sources of water supply upon the public lands, and not navigable, the subject of appropriation. *Borman v. Blackmon*, (1911) 60 Ore. 304, 118 Pac. 848.

Extent of riparian rights.—Under this statute every riparian owner, regardless of the date of settlement, is entitled (at least as against a subsequent appropriator) to a quantity of water reasonably essential for his domestic use and for the watering of his stock; but, beyond this, he is entitled to water for irrigation only to the extent to which he is the prior appropriator. Such appropriation is limited to the amount actually diverted and used for a needful purpose. *Hedges v. Riddle*, (1912) 63 Ore. 257, 127 Pac. 548.

Necessity for entryman to have plan of irrigation and adequate source of water.—The entryman can make no entry except a bona fide entry with the intention to reclaim the land, and he shall not only have bona fide such definite intention, but he shall have in mind a plan of contemplated irrigation, as well as an adequate source of water. *Chaplin v. United States*, (C. C. A. 9th Cir. 1912) 103 Fed. 879.

Combination to induce fraudulent entries as conspiracy.—An entry on the public lands made not in good faith, but in evasion of the provisions of the law, is a fraud upon the government, and a combination of two or more persons to induce others to make such entries is a conspiracy punishable by section 5440 of the Revised Statutes. *Chaplin v. United States*, (C. C. A. 9th Cir. 1912) 193 Fed. 879.

## Vol. VI, p. 397, sec. 4.

Taxation.—The rule which has been generally recognized by the courts with reference to the taxation of lands for which patent has not yet issued is that when payment in full has been made and settlement and improvement have been had, and final proof hereof has been made and the proper authorities of the Interior Department have accepted the proofs and issued a final re-

ceipt to that effect, it operates to transfer such an equitable estate in the lands as to immediately render the land liable to taxation, although the legal title is still held by the United States. This general rule has been held to be applicable to lands segregated under this section. *Bothwell v. Bingham County*, (1913) 24 Idaho 125, 132 Pac. 972.

## Vol. VI, p. 398, sec. 1.

Popular name of act.—This legislation is known in common parlance as the "Carey Act." *State v. Des Chutes Land Co.*, (1913) 64 Ore. 167, 129 Pac. 764.

## Vol. VI, p. 399, sec. 2479.

Grant in praesenti.—To the same effect the original note, see *Hart v. Delphey*, a. (1912) 136 N. W. 702; *Union Sawmill Co. v. Taylor*, (La. 1913) 63 So. 594; *Henson v. Blair*, (1912) 102 Miss. 640, 59 S. 856.

This section is cited in *Chapman & Dewey Lumber Co. v. Board of Directors of St. Francis Levee Dist.*, (1911) 100 Ark. 94, 139 S. W. 625.

## Vol. VI, p. 404, sec. 2480.

Identification and patent perfect title in fee.—To the same effect as the original

note, see *Little v. Williams*, (1913) 231 U. S. 335, 34 S. Ct. 68.

## Vol. VI, p. 419, sec. 17.

**Reserving land for county seat purposes.**—The authority to reserve not to exceed one-half section of land in each county in the Cheyenne and Arapaho country for county seat purposes, conferred upon the Secretary of the Interior by this section, embraced the power to set aside for public purposes such

lots or parcels of ground situated upon such town site as, in the judgment of the Secretary, would be necessary for the municipal needs and conveniences of a county seat town. *League v. Taloga*, (1913) 35 Okla. 277, 120 Pac. 702; *Foot v. Watonga*, (1913) 37 Okla. 43, 130 Pac. 597.

## Vol. VI, p. 436, sec. 4.

**Lands purchased before act passed.**—It is an open question whether the benefit of this act was intended to be confined to lands purchased of railroads before the act was passed. *Lyle v. Patterson*, (1913) 228 U. S. 211, 33 S. Ct. 480, 57 U. S. (L. ed.) 804.

**Interest.**—No provision for paying inter-

est on the amounts for which the railroads are liable is contained in this section, and no liability for interest arises until the amounts are fixed. *Southern Pac. R. Co. v. United States*, (1913) 228 U. S. 618, 33 S. Ct. 717, 57 U. S. (L. ed.) 993.

## Vol. VI, p. 449, sec. 1.

**To what lands applicable.**—The act was one of a series of acts and applies only to the public lands of the United States subject to acquisition under the laws enacted for the disposition of the public domain. *Northern Pac. R. Co. v. United States*, (1913) 227 U. S. 355, 33 S. Ct. 368, 57 U. S. (L. ed.) 544.

**Applicable to homestead and pre-emption entries.**—This act confirmed the title of bona fide purchasers from the railroad even as against homestead and pre-emption entries. No exception is made in favor of settlers of any kind. *Iatt Lumber Co. v. Faircloth*, (1913) 132 La. 906, 61 So. 866.

## Vol. VI, p. 462, sec. 2275.

This section is considered in *Buena Vista Land & Development Co. v. Honolulu Oil Co.*, (1913) 166 Cal. 71, 134 Pac. 1154, and

*Deseret Water, Oil & Irrigation Co. v. State*, (Cal. 1914) 138 Pac. 981.

## Vol. VI, p. 473, sec. 10.

**Grant in praesenti.**—The words "hereby granted" in this section indicate a grant in praesenti and pass not a special or limited interest in the land, but are words of absolute donation and vest a present title subject only to survey, to give precision to the grant and attach it to any particular tract. *Wol-*

*pers v. Spokane*, (1912) 66 Wash. 633, 120 Pac. 113.

Congress could not by subsequent enactment restrict or change the grant made in this act. *State v. Whitney*, (1912) 66 Wash. 473, 120 Pac. 116.

## Vol. VI, p. 474, sec. 11.

No repeal of this section has been effected by subsequent legislation. *State v. Whitney*, (1912) 66 Wash. 473, 120 Pac. 116.

Vol. VI, p. 481, sec. 2. [*Lands, how selected.*]

**Collateral attack on selection.**—This duty of determining whether the lands were selected in conformity with the terms of this act was cast upon the Land Department and

its certification is not open to collateral attack. *Southern Development Co. v. Ender-son*, (D. C. Nev. 1912) 200 Fed. 272.

## Vol. VI, p. 498, sec. 2477.

**Grant not in praesenti.**—The grant resulting from this section is not in praesenti. *Stofforan v. Okanogan County*, (1913) 76

Wash. 265, 136 Pac. 484, wherein the court said: "The net result of our decisions therefore, is that the United States statute

takes effect as a grant only when the res comes into being; that is, when the road has been established on petition as prescribed by our statute, or by prescription prior to the attaching of any adverse rights upon the public lands over which it passes."

**Public use.**—The Indians are wards of the government, and the reservation of public lands for their use would seem clearly to be a reservation for public use, so that, until a reservation is thrown open for settlement,

the land does not come within the purview of the grant contained in this section. *Stofferan v. Okanogan County*, (1913) 76 Wash. 265, 136 Pac. 484.

This section is cited in *People v. Quong Sing*, (1912) 20 Cal. App. 26, 127 Pac. 1052; *Scott's Bluff County v. Tri-State Land Co.*, (1913) 93 Neb. 805, 142 N. W. 296; *Rule v. Sioux County*, (1913) 94 Neb. 736, 144 N. W. 806.

## Vol. VI, p. 501, sec. 1.

**Grant in praesenti.**—The uniform construction of this act has been that it is a grant "*in praesenti*" of lands to be thereafter identified." *Stalker v. Oregon Short Line R. Co.*, (1912) 225 U. S. 142, 32 S. Ct. 636, 56 U. S. (L. ed.) 1027. Compare *United States v. Chicago, M. & St. P. Ry. Co.*, (N. D. Idaho, 1913) 207 Fed. 164.

"Public lands" include land reserved and withdrawn from public entry for the purpose of reclamation and irrigation under the act of June 17, 1902, 32 Stat. L. 388, 7 Fed. Stat. Annot. 1098. *United States v. Minidoka & S. R. Co.*, (C. C. A. 9th Cir. 1911) 190 Fed. 491.

**Patent relates back to initiatory act.**—"The act of 1875 confers upon the railroad company the 'right to take' from the public lands adjacent to its right of way, ground for station purposes. This 'right to take' in advance of construction is subject to the approval of the Secretary of the Interior. When, therefore, the railroad company has exercised its 'right to take' a particular tract for station purposes, by filing a survey and plat of the ground selected, the Secretary of the Interior is called upon to interpret the law under which the right to take is claimed, and to determine the lawfulness of the taking, as of the time when the right was asserted by the filing of the plat and

survey. When he acts and for the Government consents, by approving the plat, his approval operates to give effect to the grant, the land upon which it operates being thereby definitely determined. Therefore it is that a claim by another initiated pending his conclusion is cut off by giving effect to the approval as of date when his action was invoked. The principle is that which has been many times applied in conflicting claims to indemnity lands, under railroad land grants. In such cases the patent, when issued, is held to relate to the date of the filing of the railroad company's list of selections in lieu of place lands lost, thereby defeating adverse rights initiated after the actual filing of the list of selections. The same rule has likewise been applied to lists of selections made by states to which a grant has been made subject to location. In both classes of cases, it has been many times ruled that while no vested right against the United States is acquired until the actual approval of the list of selections, the company does acquire a right to be preferred over such an intervenor. In other words, the patent, when issued, relates back to the initiatory right, and cuts off all claimants whose rights were initiated later." *Stalker v. Oregon Short Line R. Co.*, (1912) 225 U. S. 142, 32 S. Ct. 636, 56 U. S. (L. ed.) 1027.

## Vol. VI, p. 506, sec. 4.

**Filing and approval of profile.**—The requirement of the statute that the railroad company shall file with the register and receive the profile of its road and that this profile shall be approved by the Secretary of the Interior before any right attaches is an important and far-reaching provision in view of the general authority conferred upon the Secretary of the Interior by the various acts of Congress relating to the public lands and particularly by section 441, 3 Fed. Stat. Annot. 537, of the Revised Statutes, wherein he is charged with the supervision of the public business relating to public lands. *United States v. Minidoka & S. R. Co.*, (C. C. A. 9th Cir. 1911) 190 Fed. 491.

The initiatory act, to which the final act of approval relates, is the filing with the Secretary of the Interior of the map of definite location. The mere surveying and staking of a route is the tentative act of the

railroad. It might at will select a different route and move its stakes. But when it adopts a route definitely and then causes a map of such route to be filed in the land office of the district, in duplicate, and then filed with the Secretary of the Interior, a right is thereby initiated which, until disposed of, precludes the creation of a later right and gives to the company, as prior in time, priority in the right. *Stalker v. Oregon Short Line R. Co.*, (1912) 225 U. S. 142, 32 S. Ct. 636, 56 U. S. (L. ed.) 1027.

**Right of way acquired without filing profile map.**—Where a railroad company has complied with this act by filing with the Secretary of the Interior a copy of its articles of incorporation and proofs of its organization under the same, and has constructed a railroad over the land, it obtains a full and complete right of way without the necessity of filing a profile map as provided

in this section. *Johnson v. Spokane International Ry. Co.*, (1913) 25 Idaho 389, 137 Pac. 894, following *Jamestown & N. R. Co. v. Jones*, (1900) 177 U. S. 125, 20 S. Ct. 568, 44 U. S. (L. ed.) 698.

A definite location of the right of way of a railway company which will entitle it to the benefits of this act, is made by the completion of the grade ready for the ties and rails, which has been preceded by the approval of a plat and profile of such road by the Secretary of the Interior, even though there is no proof that such plat was ever filed in the land office of the district in which the land is situated. *Northern Pac. Ry. Co. v. Barlow*, (N. D. 1913) 143 N. W. 903.

**Station grounds.**—The provisions of this section, for securing in advance of construction the benefits of the act, have application to station grounds, as well as to the right of way proper. The "benefits" to be secured cover one as well as the other. *Stalker v. Oregon Short Line R. Co.*, (1912) 226 U. S. 142, 32 S. Ct. 636, 56 U. S. (L. ed.) 1027.

A profile map is something more than an alignment map or a map of definite location. *United States v. Minidoka & S. R. Co.*, (C. C. A. 9th Cir. 1911) 190 Fed. 491, where

the court said: "A profile is 'the outline of a vertical section through a country or line of work, showing actual or projected elevations and hollows.' Standard Dictionary. 'A drawing exhibiting a vertical section of the ground along a surveyed line, or graded work, as of a railway, showing elevations, depressions, grades,' etc. Webster's Int. Dictionary. 'A vertical section through a work or a section of country, to show the elevations or depressions.' Century Dictionary. With a map of this character before the Secretary of the Interior showing the contour of the projected line of railroad through the public lands included in an irrigation and reclamation project, he can determine whether the construction of such a road would interfere with the project. He can determine, also, whether suitable provision has been made for the crossing of canals and other waterways, and, if not, what provision is required to preserve the work of the reclamation service from encroachment and impairment. All this is clearly included in the authority of the Secretary to approve or disapprove the profile of the road." Compare *Taggart v. Great Northern Ry. Co.*, (E. D. Wash. 1912) 208 Fed. 455.

## Vol. VI, p. 506, sec. 5.

Lands withdrawn from entry by executive proclamation, and set apart as a forest preserve, are "lands especially reserved from sale" within the meaning of that clause as

used in this section. *United States v. Chicago, M. & St. P. Ry. Co.*, (N. D. Idaho 1913) 207 Fed. 164.

## Vol. VI, p. 508, sec. 1.

**Nature of proceeding.**—An action may be maintained for an injunction to prevent the patentees of land or their grantees from in any manner obstructing, hindering, delaying and preventing the contractors, agents, servants and employees of the United States in the construction of an irrigation canal across patented lands. *United States v. Van Horn*, (D. C. Colo. 1912) 197 Fed. 611.

**Necessity for definiteness in reservation.**—In answer to an objection that a reservation in a patent of a right of way thereon for ditches and canals constructed by the authority of the United States was void for uncertainty, the court, in *United States v. Van Horn*, (D. C. Colo. 1912) 197 Fed. 611, said: "This requirement as to the future disposition of public lands was known to all, and all entrymen thereafter acted in the light of that knowledge so charged to them. And there can be no doubt that Congress was vested with full power to make the

reservation. . . . It was under these conditions that the defendants or their grantors made their entries and initiated their rights to all the lands in question and thereafter accepted patents containing said reservation. It cannot be doubted that the intent, purpose and scope of the reservation was fully understood by each patentee. In the construction of the West Canal in connection with and as a part of the Uncompahgre Valley project the complainants are only seeking to carry out and execute that purpose; and there is no foundation for the claim now made that the right of way reserved is so uncertain and indefinite as to render it void. . . . Beside this, the reservation in the patents was but a compliance with the Acts of Congress, and Congressional grants are not within the rules of construction applicable to transactions between private parties. They are given a broader scope for the purpose of executing the legislative intent."

## Vol. VI, p. 508, sec. 18.

The word "reservation," as used in the section, includes an Indian reservation. *United States v. Portneuf-Marsh Valley Irr. Co.*, (D. C. Idaho 1913) 205 Fed. 416.

This section has not been repealed by implication by the Act of May 11, 1898, *infra*, p. 512. *United States v. Portneuf-Marsh Valley Irr. Co.*, (D. C. Idaho 1913) 205 Fed. 416.



## Vol. VI, p. 513, sec. 1.

**Approval of Secretary of Interior.**—Under this section a grant is conditioned upon the precedent approval of the Secretary of the

Interior. *United States v. Chicago, M. & St. P. Ry. Co.*, (N. D. Idaho, 1913) 207 Fed. 164.

## Vol. VI, p. 515, sec. 2449.

**Certified list operates as patent.**—To the same effect as the original note, see *Southern Development Co. v. Endersen*, (D. C. Nev. 1912) 200 Fed. 272.

**Conclusiveness of certified list.**—To the same effect as the original note, see *Southern Development Co. v. Endersen*, (D. C. Nev. 1912) 200 Fed. 272.

## Vol. VI, p. 525, sec. 7.

**Coal lands.**—The proviso of section 7 giving the right to patent where no contest or protest has been filed within two years after receiver's receipt "upon the final entry of any tract of land under the homestead, timber culture, desert land, or pre-emption laws," does not include coal land entries. *United States v. Yankee Fuel Co.*, (D. C. N. M. 1912) 195 Fed. 850.

**"Pending contest or protest."**—The directing of an investigation by a government special agent within two years from the time final proof had been submitted and certificate issued is sufficient to bar the operation of the proviso in this section. *Moses v. Long-Bell Lumber Co.*, (C. C. A. 5th Cir. 1913) 206 Fed. 51.

## Vol. VI, p. 526, sec. 8.

The object of this statute is to extinguish any right the government may have in the land and vest a perfect title in the adverse holder after six years from date of the patent, regardless of any mistake or error in the Land Department, or the fraud or imposition of the patentee. *United States v. Exploration Co.*, (C. C. Colo. 1911) 190 Fed. 405.

**Patents issued for lands within the public domain** are the patents affected by this section. *Northern Pac. Ry. Co. v. United States*, (C. C. A. 9th Cir. 1911) 191 Fed. 947.

**Effect of fraud on running of bar.**—If the United States is defrauded of public lands by means of "dummy" entries, and the perpetrators and beneficiaries of the wrong by subsequent and affirmative acts of fraud conceal the original fraud from the knowledge of the government until after six years have elapsed from the date of the issuance of the patents, a court of equity will not permit the wrongdoers to enjoy the fruits of their fraud, by pleading the statute of limitations as a defense, when the delay in the institution of suit was deliberately induced by fraud practiced upon the government for the express purpose of gaining the benefits of the statute. *United States v. Exploration Co.*, (C. C. A. 8th Cir. 1913) 203 Fed. 387, followed in *Linn & Lane Timber Co. v. United States*, (C. C. A. 9th Cir. 1913) 203 Fed. 394.

**Application to suit to set aside Indian trust patent.**—In *United States v. La Rogue*, (C. C. A. 8th Cir. 1912) 198 Fed. 645, which was a bill in equity filed by the United States to set aside an Indian trust patent issued under Act of Feb. 8, 1887, 24 Stat. L. 388, c. 119, sec. 5, 3 Fed. Stat. Ann.

494, it was held that this section was not applicable. The court said: "Does the word 'patent,' as used in section 8, cover such a document as was issued by the government in this case? In *United States v. Rickert*, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. ed. 532, the court, speaking of trust patents issued under the allotment act of 1887, said: 'The "patents" here referred to (although that word has various meanings) were, as the statute plainly imports, nothing more than instruments or memoranda in writing, designed to show that for a period of 25 years the United States would hold the land allotted in trust for the sole use and benefit of the allottee, or, in case of his death, of his heirs, and subsequently, at the expiration of that period—unless the time was extended by the President—convey the fee, discharged of the trust, and free of all charge or incumbrance. In other words, the United States retained the legal title, giving the Indian allottee a paper or writing, improperly called a "patent," showing that at a particular time in the future, unless it was extended by the President, he would be entitled to a regular patent conveying the fee.' The court referred to the enabling act of South Dakota, which, after providing that its constitution should contain certain declarations relating to the Indians, declared that nothing therein provided should preclude the state from taxing lands held and owned by an Indian who had obtained from the United States title thereto by patent or other grant. It then said: 'The patent or grant here referred to is the final patent or grant which invests the patentee or grantee with the title in fee; that is, with absolute ownership. No such patent or grant has been issued to these Indians.' In

the case of a true land patent the negotiations and dealings between the government and the patentee are at an end when the patent is issued. But in cases like the one here in question the relations between the government and the Indian are not terminated when the trust patent is issued. The United States still holds the legal title, and does not lose its interest in the land until the expiration of the trust period. So long as this relation continues there seems to be no reason why any limitations should be placed upon its power to enforce in the courts any rights which it may have. It should also be considered that, in the case of an ordinary land patent, no one but the government and the patentee are interested. If the patent is set aside, the government becomes again the real owner of the property. In the case of Indian lands, this is not true. Although the legal title is in the government, yet the Indians are in a way

the beneficial owners of the property. It is the duty of the government to distribute the land among the Indians entitled thereto. If the patent in this case is set aside, the government will not become the actual owner of the land; but it will be its duty to allot it to some other Indian. Its power to perform its duty in this respect should not be limited, at least during the trust period. It is also to be observed that by the Act of April 23, 1904, 33 Stat. 297, c. 1489, [10 Fed. Stat. Ann. p. 141], . . . the Secretary of the Interior is given power during the whole of the trust period to cancel the trust patent under certain conditions. It would seem strange, indeed, to limit the power of the courts with reference to such patents to six years, when a similar power is given to an administrative officer for 25 years. The defense based upon this statute of limitations cannot prevail."

### Vol. VI, p. 529, sec. 2478.

Administrative and not legislative power is conferred by this section. *United States v. George*, (1913) 228 U. S. 14, 33 S. Ct. 412, 57 U. S. (L. ed.) 712.

### Vol. VI, p. 533, sec. 1.

**Act constitutional.**—In *Golconda Cattle Co. v. United States*, (C. C. A. 9th Cir. 1912), 201 Fed. 281, the court said: "The United States has a clear right to legislate for the protection of the public lands and to exercise what is called a police power to make the protection effective, even though there may be some inconvenience or slight damage to individual proprietors."

**Purpose of statute.**—To the same effect as the original note, see *United States v. Pacific Live Stock Co.*, (D. C. Nev. 1910), 192 Fed. 443; *United States v. Rindge*, (S. D. Cal. 1913), 208 Fed. 611.

In *United States v. Bernard*, (C. C. A. 9th Cir. 1913), 202 Fed. 728, the court said: "As we construe that act, it was its purpose, first, to render illegal all inclosures of public lands; and, second, to enlarge the equitable jurisdiction of the Circuit Courts in the matter of enjoining such inclosures, and to extend it to injunctions against maintaining fences on lands other than the public lands, with the effect to inclose the public lands; also to confer the same jurisdiction upon the District Courts. Its effect is to give to the courts of the United States jurisdiction in equity over such a case as the case at bar, and it should be held that the jurisdiction is as broad as the ordinary jurisdiction of courts of equity in the classes of cases in which injunctions may issue, and that it comprehends the granting of any appropriate relief ordinarily incidental to such a suit, such as an accounting and the awarding of damages."

**Inclosure erected in good faith.**—Inclosure of any of the public land, except under bona fide claim of title thereto, is made

unlawful by this statute, and it matters not what the intent of the parties may have been in making the inclosure. *Golconda Cattle Co. v. United States*, 201 Fed. (C. C. A. 9th Cir. 1912), 281 affirming (1912) 196 Fed. 240, wherein the court said: "There are some expressions in the opinion of this court in *Potts v. United States*, 114 Fed. 52, 51 C. C. A. 678, which seem to consider the intent with which an inclosure upon the public domain has been made as a material element in proving guilt under a criminal charge brought for violation of section 3 of the act. But the facts of that case and the section of the statute examined make it distinguishable from the question now before us. In *Bircher v. United States*, 169 Fed. 589, 95 C. C. A. 87, this court held that under an indictment under section 1 of the act the test of criminality is 'whether the person who committed the act had, at the time of committing it, color or claim of title, or asserted right under the land laws.' The court said of the act: 'It makes punishable the act of unlawfully inclosing the government lands, and it makes punishable the act of unlawfully maintaining an inclosure, whether the person maintaining the same was the person who erected it, or whether, at the time when it was erected, it was erected with or without authority of law.' In *Homer v. United States*, 185 Fed. 741, 108 C. C. A. 79, the Court of Appeals of the Eighth Circuit reaffirmed its opinion in the *Camfield Case* (*Camfield v. United States*, 167 U. S. 518, 17 Sup. Ct. 864, 42 L. ed. 200), by expressly deciding that one's intent in building a fence is immaterial if in fact it incloses public land.

The court goes on to distinguish carefully what was before the Supreme Court when the *Camfield Case*, supra, was considered on appeal, and concludes that the opinion by Justice Brown, when taken as a whole and construed with relation to the issues before the court, necessarily was that building a fence on one's own land without an intention of including lands of the United States was no defense, if in fact the lands involved were actually inclosed. In *Hanley v. United States*, 186 Fed. 711, 108 C. C. A. 581, the question of necessity for intent seems not to have been directly involved."

**Liberal construction of act.**—The courts will give effect to the broad purpose of the act to prevent unlawful occupancy of the public domain, by avoiding a construction which will narrowly confine the definition of what constitutes an inclosure to cases only where there is literally a complete separation of a tract by means of fences or other barriers in which there are no openings through which settlers and live stock may pass to and fro. The spirit and true intention of the act are inconsistent with such an interpretation; its substance is violated if there be a surrounding of any tract of public land by means of fences or other barriers, or both, which do in a practical way and for all practical purposes withdraw the tract so surrounded from free access by those seeking homes upon the public domain, or from free access by live stock which by acquiescence may graze upon the public range. *Golconda Cattle Co. v. United States*, (C. C. A. 9th Cir. 1912), 201 Fed. 281.

The word "or" preceding the words "an asserted right" should be "nor," and then the statute would be rendered clear. It would

then read "no claim or color of title," etc., "nor an asserted right." *Lillis v. United States*, (C. C. A. 9th Cir. 1911), 190 Fed. 530.

**Common-law rights.**—Irrespective of this act, the United States has all common-law rights of an individual, in respect to depredations committed on the public lands. *United States v. Bernard*, (C. C. A. 9th Cir. 1913), 202 Fed. 728.

**Completeness of inclosure.**—In *United States v. Golconda Cattle Co.*, (D. C. Nev. 1912), 196 Fed. 240, the court said: "There is some authority for the proposition that an incomplete inclosure is not an unlawful inclosure within the meaning of this statute. The act declares, however, that 'all inclosures of any public lands' made without claim or color of title are unlawful, and the maintenance of any such inclosure is forbidden and prohibited. The purpose of Congress was to prohibit those who were without claim or color of title from so fencing such lands as to acquire exclusive use, or prevent the common use thereof. It is not reasonable to think Congress intended it should be lawful to exclude the public from government land up to that point where such exclusion fails to be complete exclusion, and the inclosure does not amount to a complete inclosure. If the statute prohibits complete inclosure only, then a single 20-foot gap in 40 miles of fence surrounding a tract of government land would entirely eliminate any question of unlawfulness, and yet the purpose of the act would probably be as effectually defeated as if there were no gap. I cannot yield my assent to such a construction of this act. It must be interpreted with a view to effect its obvious purpose."

## Vol. VI, p. 536, sec. 4.

**Violation a defense to action for purchase price.**—A paragraph of answer, interposed in a suit on notes, and to foreclose a trust deed, given for the purchase price of the land included in the trust deed, which sets up as a defense that the contract by which

the land was acquired and the consideration for the notes secured by the trust deed was in violation of the penal provisions of this act, states a good defense. *Third Nat. Exch. Bank of Sandusky, Ohio, v. Smith*, (N. M. 1912) 125 Pac. 632.

## Vol. X, p. 358. [Act of March 4, 1904.]

**Construction of statute.**—In construing his act the court in the case of *In re James D. C. Mont*, 1912), 195 Fed. 981, said: "Wherein the statute says affidavits may be 'made before' the Commissioner, it means that they may be executed before him—i. e., subscribed and sworn to by the affiant before him—and means no more. The official duty of the Commissioner is to administer the oath and attach his jurat to the affidavit, and no more. For this service the statutory fee is 25 cents. The affidavit is 'made before' the officer when subscribed and sworn to before him, by whoever drafted, and it is 'made before' the officer when so subscribed and sworn to

before him, though theretofore drafted by the officer. It is no part of the officer's duty to draft affidavits in whole or in part, as by completing the skeleton form thereof with matter of substance. Such drafting of the affidavit may be done by anybody, and needs be done before nobody, and such drafting is no part of the ceremony wherein the affidavit is 'made before' the Commissioner. If the officer actually drafts the affidavit or any portion thereof, it is a service rendered beyond his official duty; and this statute does not forbid making a charge therefor and any charge upon which the parties agree, or, in the absence of agreement, that the service is reasonably

worth. For completing the application part of such combined applications and affidavits, the Commissioner may likewise legally charge and receive compensation, as for services beyond his official duty and in the capacity of employee. United States commissioners are located throughout the states where settlers are entering public lands, and for their convenience. They usually are supplied with information in reference to vacant lands, impart it to and otherwise advise settlers, keep a supply of such printed and prescribed blank applications, affidavits, or forms as the Land Department insists upon, prepare them for applicants, draft necessary affidavits for which there are no prescribed and printed forms and some of which may extend to many pages and require much skill and ability, secure needed copies of records,

transmit the settler's application and money to the proper land office, and well serve the settlers in many ways, often saving them much time, labor, and money. In many places there is no one conveniently at hand to render such services but the Commissioner. These services are rendered as an employee, and not as an officer, and it is not the intent of the statute that they may not be charged and compensated for. With them the statute has naught to do. Let it be noted, however, that the charges for services in the line of official duty and the charges for services in the line of an employee should not be confused, but be made separate and distinct to the settler's understanding and knowledge that the latter may not serve as a cloak for excess in the former and mask a violation of the statute involved."

### Vol. X, p. 363. [*Act of March 3, 1905.*]

This act is cited in *United States v. Minidoka & S. R. Co.*, (C. C. A. 9th cir. 1911) 190 Fed. 491.

### 1909 Supp., p. 547. [*Act of March 10, 1908.*]

A corporation may be punished under this amendment, and this is so though the offense was committed before its passage. *United States v. Pacific Live Stock Co.*, (D. C. Nev. 1910), 192 Fed. 443, wherein the court said: "It is urged that the act as amended is an *ex post facto* law as against the defendant, because it was passed after the commission of the offense charged, because it imposes a punishment where none was imposed by the act under

which the indictment was found, and that the court in fixing the punishment must be guided by the provisions of the act as it stood when the offense was committed; that the judgment must conform strictly to the statute, and impose both fine and imprisonment, otherwise it is void; consequently, as a corporation cannot be imprisoned, no valid judgment can be entered in this case against the defendant. I am unable to yield my assent to this reasoning."

### 1912 Supp., p. 321, sec. 1.

Right of withdrawal prior to this act.—Neither the Secretary of the Interior nor the President, under the expressed or implied powers conferred upon them to administer the land laws, and to make all the needed rules and regulations with reference there-

to, had power to withdraw lands from location, settlement, selection, etc., under the public or mineral land laws of the United States prior to the passage of this act. *United States v. Midwest Oil Co.*, (D. C. Wyo. 1913), 206 Fed. 141.

## PUBLIC OFFICERS.

### Vol. VI, p. 595, sec. 1765.

Special disbursing agent.—Where the facts showed that the appointment of the plaintiff as a "special disbursing agent" was not an appointment to a separate and distinct office from those already held by him, but was merely an order requiring him to perform additional services in the way of disbursing public moneys, it was held that the

payment for the extra services was prohibited by the terms of this section without reference to the fact that the appellant already held offices whose salary or annual compensation amounted to more than two thousand five hundred dollars. *Evans v. United States*, (1913) 226 U. S. 567, 33 S. Ct. 133, 57 U. S. (L. ed.) 353.

Vol. VI, p. 614. [*Act of Feb. 8, 1899.*]

This statute affects only Federal officials. — *Pullman Co. v. Croom*, (1913) 231 U. S. 571, 34 S. Ct. 182.

## RAILROADS.

Vol. VI, p. 752, sec. 1. [*Act of March 2, 1893.*]

The primary object of the statute was to require railroads to equip trains engaged in interstate traffic with air brake appliances, so as to minimize the dangers to the passengers and crews; but obviously it was never intended to require such appliances to be coupled up or connected while cars are being hauled by a switching engine from one yard to another, or shunted out at different points, and are not actually engaged in interstate traffic. *United States v. New York Cent. & H. R. R. Co.*, (W. D. N. Y. 1913) 205 Fed. 428.

**Constitutionality.** — The Safety Appliance Law is not repugnant to the constitution. *Chicago Junction R. Co. v. King*, (1911) 222 U. S. 222, 32 S. Ct. 79, 56 U. S. (L. ed.) 173.

**Switching operations.** — This act does not apply to switching operations. *Erie R. Co. v. United States*, (C. C. A. 3d Cir. 1912) 107 Fed. 287, wherein the court said: "Its purpose was to compel railroads to equip trains in interstate transit with air brakes, thereby contributing not only to the safety of passengers and crews, but saving brakemen, so far as possible, from the dangers incurred in manipulating hand brakes. That it was meant to apply to train transit as contrasted with switching operations is clear, not only from the essentially different character of the operation, but from the wording of the act itself. Railroad men recognize in the terms 'switching crew' and 'train crew' the difference between the two occupations. Switching is recognized as the more dangerous work and as calling for the most agile and expert of men, and in language of the act itself, 'on its line,' 'in moving interstate traffic,' 'to run any train in such traffic,' 'control its speed without requiring brakemen to use the common hand for that purpose,' are all fittingly used in describing a train on its line proper running in such traffic and within such control by its engineer, rather than to describe the sorting and switching work carried on in a terminal switching yard. Indeed, a court in its observation of the practical operation of railroads takes judicial notice of the fact that the transportation work of a great modern railway covers two distinct fields of operation—one, the hauling of its trains in transit; and the other,

the assemblage and distribution of the cars into such trains at terminal points."

But in *La Mere v. Railway Transfer Co.*, (Minn. 1914) 145 N. W. 1068, it was held that the act applied to an engine and 15 cars loaded and switched in the yards of the defendant transfer railway company, and placed upon a track set apart for the use of a particular road, and thereafter moved by the engine and crew some six or seven blocks, a distance of something like a half mile, across a number of switches, and across and along the two parallel main tracks of an independent railroad, and into the yards of the company to which the cars belonged.

Whether the Safety Appliance Act applies to Porto Rico was raised but not decided in *American R. Co. of Porto Rico v. Birch*, (1912) 224 U. S. 547, 32 S. Ct. 603, 56 U. S. (L. ed.) 879.

**Train.** — In *United States v. Grand Trunk Ry. Co. of Canada*, (W. D. N. Y. 1913) 203 Fed. 775, the court said: "In Webster's Dictionary the word 'train' is defined as a 'connected line of cars or carriages on a railroad.' In *Detroit City Ry. v. Mills*, (1891) 85 Mich. 634, 48 N. W. 1007, it is stated that 'a train is a continuous or connected line of cars or carriages on a railroad.' In *Dacey v. Old Colony R. Co.*, (1891) 153 Mass. 112, 26 N. E. 437, and in *Carson v. Boston & A. R. Co.*, (1895) 164 Mass. 523, 42 N. E. 112, a train is defined to be 'a locomotive and one or more cars coupled together and run upon a railroad.' These definitions induce the belief that Congress, in enacting the Safety Appliance Act, used the word 'train' in the ordinary and not the technical sense, regardless of the varying rules and practices of carriers. The Supreme Court of the United States in *Johnson v. Southern Pac. Co.*, (1904) 196 U. S. 1, 25 S. Ct. 158, 49 U. S. (L. ed.) 363, supports the view that, even though the statute was in derogation of the common law, it should not be so strictly construed as to defeat the purpose of Congress, and it was there held that locomotive engines are included in the act under the words 'any car.' By a parity of reasoning the words 'any train' are believed to clearly include all trains having cars coupled together and locomotives drawing them, irrespective of whether a caboose is attached or markers displayed."

**"Brakemen."**—Congress, in requiring a train to be "so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose," employed the word "brakemen" generically as including any and all men, whether specifically known as "conductors" or "brakemen" or "yard foremen" or "switchmen," whose duties in connection with the train would oblige them to use the common hand brakes in the absence of air brakes, and intended that the engineer should be able to "control the speed" and bring quickly to a standstill a train moving slowly through a congested region of drawbridges and railroad crossings, as well as a train moving rapidly on a single clear track in the country. *Atchison, T. & S. F. R. Co. v. United States*, (C. C. A. 7th Cir. 1912) 198 Fed. 637.

## Vol. VI, p. 753, sec. 2.

**What cars included—In general.**—"The terms of this act are such that its application depends, first, upon the carrier being engaged in interstate commerce by railroad, and, second, upon the use of the car in moving interstate traffic. It did not embrace all cars used on the line of such a carrier, but only such as were used in interstate commerce. *Southern R. Co. v. United States*, (1911) 222 U. S. 20, 25, 32 S. Ct. 2, 56 U. S. (L. ed.) 72. The act was amended March 2, 1903, 32 Stat. 943, c. 976, [10 Fed. Stat. Annot. p. 375] so as to include 'all cars used on any railroad engaged in interstate commerce.' *Brinkmeier v. Missouri Pac. R. Co.*, (1912) 224 U. S. 268, 32 S. Ct. 412, 56 U. S. (L. ed.) 758.

"That the federal act includes not only cars when in use in interstate commerce, but also cars commonly used on railways so engaged, even though the car is at the particular time loaded at one point in a state, and delivered at another point in the same state, or when unloaded, or when transported in, or as part of a train engaged in, or on a railroad doing an interstate business, and the use of defective cars forbidden, is no longer an open question." *Southern Ry. Co. v. Railroad Commission*, (Ind. 1913) 100 N. E. 337.

A defective car not excluded from commercial use and from connection with other vehicles commercially employed must be equipped with automatic couplers. *Southern Ry. Co. v. Snyder*, (C. C. A. 6th Cir. 1913) 205 Fed. 868.

This act applies to a defective car or engine used in moving a box car from one switch track to another in defendant's yards, when the purpose of moving such car is to load it with merchandise for shipment into another state. *Breske v. Minneapolis & St. L. R. Co.*, (1911) 115 Minn. 386, 132 N. W. 337, wherein the court said: "Congress did not intend the act to apply to defective cars which, though standing on the tracks of rail-

**Negligence as a material fact.**—The failure of a railroad company to have the air brakes in operation in an interstate movement makes it liable to an employee injured proximately because of such failure, regardless of its actual negligence. *La Mer v. Railway Transfer Co.*, (Minn. 1914) 145 N. W. 1068.

The circumstance that a state statute covers acts of negligence of railroad companies in respect to their cars, roadbed, machinery, etc., subjects dealt with by the Safety Appliance Act, does not afford any substantial ground for the contention that the statute is involved in so far as it imposed liability for an injury to an employee arising from the negligence of a co-employee. *Missouri Pac. R. Co. v. Castle*, (1912) 224 U. S. 541, 32 S. Ct. 606, 56 U. S. (L. ed.) 875.

roads engaged in interstate commerce, were not being used in such commerce. When a car used to carry an interstate shipment reaches its destination and is unloaded, it ordinarily thereupon ceases to be 'used' in moving interstate commerce. Where, however, after an interstate carriage, the car is to return empty to the state from which it came, it is considered as within the act throughout its trip, including the time between its unloading and the beginning of the return trip. But if, after discharging its interstate cargo, the car is used in intrastate traffic, or if it remains idle in the yards or shops, awaiting repairs, or awaiting a future use for state or interstate business as may afterwards be determined, it is not while so idle, 'used in moving interstate commerce.' It is also the law that, though the defective car is not itself being used in interstate business, yet if it is being hauled in a train which contains cars that are being used in moving interstate commerce, the Safety Appliance Act applies."

**Car on private switch track.**—This section applies to cars on a private switch track where it appears that the railroad is permitted to use such track in connection with its interstate business. *Gray v. Louisville & N. R. Co.*, (E. D. Tenn. 1912) 197 Fed. 874.

**Movement of car for repairs.**—Where a railroad moves a car for repairs in connection with other cars for commercial use it is subject to the provisions of this act. *Gray v. Louisville & N. R. Co.*, (E. D. Tenn. 1912) 197 Fed. 874.

A "car" does not include the tender of a locomotive and an automatic coupler between them is not required. *Pennell v. Philadelphia & R. Ry. Co.*, (1914) 231 U. S. 675, 34 S. Ct. 220, affirming *Pennell v. Philadelphia & R. Ry. Co.*, (C. C. A. 3d Cir. 1913) 203 Fed. 681. In the latter case the court said: "The union of engine and tender is in a large measure a permanent one, and the act of joining the two is of such rare occurrence,

and is so alien to transportation, and an accident resulting from the joining of such parts so unheard of, that Congress could not have had it in view to require an automatic coupler at that point."

**Each car must have couplers** which can be uncoupled without requiring men to go between the cars. If these requirements are not complied with in the case of a given car, the noncompliance cannot be excused by saying that some other car coupled to it at the time had couplers which did answer the requirements of the act. *Central Vermont Ry. Co. v. United States*, (C. C. A. 1st Cir. 1913) 205 Fed. 40.

**Coupling and uncoupling included.**—To the same effect as the original note, see *Montgomery v. Carolina & N. W. R. Co.*, (N. C. 1913) 80 S. E. 83.

The act does not require the installation of a device for disconnecting the air hose, there being a substantial distinction between this and uncoupling cars. *Yost v. Union Pac. R. Co.*, (1912) 245 Mo. 219, 149 S. W. 577.

**Kind of coupler required.**—Any standard coupler which will couple automatically by impact, and which can be uncoupled without requiring men to go between the ends of cars, will satisfy the statutes. *Devine v. Chicago & C. R. Co.*, (1913) 259 Ill. 449, 102 N. E. 803.

In *Morris v. St. Louis Southwestern Ry. Co.*, (Tex. 1913) 158 S. W. 1055, wherein it appeared that engine and car were equipped with couplers which, notwithstanding a defect in the one on the car, if properly adjusted for the purpose would couple automatically by impact, and did not appear that in order to so adjust the couplers it was necessary for some one to go between the ends of the engine and car, it was held that a directed verdict for the defendant was not error. The court said: "For aught appearing in the record to the contrary, the couplers could have been so adjusted by the manipulation of rods or levers, or otherwise, by a person standing entirely from between the ends of the engine and car. If they could have been so adjusted, it is clear appellee had not violated either of the statutes, and that appellant was not entitled to recover on the ground that it had. The burden being on appellant to prove such a violation, and he having failed to do so, the trial court did not err in peremptorily instructing the jury to find for appellee."

**Coupler out of repair.**—To the same effect as the original note, see *Central Vermont Ry. Co. v. United States*, (C. C. A. 1st Cir. 1913) 205 Fed. 40.

**A defective drawbar on the front of a locomotive** violates the provisions of the act. *Chicago, M. & P. S. Ry. Co. v. United States*, (C. C. A. 9th Cir. 1912) 196 Fed. 882, wherein the court said: "But it is contended that a verdict should have been directed for the plaintiff in error upon the proof that, after the unsuccessful attempt to use the front end of the locomotive for the transfer of cars, the locomotive was sent to the roundhouse and

reversed, and thereafter the other end only was used. We do not see how that fact mended the situation in any degree whatever. The defective drawbar still remained on the front end of the engine, and the defective engine remained in use. It may be true that no reasonably prudent railroad employé would have attempted to couple to the front end of the locomotive with knowledge of its condition, but that fact does not avoid the violation of the statute. The defective drawbar remained a danger and a menace, and when all is said, the fact remains that its use in that condition was prohibited. We are referred to *Wabash R. Co. v. United States*, 172 Fed. 864, 97 C. C. A. 284, as authority for the proposition that a locomotive engine used in interstate commerce need not necessarily have an automatic coupler at both ends. The court in that case held there was no violation of the Safety Appliance Act in the use of an engine which had originally been equipped with automatic couplers at the A end and the B end, but thereafter the lock chain had been disconnected and the knuckle removed from the coupler at the B end, leaving that coupler in such a condition that no other car could be coupled thereto or uncoupled therefrom, and where it appeared that the coupler at the A end was the only one used at the time in question in moving interstate traffic. While with all respect for that court we are inclined to doubt the correctness of that ruling, we find it sufficient for the present case to point to the difference between that case and this. There the coupler had been disconnected and the knuckle taken out 'in pursuance of a purpose that it should not be used.' In the case at bar the plaintiff in error was found using a defective coupler at one end of the engine, and thereafter, having reversed the engine, was found using the other end for the purpose of transferring cars. Nothing was shown indicative of a purpose to refrain from using both ends of the locomotive for coupling, and no portion of the defective coupling device was removed. That device remained, as it was before, a trap to the unwary. The law may not require that a locomotive shall be equipped with couplers at both ends, but it does require that, if a locomotive is so equipped, the couplers shall be such as to comply with the Safety Appliance Act."

**Liability of railroad company.**—*In general.*—The degree of diligence required by the statute is of the highest order, and the duty thus imposed is absolute and unconditional. Therefore any failure on the part of a railroad company to comply with its requirements must necessarily subject the railroad company to the penalty imposed. *Norfolk & W. Ry. Co. v. United States*, (C. C. A. 4th Cir. 1911) 191 Fed. 302.

The federal Safety Appliance Act imposes upon common carriers engaged in moving interstate traffic by railroad the absolute duty to equip their cars with couplers "that will at all times, when operated in an ordinary and reasonable manner," couple automatical-

ly on impact. *Willett v. Illinois Cent. R. Co.*, (1913) 122 Minn. 513, 142 N. W. 883.

This act imposes an absolute duty upon a railroad, on a highway of interstate commerce, to have couplers in such condition at all times that, when operated in an ordinary and reasonable manner, the cars can be uncoupled without requiring the operator to go between the cars. In this case the operator, in attempting to lift the pin to open a coupler, "jerked on it and pulled up at it" three or four times, but it would not uncouple. Another brakeman testified that he soon thereafter tried to lift the pin, but could not. Defendant's witnesses admitted that it worked stiff. This was sufficient evidence to sustain a finding of the jury that the coupler was not such as was required by law. *Popplar v. Minneapolis, St. P. & S. S. M. R. Co.*, (1913) 121 Minn. 413, 141 N. W. 798.

If the failure to have the locomotive equipped with an automatic coupler such as is required by the statutes does no more than to bring about a condition which makes the injury possible by the intervention of some other disconnected cause, then the negligence complained of is not the proximate cause of the injury. *Devine v. Chicago & C. R. R. Co.*, (1913) 259 Ill. 449, 102 N. E. 803.

*What employees protected.*—In *Pennell v. Philadelphia & R. Ry. Co.*, (1914) 231 U. S. 675, 34 S. Ct. 220, the court said: "It is still an open question whether the language of the act should be so applied as to protect all employees, of whatever class, and to make the mere absence of an automatic coupler, if accident and injury result to an employee, enough for liability."

*Car or locomotive actually engaged in interstate commerce.*—It is not necessary, to create a liability under the federal statute, that the car or locomotive in question should be actually engaged in interstate commerce at the precise time when an injury occurs. *Devine v. Chicago & C. R. R. Co.*, (1913) 259 Ill. 449, 102 N. E. 803.

## Vol. VI, p. 755, sec. 4.

*Effect of section.*—This section makes it the absolute duty of the railway company to have the car in use equipped with secure handholds, regardless of the question of reasonable care to have and keep them secure, and where the injury to the employee hap-

*Repeated and unsuccessful efforts to make the coupler lever operate* are some evidence that it was not in the condition required by the statute. *Nicholas v. Chesapeake & O. Ry. Co.*, (C. C. A. 6th Cir. 1912) 195 Fed. 913.

*The failure of a coupler to work at any time* sustains a charge of negligence against the carrier, no matter how slight the pull of the coupling lever. *Chicago, R. I. & P. R. Co. v. Brown*, (1913) 229 U. S. 317, 33 S. Ct. 840, 57 U. S. (L. ed.) 1204.

*A coupler which fails to work when an honest and reasonable effort is made to operate it* under circumstances and in the manner it is designed to be operated does not comply with the requirements of the act referred to. *Burho v. Minneapolis & St. L. R. Co.*, (1913) 121 Minn. 326, 141 N. W. 300.

*Sufficiency of declaration.*—See *Grand Trunk Western Ry. Co. v. Lindsay*, (C. C. A. 7th Cir. 1912) 201 Fed. 836.

*Duty of jury.*—In an action against a railroad engaged in interstate commerce to recover for injuries to plaintiff, its employe, while attempting to open a knuckle of an automatic coupler on a car then used in interstate commerce, it is ordinarily for the jury, and not the court, to determine whether or not the coupler was such as is required by the federal Safety Appliance Act. *Burho v. Minneapolis & St. L. R. Co.*, (1913) 121 Minn. 326, 141 N. W. 300.

In *Willett v. Illinois Cent. R. Co.*, (1913) 122 Minn. 513, 142 N. W. 883, it appeared that couplings had been made daily for more than a year on a certain curve without any failure to couple automatically on impact. At the time of the accident, the drawbars of the cars to be coupled had several inches of play or lateral motion, and were so far out of line that the cars would not couple automatically on impact on this curve. It was held that the court could not say as a matter of law that the couplers were not defective within the meaning of the Safety Appliance Act nor that the coupling was attempted at an improper place, and that these questions were properly submitted to the jury.

pens from an insecure handhold, the employer is denied the defense of assumed risk and contributory negligence. *Galveston, H. & S. A. Ry. Co. v. Kurtz*, (Tex. 1912) 147 S. W. 658.

## Vol. VI, p. 755, sec. 5.

"Freight cars" as used in the section includes locomotives. *Chicago, M. & P. S. Ry. Co. v. United States*, (C. C. A. 9th Cir. 1912) 196 Fed. 882, wherein the court said: "The plaintiff in error contends that this was error, for the reason that locomotives are not included in the designation 'freight cars' as used in section 5 of the act. It is admit-

ted that in *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. ed. 363, in construing section 2 of the act, which prohibits the use of cars in interstate traffic unless equipped with automatic couplers, it was held that locomotives are included in the term 'cars,' but it is argued that 'cars' is a general term, and may well include all



kinds of rolling stock, whereas 'freight cars' is a specific designation of certain kinds of cars, and its meaning is not to be extended beyond the precise terms used. In the *Johnson Case* the court said: 'Tested by context, subject-matter and object "any car" meant all kinds of cars running on the rails, including locomotives, and this fact is supported by the dictionary definitions and by many judicial decisions, some of them having been rendered in construction of this act.' We think, in view of the language of the act and its purpose, it was intended to include within the term 'freight cars' all cars used in the movement of freight, whether freight was actually stored in them or they were used for the purpose of moving the train, and that there is included therein the locomotive at the head of the train and the caboose at the other end. The evils to be remedied and the dangers to be averted were just as great and demanded legislation as much in the case of a locomotive as in the case of any car in the train. But all doubt is removed by Act March 2, 1903, c. 978, 32 Stat. 943, [10 Fed. Stat. Ann. 375], which amended the prior act, and enacted that its provisions and requirements relating to automatic couplers and heights of drawbars, etc., 'shall be held to apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce.' In *Southern Railway v. United States*, 222 U. S. 20, the court said that the effect of this

amendment was to enlarge the scope of the prior act. Said the court: 'For these reasons it must be held that the original act, as enlarged by the amendatory one, is intended to embrace all locomotives, cars and similar vehicles used on any railroad which is a highway of interstate commerce.'

**Noncompliance with standard height.**—In *Atchison, T. & S. F. R. Co. v. United States*, (C. C. A. 7th Cir. 1912) 198 Fed. 637, it appeared that in a train used in interstate traffic the defendant had a car whose drawbar was less than the standard height above the rails. This condition was observed by the government inspector 15 minutes before the train left the yard. The court said: "Violation of the statute is questioned on the ground that the condition resulted, not from any defect in the drawbar itself, or in its attachment to the frame of the car, but from the breaking of a king pin, whereby the frame to which the drawbar remained securely attached was lowered. But the statute (section 5) provides that 'no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for.' So it is immaterial whether the lowering was caused by the sagging of the drawbar from the frame or the sagging of the entire frame; and the resulting condition of noncompliance with the standard height would be as observable in the one case as in the other."

## Vol. VI, p. 756, sec. 6.

The words "on its lines" does not mean that the carrier must own the tracks. It is sufficient that the carrier is in lawful use of the tracks for the conduct of its interstate

traffic under a contract with the corporation owning them. *Philadelphia & R. Ry. Co. v. United States*, (C. C. A. 3d. Cir. 1911) 191 Fed. 1.

## Vol. VI, p. 756, sec. 8.

**Assumption of risk** is in express terms abolished by this section. *Montgomery v. Carolina & N. W. R. Co.*, (N. C. 1913) 80 S. E. 83. It follows that it is not a defense when the action is based upon the Safety Appliance Act. *La Mere v. Railway Transfer Co.*, (Minn. 1914) 145 N. W. 1068. And it is unnecessary to instruct on the subject of assumed risk. *Atlantic Coast Line R. Co. v. Whitney*, (Fla. 1913) 61 So. 179.

**Contributory negligence.**—The safety appliance statute does not take away contributory negligence as a complete defense. *Southern Ry. Co. v. Snyder*, (C. C. A. 6th Cir. 1913) 205 Fed. 868. Compare *La Mere v. Railway Transfer Co.*, (Minn. 1914) 145 N. W. 1068, wherein it was held that contributory negligence is not a defense to an action based upon the Safety Appliance Act.

## Vol. X, p. 375, sec. 1.

The exception from the operation of this act of cars which are "used upon street railways" includes only cars used solely on street railways and does not apply to interurban cars although they are run over the tracks of a street railway proper, or to the cars of a street railway that are also used on an interurban line. *United States v. Spokane & I. E. R. Co.* (E. D. Wash. 1912) 206 Fed. 988.

This amendment does not make it necessary for a locomotive and tender to have an automatic coupler between them. *Pennell v. Philadelphia & R. Ry. Co.*, (1914) 231 U. S. 675, 34 S. Ct. 220.

The act as amended applies to Porto Rico. — *American R. Co. of Porto Rico v. Didricksen* (1913) 227 U. S. 145, 33 S. Ct. 224, 57 U. S. (L. ed.) 456, wherein the court said: "Though for all purposes the Island

of Porto Rico has not been fully incorporated into the United States, it obviously is not foreign territory, nor its citizens aliens. *Gonzales v. Williams*, (1904) 192 U. S. 1, 15. Its organization is in most essentials that of those political entities known as territories. It has a territorial legislature

and a territorial system of courts. By the fourteenth section of the Foraker Act of April 12, 1900, 31 Stat. 77, 80, c. 191, 'the statute laws of the United States not locally inapplicable . . . have the same force and effect in Porto Rico as in the United States, except the revenue law.'

### 1909 Supp., p. 581, sec. 1.

The constitutionality of this act has been conclusively settled. *United States v. Kansas City Southern Ry. Co.*; (W. D. Ark. 1911) 189 Fed. 471.

**Transportation when interstate commerce.**—In *Northern Pac. R. Co. v. State of Washington*, (1912) 222 U. S. 370, 32 S. Ct. 160, 56 U. S. (L. ed.) 237, the court, on the question whether the facts in the case showed that the transportation was interstate commerce, said: "The train, although moving from one point to another in the

state of Washington, was hauling merchandise from points outside of the state destined to points within the state and from points within the state to points in British Columbia, as well as in carrying merchandise which had originated outside of the state and was in transit through the state to a foreign destination. This transportation was interstate commerce, and the train was an interstate train, despite the fact that it may also have been carrying some local freight."

### 1909 Supp., p. 582, sec. 2.

"The purpose of this legislation is the protection of the lives of employes of railroad companies, and also the lives and property intrusted to the railroads as common carriers. It recognizes that there is a limit to human endurance, and that hours of rest and recreation are needful to the health and efficiency of men engaged in the hazardous work of railroading. The benefit it is intended to confer is to better enable employes to serve their employers, and to promote the needs of commerce, and also to promote the safety of travelers upon railroads. The limiting of hours of labor of those who are in control of dangerous agencies, it is believed, will relieve the employes of overfatigue and resulting indifference, and thus avert accidents which lead to injuries and destruction of life and property." *United States v. Yazoo & M. V. R. Co.*, (W. D. Tenn. 1913) 203 Fed. 159.

Experience has shown that many serious accidents to trains causing great loss of life or permanent disabilities to passengers, as well as employees, are often due solely to the fact that members of the train crew had become exhausted by reason of being required or permitted to remain on duty for too long a period, and therefore unable to give that care and attention necessary for the safety of the train. To prevent accidents from such causes the Congress, in its wisdom, enacted this statute prohibiting railroads not only from requiring any employee subject to the act to remain on duty for a longer period than sixteen consecutive hours, but also from "permitting" it. *United States v. Kansas City Southern Ry. Co.*, (W. D. Ark. 1911) 189 Fed. 471.

Congress had in view in the passage of the act the safety of both those traveling on and those engaged in operating interstate railway trains, to be accomplished by affording protection against the uncertain working of the minds of its employees overtaxed by long-continued service, loss of sleep, etc. In so providing it classified the offices in which telegraphic operators engaged in handling train orders worked as day offices only and those open for the transaction of such business during both the day and night. As to the latter class, it limited the hours of service of such operators to 9 out of 24. As to the former class, where the office was open for business only during the daytime, it limited the hours of service of such operators to 13, unless in case of emergency the period of service should be extended to 17 hours without violating the statute. Such appears to be the reasonable construction of the act and the one given, at least in principle, from those courts in which it has received consideration. *United States v. Missouri, K. & T. Ry. Co.*, (D. C. Kan. 1913) 208 Fed. 957.

**Liberal construction.**—The act being remedial, for the purpose of preventing accidents to trains and consequent injuries to passengers and employees, it is the duty of the courts to construe it liberally in order to accomplish the purpose of its enactment. *United States v. Kansas City Southern Ry. Co.*, (W. D. Ark. 1911) 189 Fed. 471. See to the same effect *United States v. Great Northern Ry. Co.*, (N. D. Idaho 1913) 206 Fed. 838; *United States v. St. Louis, Southwestern Ry. Co. of Texas*, (W. D. Tex. 1911) 189 Fed. 954.

### 1909 Supp., p. 583, sec. 3.

"This law was passed to meet a condition of danger incidental to the working of rail-

road employes so excessively as to impair their strength and alertness. It is highly

remedial, and the public, no less than the employes themselves, is vitally interested in its enforcement. For this reason, although penal in the aspect of a penalty provided for its violation, the law should be liberally construed in order that its purposes may be effected." *United States v. Kansas City Southern Ry. Co.*, (C. C. A. 8th Cir. 1913) 202 Fed. 828.

In *United States v. Chicago, M. & P. S. R. Co.*, (E. D. Wash. 1912) 197 Fed. 624, the court said: "While the statute is penal in its nature, it is in some aspects remedial and should be so construed as to promote the apparent policy and object of the legislation, and not entirely defeat its purpose."

A state statute which attempts to regulate the hours of service of persons engaged in interstate commerce is in conflict with this section and is therefore void. *State v. Wabash R. Co.*, (1911) 238 Mo. 21, 141 S. W. 646.

"Common carrier" as including railroad in hands of receiver.—This section is applicable to railroads in the hands of a receiver. *United States v. Ramsey*, (C. C. A. 8th Cir. 1912) 197 Fed. 144, wherein the court said: "Congress, in passing the act in question, must have intended to use the term 'common carrier' in the usual and ordinary acceptation of the term, to wit, as one engaged in the business of carrying persons and property from one place to another, for compensation, for all who should apply to have their goods transported or to be transported in person. The mere fact that the statute in question is a penal one does not require that the words 'common carrier' should receive a restricted interpretation. . . . It seems to us clear that the term 'common carrier' had a well-defined meaning, and that the receiver of a railroad came within the designation 'common carrier'; that Congress, in using the term 'common carrier,' used it in the sense in which such words are generally meant and understood; that the object and purpose of the statute would be entirely defeated in all cases in which a railroad or other common carrier is operated by a receiver, if the words 'common carrier' should be given a more restricted meaning than generally understood. It seems clear that a receiver, in the operation of a railroad, is a common carrier within the meaning of the statute; and though he is not personally liable, he is liable in his official capacity, and the payment of any judgment obtained would be subject to the order of the court appointing the receiver in the exercise of its equitable powers."

The expression "on duty," as used in this section, means "to be actually engaged in work or to be charged with present responsibility for such should the occasion for it arise." *United States v. Denver & R. G. R. Co.*, (D. C. N. M. 1912) 197 Fed. 629.

The classification of telegraph operators is not arbitrary, thereby rendering the act void, since it discriminates between operators engaged in stations that are "continuously operated night and day" and those employed

in stations that are "continuously operated only during the daytime." *United States v. St. Louis Southwestern Ry. Co. of Texas*, (W. D. Tex. 1911) 189 Fed. 954.

The word "orders" as used in the section is not confined to what the railroads technically call "train orders," that is, such orders as emanate from the train dispatcher's office, and are reduced to writing and handed to the conductor and engineer of a train. An order affecting train movements may be given by a wave of the hand or the flash of a lantern, and its disobedience might cause as dire consequences as the failure to obey a written message. Necessarily an order affecting train movements can be given by any subordinate having to do with trains and switches, such as a towerman. *United States v. Houston Belt & Terminal Ry. Co.*, (C. C. A. 5th Cir. 1913) 205 Fed. 344.

An office is "continuously operated night and day" although it is closed each day of twenty-four hours four times for the period of one hour. *United States v. St. Louis Southwestern Ry. Co. of Texas*, (W. D. Tex. 1911) 189 Fed. 954.

Employees included in statute.—An employee to be within the protection of the statute must be engaged in work which has some connection, though it may be remote, with the safety of the train, or with the safety of persons who might be injured by the movement of the train. *Schweig v. Chicago, M. & St. P. Ry. Co.*, (D. C. Minn. 1913) 205 Fed. 96.

Employees on intrastate trains hauling interstate freight.—Within this rule, employees of a railway company, engaged in hauling freight, from some intermediate point on the railway line to another point in the same state where it is taken up by the regular trains for interstate shipment, are "employed in interstate commerce," and the railway company itself is engaged in interstate commerce. *United States v. Chicago, M. & P. S. R. Co.*, (E. D. Wash. 1912) 197 Fed. 624.

Part of duty not connected with movement of train.—Under a proper construction of the act, locomotive firemen, engineers, conductors, and other members of train crews, being "employés" as that term is defined, cannot be permitted to be on duty for more than 16 consecutive hours, regardless of the question whether such duty consists in whole or only in part of work directly connected with the movement of trains. Thus where a locomotive fireman at the end of a run is required to act as watchman on his engine so that the combined time of his work as fireman and watchman exceeds the sixteen hours, the statute is violated. *United States v. Great Northern Ry. Co.*, (N. D. Idaho 1913) 206 Fed. 838; *United States v. Missouri Pac. Ry. Co.*, (D. C. Kan. 1913) 206 Fed. 847.

Deductions allowed in computing sixteen hour period.—The time allowed for meals should not be deducted in computing the sixteen hour period.—*United States v. Chicago, M. & P. S. R. Co.*, (E. D. Wash. 1912)

197 Fed. 624, wherein the court said: "The statute uses the terms, 'sixteen consecutive hours,' and 'continuously on duty'; and while, literally speaking, 'consecutive' means succeeding one another in regular order, with no interval or break, and the word 'continuously' means substantially the same, yet it is manifest that no such strict or literal meaning of these expressions was intended. The purpose of the statute, as indicated by its title, is to promote the safety of employes and travelers upon railroads, by limiting the hours of labor of those who are in control of dangerous agencies, lest by excessive periods of duty they become fatigued and indifferent, and cause accidents leading to injuries and destruction of life. . . . I cannot believe that by the expressions, 'sixteen consecutive hours,' and 'continuously on duty,' Congress intended to include only those who are employed for 16 hours, without interruption for meals or otherwise. Congress was no doubt mindful of the fact that no laboring man works for 16 consecutive hours, or is on duty continuously for that period, without food or drink, except in cases of dire necessity, and the act should not be so restricted. It may be said that trainmen are on duty and subject to call during meal hours, but this is only because such is the will of their employers. If a railroad company may relieve its employes from service during meal hours, it may also relieve them from service every time a freight train is tied up on a side track waiting for another train, and thus defeat the very object the legislature had in view."

*A lay-off while on a trip* for an indefinite period waiting the arrival of a delayed engine is not to be deducted in computing the sixteen hour period. *United States v. Chicago, M. & P. S. R. Co.*, (E. D. Wash. 1912) 197 Fed. 624, wherein the court said: "If this crew had been laid off for a definite period of three hours at a terminal or other place where the crew might rest, such lay-off would no doubt break the continuity of the service. But such was not the case here. The crew was laid off for an indefinite period, awaiting the arrival of a delayed engine. They did not know at what moment the train might move, and had no place to go except to a bunk house, or remain in the caboose. They chose the latter course. This, in my opinion, was a trifling interruption. The facts in this case demonstrate the absurdity of the company's claim. According to its view of the law, it may work its employes for the full period of 16 hours, allow them two hours and forty-five minutes off for their meals, lay them off for 3 hours at a siding in the mountains to wait for a helper, and thus leave them two hours and 15 minutes for sleep and recreation. Such a policy would illy protect the safety of either the employes or the traveling public."

*Train held at siding waiting for another train.*—Where a train is held upon a siding at a station for 55 minutes to allow another train to pass, the exact time of arrival of the

latter train being uncertain, and the duty existing upon the crew of the former train to resume the journey immediately upon such arrival, such crew is "on duty" during the period of waiting and such interval in the operation of the train does not constitute a break in the "sixteen consecutive hours" necessary to a violation of this act. This principle is not interfered with by the fact that during such period of waiting the switch is locked, the headlight of the waiting train is extinguished, its conductor is reading, and its brakemen are asleep. *United States v. Denver & R. G. R. Co.*, (D. C. N. M. 1912) 197 Fed. 629.

*The time between reporting for duty and starting on a run* should be counted in computing the sixteen hours period of duty, notwithstanding the pay of the employee begins only at the starting time. *United States v. Denver & R. G. R. Co.*, (D. C. N. M. 1912) 197 Fed. 629, wherein the court said: "It is doubtful if any definition of the words 'on duty' can be clearer than the words themselves. Manifestly, however, they mean to be either actually engaged in work or to be charged with present responsibility for such should occasion for it arise. Tested by this definition, the crew during the preparatory 15 minutes was clearly on duty. They were at the starting point pursuant to a rule of the defendant company requiring them to be there. They were engaged in work necessary to the trip. The conductor, according to the proofs, was getting his bills and orders, the brakemen were looking over the train to detect defective cars and equipment and in going to the roundhouse to bring the engines and to couple them to the train. With all of these unperformed the train could not have moved. With some unperformed the train would probably have moved only to destruction for lack of orders or of safe equipment. These duties were quite as important as those after the train started, and, contrary to what counsel contend, impress us as constituting quite as great a strain upon the nervous and physical energies as arose after the train was actually in motion. We believe such to have been as much in the congressional mind in declaring what length of duty shall call for rest as those connected with a train actually moving. Nor does it detract from this view that the men were paid nothing for this preliminary work. The defendant can hardly be heard to contend this in the face of its rule requiring this very service. Presumably, however, in fixing a rate of compensation beginning in terms only with the starting time, the employes and the railroad took into consideration the rule just mentioned, so that after all this preliminary work was not really done gratuitously, but was merged into a scale of wages mutually satisfactory to all concerned. At any rate, labor does not cease to be such because not paid for, nor does duty cease to exist because performed without compensation in connection with duty for which there was compensation."

The effect of the violation of this act is not to create an unconditional liability for all accidents happening during the period beyond the statutory time irrespective of proof showing a connection between the accident and the working over time; in other words the carrier is not an insurer of the safety of all his employees while working beyond the statutory time. *St. Louis, I. M. & S. R. Co. v. McWhirter*, (1913) 229 U. S. 265, 33 S. Ct. 858, 57 U. S. (L. ed.) 1179, *reversing* (1911) 145 Ky. 427, 140 S. W. 672, wherein the court said: "We are unable to discover in the text of the statute any support for the conclusion that it was the purpose of Congress in adopting it to subject carriers to the extreme liability of insurers which the view taken of the act by the court below imposes. We say this because although the act carefully provides punishment for a violation of its provisions, nowhere does it intimate that there was a purpose to subject the carrier who allowed its employees to work beyond the statutory time to liability for all accidents happening during such period without reference to whether the accident was attributable to the act of working over time. And we think that where no such liability is expressed in the statute it cannot be supplied by implication. It requires no reasoning to demonstrate that the general rule is that where negligence is charged, to justify a recovery it must be shown that the alleged negligence was the proximate cause of the damage. The character of evidence necessary to prove such causation we need not point out, as it must depend upon the circumstances of each case. Conceding that a case could be presented where the mere proof of permitting work beyond the statutory time and the facts and circumstances connected with an accident might be of such character as to justify not only the conclusion of negligence, but also the inference of proximate cause, such concession can be of no avail here, since the instruction of the trial court and the ruling affirming that instruction were based upon the theory that the mere act of negligence in permitting an employee to work beyond the statutory period created liability irrespective of the connection between the alleged negligence and the injury complained of."

But in *St. Louis, I. M. & S. R. Co. v. McWhirter*, (1911) 145 Ky. 427, 140 S. W. 672, it was held that a carrier is liable for the death of a train employee while engaged in its service, in violation of the restriction contained in this section, the violation of the statutory duty being negligence per se.

Necessity that act of carrier involve turpitude or moral wrong.—In *United States v. Kansas City Southern Ry. Co.*, (C. C. A. 8th Cir. 1913) 202 Fed. 828, the court said: "The act under consideration does not employ the words 'knowingly' and 'willfully.' The carrier is made liable if it requires or permits any employee to be or remain on duty in violation of stated provisions. This case then falls within that class where purposely doing a thing prohibited by stat-

ute may amount to an offense, although the act does not involve turpitude or moral wrong. *Armour Packing Co. v. United States*, (C. C. A. 8th Cir. 1907) 153 Fed. 1, 14 L.R.A.(N.S.) 400, (1908) 209 U. S. 56, 28 S. Ct. 428, 52 U. S. (L. ed.) 681; *Chicago, St. P., M. & O. Ry. Co. v. United States*, (C. C. A. 8th Cir. 1908) 162 Fed. 835. By the terms of the proviso the carrier is excused 'where the delay is the result of a cause not known . . . at the time said employee left a terminal, and which could not have been foreseen.' Not merely which was not foreseen, but which *could not have been foreseen*. The phrase 'by the exercise of due diligence and foresight' is not present. Counsel argue that by leaving out this phrase Congress intended to limit the liability of the carrier; that it meant to imply that what was not actually foreknown could not, in contemplation of this law, have been foreseen. We cannot assent to this interpretation. Clearly Congress did not intend to relieve the carrier from responsibility in guarding against delays in a matter deemed to be of such importance. By this act it sought to prevent railroad employees from working consecutively longer than the period prescribed, as completely and effectively as could be accomplished by legislation. To bring itself within the exceptions stated, the carrier must be held to as high a degree of diligence and foresight as may be consistent with the object aimed at, and the practical operation of its railroad. Conformably to this view it has been uniformly held by the courts that, ordinarily, delays in starting trains by reason of the fact that another train is late; from side-tracking to give superior trains the right of way, if the meeting of such trains could have been anticipated at the time of leaving the starting point; from getting out of steam or cleaning fires; from defects in equipment; from switching; from time taken for meals; and in short from all the usual causes incidental to operation—are not, standing alone, valid excuses within the meaning of this proviso. The carrier must go still farther and show that such delays could not have been foreseen and prevented by exercise of the high degree of diligence demanded."

Casualty has been defined as an act which proceeds from an unknown cause or is an unusual effect of a known cause. *United States v. Kansas City Southern Ry. Co.*, (W. D. Ark. 1911) 189 Fed. 471.

Unavoidable accident.—"While some authorities hold that 'unavoidable accident' is synonymous with 'act of God,' the better definition, in the opinion of the court, is that it must be an inevitable accident which could not have been foreseen and prevented by the exercise of that degree of diligence which reasonable men would exercise under like conditions and without any fault attributable to the party sought to be held responsible." *United States v. Kansas City Southern Ry. Co.*, (W. D. Ark. 1911) 189 Fed. 471.

**Act of God.**—While it is not advisable to give an exact definition of that phrase which will cover every phase, it has been generally defined as something which occurs exclusively by the violence of nature; at least an act of nature which implies an entire exclusion of all human agencies. *United States v. Kansas City Southern Ry. Co.*, (W. D. Ark. 1911) 189 Fed. 471.

A delay in starting a train caused by reason of the fact that another train is late is not an excuse within the meaning of the proviso. *United States v. Kansas City Southern Ry. Co.*, (W. D. Ark. 1911) 189 Fed. 471.

The recovery is by a civil action, and the rules governing civil procedure apply. *United States v. Kansas City Southern Ry. Co.*, (C. C. A. 8th Cir. 1913) 202 Fed. 828.

**Pleading.**—The plaintiff in its pleading need not negative that the acts and conduct of the defendant complained of came within an exception of the act. *United States v. Houston Belt & Terminal Ry. Co.*, (C. C. A. 5th Cir. 1913) 205 Fed. 344, wherein the court said: "The action, though for a penalty, is civil in its nature, and the pleader is not required to state his cause of action with the exactness and particularity that would be necessary in a criminal indictment. In the nature of things, in most cases arising under the act, facts bringing the case within the exception would be only within the knowledge of the railroad, and the government should not be required to allege that of which it knows nothing simply to conform to a mere technicality of pleading. If facts existed that would bring the case within the exception, they constituted a defense that the railroad should have pleaded and proved."

**Burden of proof.**—In *United States v. Kansas City Southern Ry. Co.*, (C. C. A. 8th Cir. 1913) 202 Fed. 828, the court speaking of the burden of proof said: "The burden was upon the government to establish that the defendant had required or permitted its employees to remain on duty longer than 16 hours; this, being conceded, made a prima facie case. The excuses embodied in the proviso are separate and affirmative defenses which must be pleaded in the answer; and the burden is upon the defendant to sustain such allegations."

**Amount of penalty.**—*Determined by judge.*—The statute provides for a penalty not to exceed five hundred dollars. It is argued that the amount of the penalty was for the jury, the proceeding being a civil suit. But the penalty is a deterrent, not compensation. The amount is not measured by the harm to the employees but by the fault of the carrier, and being punitive, rightly was determined by the judge. *Missouri, K. & T. Ry. Co. v. United States*, (1913) 231 U. S. 112, 34 S. Ct. 26.

*Amount held sufficient.*—Where a prosecution of a railroad for violation of this act was the first against such defendant in the particular district, and the questions presented were not free from doubt and difficulty, it was held that a penalty of \$100 on each of 33 counts was sufficient punishment. *United States v. Chicago, M. & P. S. R. Co.*, (E. D. Wash. 1912) 197 Fed. 624.

**Separate penalty for each employee delayed.**—When several persons are kept beyond the proper time by reason of the same delay of a train, a separate penalty is incurred for each. *Missouri, K. & T. Ry. Co. v. United States*, (1913) 231 U. S. 112, 34 S. Ct. 26, wherein the court per Mr. Justice Holmes said: "The petitioner cites many cases in favor of the proposition that generally, when one act has several consequences that the law seeks to prevent, the liability is attached to the act, and is but one. It argues that the delay of the train was such an act and that the principle, which is a very old one, applies. *Baltimore & O. S. W. R. Co. v. United States*, (1911) 220 U. S. 94. But unless the statute requires a different view, to call the delay of the train the act that produced the wrong, is to beg the question. See *Memphis & C. R. Co. v. Reeves*, (1869) 10 Wall. 176; *Denny v. New York Cent. R. Co.*, (1859) 13 Gray (Mass.) 481. The statute was not violated by the delay. That may have made keeping the men overtime more likely, but was not in itself wrongful conduct *quoad hoc*. The wrongful act was keeping an employee at work overtime, and that act was distinct as to each employee so kept. Without stopping to consider whether this argument would be met by the proviso declaring a 'delay' in certain cases not to be within the statute, it is enough to observe that there is nothing to hinder making each consequence a separate cause of action or offence, if by its proper construction the law does so; see *Flemister v. United States*, (1907) 207 U. S. 372, 375; so that the real question is simply what the statute means. The statute makes the carrier who permits 'any employee' to remain on duty in violation of its terms, liable to a penalty 'for each and every violation.' The implication of these words cannot be made much plainer by argument. But it may be observed as was said by the government that as towards the public every overworked man presents a distinct danger, and as towards the employees each case of course is distinct." *Missouri, K. & T. Ry. Co. v. United States*, (1913) 231 U. S. 112, 34 S. Ct. 26.

## 1909 Supp., p. 584, sec. 5.

State statutes in conflict with the provisions of the hours of service law became ineffective on the passage of this act although this section provided that the law

should not take effect until a year after the passage. *Northern Pac. R. Co. v. State of Washington*, (1912) 222 U. S. 370, 32 S. Ct. 160, 58 U. S. (L. ed.) 237.

## 1909 Supp., p. 584, sec. 1.

- I. INTRODUCTORY.
- II. EMPLOYER ENGAGED IN INTERSTATE COMMERCE.
- III. EMPLOYEE ENGAGED IN INTERSTATE COMMERCE.
- IV. NEGLIGENCE AND ASSUMPTION OF RISK.
- V. ACTIONS.

## I. INTRODUCTORY.

**Constitutionality.**—Congress did not exceed its power in imposing the liability defined by this statute. *Philadelphia, B. & W. R. Co. v. Schubert*, (1912) 224 U. S. 603, 32 S. Ct. 589, 56 U. S. (L. ed.) 911.

This act is constitutional. *Cain v. Southern R. Co.*, (E. D. Tenn. 1911) 199 Fed. 211; *St. Louis, S. F. & T. Ry. Co. v. Geer*, (Tex. 1912) 149 S. W. 1178. Compare *In re Taylor*, (1912) 204 N. Y. 135, 97 N. E. 502, Ann. Cas. 1913D 276.

**Purpose of act.**—It was the purpose of this act that every common carrier by railroad engaged in commerce between any of the several states should be liable in damages to any person suffering injury while employed in interstate commerce by such carrier for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such company, as well as employees injured by reason of any defect or insufficiency in its engines, cars, bolts, etc. *De Atley v. Chesapeake & O. Ry. Co.*, (E. D. Ky. 1912) 201 Fed. 591; *Baltimore & O. R. Co. v. Darr*, (C. C. A. 4th Cir. 1913) 204 Fed. 751, 47 L.R.A.(N.S.) 4; *Neil v. Idaho & W. N. R. Co.*, (1912) 22 Idaho 74, 125 Pac. 331.

By this act liability is imposed on a common carrier by railroad if it is engaged in the business of interstate commerce, but only while engaging in such business at the time of the happening of an accident which produces injury to an employee. And it does not impose such liability, even when the carrier is so engaged, unless the person injured is, at the time of the occurrence of the accident, himself employed by the carrier in such commerce. In other words, the purpose of the statute is "to secure the safety of interstate transportation, and of those who are employed therein." *Pierson v. New York, S. & W. R. Co.*, (1912) 83 N. J. L. 661, 84 Atl. 233, followed in *Granger v. Pennsylvania R. Co.*, (1913) 84 N. J. L. 338, 86 Atl. 264.

**Construction.**—This law should be as broadly and liberally construed as possible. *Behrens v. Illinois Cent. R. Co.*, (E. D. La. 1911) 192 Fed. 581.

The federal courts are to be followed by the state courts in interpreting the various provisions of this act. *Montgomery v. Southern Pac. R. Co.*, (1913) 64 Ore. 597, 131 Pac. 507, 47 L.R.A.(N.S.) 13.

**Not retrospective.**—The act is not remedial since it introduced a new policy and quite radically changed the existing law. It cannot therefore be construed as retrospect-

ive. *Winfree v. Northern Pac. R. Co.*, (1913) 227 U. S. 296, 33 S. Ct. 273, 57 U. S. (L. ed.) 518, wherein the court said: "Plaintiff, to support his contention that the Act of Congress has retroactive operation, presents a very elaborate argument based on the extensive effect which courts have given to remedial statutes, applying them, it is contended, to the past as well as to the future. The Court of Appeals met the argument, as we think it should be met, by saying that statutes that had received such extensive application were 'such as were intended to remedy a mischief, to promote public justice, to correct innocent mistakes, to cure irregularities in judicial proceedings or to give effect to acts and contracts of individuals according to the intention thereof.' It is hardly necessary to say that such statutes are exceptions to the almost universal rule that statutes are addressed to the future, not to the past. They usually constitute a new factor in the affairs and relations of men and should not be held to affect what has happened unless, indeed, explicit words be used or by clear implication that construction be required. It is true that it is said that there was liability on the part of the defendant for its negligence before the passage of the Act of Congress and the act has only given a more efficient and a more complete remedy. It, however, takes away material defenses, defenses which did something more than resist the remedy; they disapproved the right of action. Such defenses the statute takes away, and that none may exist in the present case is immaterial. It is the operation of the statute which determines its character. The Court of Appeals aptly characterized it, and we may quote from its opinion, (C. C. A. 9th Cir. 1909, 173 Fed. 66): 'It is a statute which permits recovery in cases where recovery could not be had before, and takes from the defendant defenses which formerly were available, defenses which in this instance existed at the time when the contract of service was entered into and at the time when the accident occurred.'"

**Creation of new cause of action.**—A cause of action for the death of an employee which is authorized by this statute was not recognized at common law. *St. Louis, S. F. & T. R. Co. v. Seale*, (1913) 229 U. S. 156, 33 S. Ct. 651, 57 U. S. (L. ed.) 1129.

**State laws superseded.**—The one purpose of Congress was to adopt a uniform rule operating alike on all employees of railroad companies engaged in interstate commerce, and one of the effects of the statute is to supersede the laws of the states in so far as they cover the same field. *Missouri, K. & T. R. Co. v. Wulf*, (1913) 226 U. S. 570, 33 S. Ct. 135, 57 U. S. (L. ed.) 355; *Michigan Cent. R. Co. v. Vreeland*, (1913) 227 U. S. 59, 33 S. Ct. 192, 57 U. S. (L. ed.) 417; *St. Louis, I. M. & S. R. Co. v. Hesterly*, (1913) 228 U. S. 702, 33 S. Ct. 703, 57 U. S. (L. ed.) 1031; *St. Louis, S. F. &*

*T. R. Co. v. Seale*, (1913) 229 U. S. 156, 33 S. Ct. 651, 57 U. S. (L. ed.) 1129; *Minnesota Rate Cases*, (1913) 230 U. S. 352, 33 S. Ct. 729, 57 U. S. (L. ed.) 1511, 48 L.R.A. (N.S.) 1151; *Oliver v. Northern Pac. R. Co.*, (E. D. Wash. 1912) 196 Fed. 432; *M'Cheaney v. Illinois Cent. R. Co.*, (W. D. Ky. 1912) 197 Fed. 85; *Illinois Cent. R. Co. v. Nelson*, (C. C. A. 8th Cir. 1913) 203 Fed. 956; *Cary v. Lake Shore & M. S. Ry. Co.*, (N. D. Ohio 1911) 208 Fed. 847; *Southern Ry. Co. v. Howerton*, (Ind. 1913) 101 N. E. 121; *Louisville & N. R. Co. v. Strange's Adm'x*, (1913) 156 Ky. 439, 161 S. W. 239; *Fernette v. Pere Marquette R. Co.*, (1914) 175 Mich. 653, 141 N. W. 1084, 144 N. W. 834; *Melzner v. Northern Pac. R. Co.*, (1912) 46 Mont. 277, 127 Pac. 1002; *Fleming v. Norfolk Southern R. Co.*, (1912) 160 N. C. 196, 76 S. E. 212; *Burnett v. Atlantic Coast Line R. Co.*, (1913) 163 N. C. 186, 79 S. E. 414; *Missouri, K. & T. Ry. Co. v. Lenahan*, (1913) 39 Okla. 283, 135 Pac. 383; *Gulf, C. & S. F. Ry. Co. v. Lester*, (Tex. 1912) 149 S. W. 841; *St. Louis, S. F. & T. Ry. Co. v. Geer*, (Tex. 1912) 149 S. W. 1178; *Rowlands v. Chicago & N. R. Co.*, (1912) 149 Wis. 51, 135 N. W. 156.

Earlier limited liability acts are not repealed by this act. *The Passaic*, (C. C. A. 2d Cir. 1913) 204 Fed. 266.

Test as to applicability of federal or state law.—In determining whether or not the federal or state law is applicable to an action of this character, the test is this: Were the injuries of the employee sustained while the company was engaged and the employee was employed in interstate commerce? If so, the federal statute applies; if not, the state law is applicable. *Louisville & N. R. Co. v. Strange's Adm'x*, (1913) 156 Ky. 439, 161 S. W. 239.

Before this act applies to an action for damages brought against a railroad company by one of its employees for injuries received in the service of the company, it must appear (1) that the railroad company is an interstate carrier; (2) that, as to the transaction through which the injury occurred, it was at the time engaged in interstate commerce; and (3) that the injured employee was at the time engaged in interstate commerce. *Charleston & W. C. R. Co. v. Anchors*, (1912) 10 Ga. App. 322, 73 S. E. 551.

Waiver of objection to action under state law.—If an action is brought under a state Employers' Liability Act and the railroad claims that it should have been brought under the federal act, that contention should be set up as a defense and by going to trial without doing so the railroad waives its right to urge his contention. *Chicago, R. I. & G. Ry. Co. v. Rogers*, (Tex. 1912) 150 S. W. 281.

Waiver of rights under statute.—The acceptance of benefits from a relief department does not prevent a recovery of damages for negligence under the Employers' Liability Act of 1908. *Burnett v. Atlantic Coast Line R. Co.*, (1913) 163 N. C. 186, 79 S. E. 414.

A release of damages for injury or death

is against public policy and void. *Oliver v. Northern Pac. R. Co.*, (E. D. Wash. 1912) 196 Fed. 432.

Defects in cars.—The act deals with the liability of carriers while engaged in commerce between the states for defects in cars. *St. Louis, I. M. & S. R. Co. v. Hesterly*, (1913) 228 U. S. 702, 33 S. Ct. 703, 57 U. S. (L. ed.) 1031.

New Mexico.—This act is valid as to the territory of New Mexico. *Friday v. Santa Fé Cent. R. Co.*, (1911) 16 N. M. 434, 120 Pac. 316, following *El Paso & N. E. R. Co. v. Gutierrez*, (1909) 215 U. S. 87, 30 S. Ct. 21, 57 U. S. (L. ed.) 106.

Porto Rico.—This act expressly applies to Porto Rico. *American R. Co. of Porto Rico v. Birch*, (1912) 224 U. S. 547, 32 S. Ct. 603, 56 U. S. (L. ed.) 879.

This act is cited in *Missouri, K. & T. R. Co. v. Blalack*, (1912) 105 Tex. 296, 147 S. W. 559; *Missouri, K. & T. Ry. Co. v. Odom*, (Tex. 1912) 152 S. W. 730; *Chicago, R. I. & G. Ry. Co. v. Trout*, (Tex. 1912) 152 S. W. 1137.

## II. EMPLOYER ENGAGED IN INTERSTATE COMMERCE.

Carrier engaged in intrastate commerce also.—The statute was intended to apply to every carrier while engaging in interstate commerce, and to an employee of such carrier while so engaged, and, if these conditions concur, the fact that the carrier and the employee may also be engaged in intrastate commerce is immaterial. *Atlantic Coast Line Ry. Co. v. Jones*, (1913) 9 Ala. App. 499, 63 So. 693.

Common carriers by vessels.—Where a vessel is part of a railroad system, and its crew are employees of the railroad, it would seem as if this act might include maritime injuries. *The Pawnee*, (E. D. Mich. 1913) 205 Fed. 333.

Movements in terminal yard.—In the case of an interstate train engaged in the movement of interstate freight, interstate transportation is not ended on reaching the terminal yard although the cars are not going to points beyond, for it is still necessary that the train be broken up and the cars taken to the appropriate tracks for making up outgoing trains or for unloading or delivering freight, and this is as much a part of the interstate transportation as is the movement across the state line. *St. Louis, S. F. & T. R. Co. v. Seale*, (1913) 229 U. S. 156, 33 S. Ct. 651, 57 U. S. (L. ed.) 1129.

Train run from one state to another, but no freight carried across line.—If a train is run from one state into another for the purpose of carrying freight from station to station, it is engaged in interstate commerce, even though it does not appear that any freight was actually carried across the state line, for it is the operation of the train for the purpose of carrying freight across the state line, if offered, which constituted the interstate commerce. *Kansas City Southern*



R. Co. v. Cook, (1911) 100 Ark. 467, 140 S. W. 579.

**Intrastate train with interstate cars.**—A train operating only between two points within the state, and carrying merchandise only to destinations within the state, would clearly be subject to the regulatory provisions of a state act on the same subject. But if a train operating between two points within the state carries one or more cars billed to a foreign destination the entire train is impressed with the qualities of a federal agency of interstate commerce and is subject to federal control. *Fernette v. Pere Marquette R. Co.*, (1914) 175 Mich. 653, 141 N. W. 1084, 144 N. W. 834.

**Moving water or coal across state line for railroad use.**—An interstate railroad when engaged in moving cars of water or coal over its line from one state into another for use in its own engines is engaged in "interstate commerce." *Barker v. Kansas City, M. & O. R. Co.*, (1913) 88 Kan. 767, 129 Pac. 1151, 43 L.R.A.(N.S.) 1121.

### III. EMPLOYEE ENGAGED IN INTERSTATE COMMERCE.

**Necessity that employee be engaged in duties connected with interstate commerce when injury received.**—That a railroad company may be engaged both in interstate commerce and in intrastate commerce is self-evident. As to whether a cause of action for an injury to an employee arises under the employer's liability act depends upon the circumstances existing at the time of the injury. If at the time of the injury the employee was performing some service for the company in furtherance of its interstate commerce business, then the rules of law declared in the act of 1908, and its amendment, will apply. Upon the other hand, if the employee, when injured, is engaged wholly in the performance of a service in furtherance of the intrastate business of the railroad company, then the act of Congress does not apply, because to give it application in such case would be extending the power of the federal government over matters exclusively within the state jurisdiction and control. *Van Brimmer v. Texas & P. Ry. Co.*, (E. D. Tex. 1911) 190 Fed. 394; *Neil v. Idaho & W. N. R. Co.*, (1912) 22 Idaho 74, 125 Pac. 331; *Southern Ry. Co. v. Howerton*, (Ind. 1913) 101 N. E. 121; *Barker v. Kansas City, M. & O. R. Co.*, (1913) 88 Kan. 767, 129 Pac. 1151, 43 L.R.A.(N.S.) 1121; *Montgomery v. Southern Pac. Co.*, (1913) 64 Ore. 597, 131 Pac. 507, 47 L.R.A.(N.S.) 13; *Gray v. Chicago & N. W. R. Co.*, (1913) 153 Wis. 637, 142 N. W. 505. Compare *Montgomery v. Southern Pac. Co.*, (1913) 64 Ore. 597, 131 Pac. 507, 47 L.R.A.(N.S.) 13.

The earlier act of 1906 (Act July 11, 1906, c. 3073; 34 Stat. 232) was, in the Employers' Liability Cases, (1908) 207 U. S. 463, 28 S. Ct. 141, 52 U. S. (L. ed.) 297, held unconstitutional as exceeding the power of Congress under the commerce clause of the Constitution, in that it imposed a lia-

bility, as against all common carriers engaged in interstate commerce, in favor of any of their employees, without restriction, and whether their employment did or did not pertain to interstate commerce. In those cases, however, all the justices concurred in recognizing the power of Congress to regulate the relation of master and servant by regulations confined to interstate commerce and services connected therewith. The act of 1908, above quoted, was passed to conform to that decision, and should therefore be construed as including within the term "any person suffering injury while he is employed by such carrier in such commerce," every person who could be so included within the purview of the constitutional power. *Horton v. Oregon-Washington R. & Nav. Co.*, (1913) 72 Wash. 503, 130 Pac. 897, 47 L.R.A.(N.S.) 8.

The test question in determining whether a personal injury to an employee of a railroad company is within the purview of the act is, What is its effect upon interstate commerce? Does it have the effect to hinder, delay, or interfere with such commerce? *Lamphere v. Oregon R. & Nav. Co.*, (C. C. A. 9th Cir. 1912) 196 Fed. 336.

**"Employed."**—"To be employed by one is to be engaged in his service, to be used as an agent or substitute in transacting his business, to be commissioned and intrusted with the management of his affairs. In our judgment, the words, 'while employed by such carrier,' construed in connection with the context, is equivalent to 'while hired by such carrier,' which implies a request and a contract for compensation. The persons falling within the meaning of the act are those hired by the railway company, or those who are working for it at its request and under an agreement on its part to compensate them for their services." *Missouri, K. & T. Ry. Co. v. West*, (Okla. 1913) 134 Pac. 655.

A "boiler maker's helper," employed at the time of an injury in assisting in the repair of an engine used in interstate commerce, is employed in interstate commerce. *Law v. Illinois Cent. R. Co.*, (C. C. A. 6th Cir. 1913) 208 Fed. 869.

**Brakeman.**—In *Illinois Cent. R. Co. v. Nelson*, (C. C. A. 8th Cir. 1913) 203 Fed. 956, the facts were as follows: The plaintiff was employed by the defendant as a brakeman. In the forenoon of Jan. 1, 1911, he went to his train in the yards at Waterloo, Iowa, to assume his duties. After reaching the train, which stood on track No. 4 in the yards, he discovered a couple of hot boxes, and went from there to the north to the icehouse of the company, to obtain a cake of ice, to be used in cooling the boxes and to take upon the train for a like purpose, in so doing crossing tracks 5, 6, 7, and 8. Returning from the icehouse with his ice, tracks 8 and 7 having standing cars on them, he threw his ice through under the cars and climbed over the drawbar; reaching track 6, there was an opening between cars of about 10 feet, through which he passed, and then

turned eastward, without looking or listening for any moving cars, though he knew that switching was being done there. After proceeding between tracks 6 and 5 a distance of about 15 or 20 feet, he was struck by a car and received the injuries complained of. He alleged that, at or about the point where he was struck by the car, the defendant negligently permitted an accumulation of cinders, ice, and snow between the tracks several inches in height and about 10 feet in length; that he slipped upon this pile of cinders covered with ice and snow, and, because of such slipping, was struck by the car in question. The train upon which he was employed the evidence clearly showed to have been engaged at the time in interstate commerce. It was held that the plaintiff being a brakeman upon said train was an employee engaged in interstate commerce.

But in *Van Brimmer v. Texas & P. Ry. Co.*, (E. D. Tex. 1911) 190 Fed. 394, it appeared that the plaintiff was a brakeman on a train of the defendant which contained cars being used for interstate shipments of freight. In the train was a car which was filled with merchandise destined for a point within the state. The shipment of this car originated in Texas, and was to end in that state. When the plaintiff was injured, he was engaged in the work of completing the transportation of that intrastate car. It was held that he was not engaged in interstate commerce.

**Bridge repairman.**—A man employed by a railroad and carrying bolts to be used by him in repairing a railroad bridge used in both interstate and intrastate commerce is employed in interstate commerce, and if injured by the negligence of a co-employee is entitled to an action for damages under the statute. *Pedersen v. Delaware, L. & W. R. Co.*, (1913) 229 U. S. 146, 33 S. Ct. 648, 57 U. S. (L. ed.) 1125, *reversing* (C. C. A. 3d Cir. 1912) 197 Fed. 537. To the same effect see *Thomson v. Columbia & P. S. R. Co.*, (W. D. Wash. 1913) 205 Fed. 203.

An employee engaged in repairing an engine which has just finished an interstate run and is soon to begin the return trip is employed in interstate commerce. *Baltimore & O. R. Co. v. Darr*, (C. C. A. 4th Cir. 1913) 204 Fed. 751, 47 L.R.A.(N.S.) 4, *affirming*, (D. C. Md. 1912) 197 Fed. 655. In the lower court it was said: "The engine came in from its interstate commerce run as usual, and apparently went out as usual. The repairs which the plaintiff was making to it were of the ordinary trivial kind which must be, and habitually are, made from day to day without in any wise interfering with the ordinary and profitable use of the equipment. At the time of the accident I am persuaded the locomotive and tender were 'instruments of interstate commerce' as those words are used by the Supreme Court. A very slight change of the facts might doubtless have taken the plaintiff out of the protection of the act."

**Employee moving oil for use on interstate trains.**—In *Montgomery v. Southern Pac.*

*Co.*, (1913) 64 Ore. 597, 131 Pac. 507, 47 L.R.A.(N.S.) 13, the evidence tended to show that the plaintiff was engaged in moving the oil for the purpose of providing fuel for the engines used in transmitting freight and passengers from California into Oregon. The oil was to be used principally for the engine and crew with which plaintiff was engaged in his general work of switching interstate cars and spotting, setting out, and moving them from station to station. It appears that about two-thirds of the work of plaintiff, switch crew, and engine was the moving of cars used in the transportation of interstate commodities, although all of plaintiff's work was done in the state of California. It was held that the plaintiff was engaged in the business of interstate commerce.

**Employee on way to work.**—It has been held that an employee on his way to work on an interstate train is within the protection of the act. *Lamphere v. Oregon, etc. Nav. Co.*, (C. C. A. 9th Cir. 1912) 196 Fed. 336, *reversing* (E. D. Wash. 1911) 193 Fed. 248; *Missouri, K. & T. Ry. Co. v. Rentz*, (Tex. 1913) 162 S. W. 959; *Horton v. Oregon-Washington R. & Nav. Co.*, (1913) 72 Wash. 503, 130 Pac. 897, 47 L.R.A.(N.S.) 8.

In *Lamphere v. Oregon etc. Nav. Co.*, (C. C. A. 9th Cir. 1912) 196 Fed. 336, the court said: "There are decisions which hold that an employé of a railroad company while going to and from his work is not engaged in the service of his employer, and is not the fellow servant of other employées of the same master, but there are cases holding to the contrary, and, whatever may be the conflict of authority as to the ordinary case of an employé going to and from his work, there can be no question that he is in the service of his master, and is a fellow servant of his co-employés whenever he is doing that which under his contract of employment he is bound to do. . . . The deceased when he was killed was not only on his way to work for his employer, but he was proceeding under the direct and peremptory command of the railroad company to do a designated specific act in the service of the company, to wit, to move a train then engaged in interstate commerce. He was on the premises of the railroad company and in the discharge of his duty when he met his death, and the train which struck him and caused his death was engaged in interstate commerce, and belonged to the same railroad company. Must a fireman be actually in his place of duty on the locomotive of a train which is engaged in commerce between the states in order that he may be said to be employed in interstate commerce? If he is commanded to step down from his train and proceed across the track and take his place on another train engaged in interstate commerce and he is injured while on the way, will it be said that he was not employed in interstate commerce when he received the injury? The case supposed is substantially the case which is now before the court."

But in *Feaster v. Philadelphia & R. R.*

Co., (E. D. Pa. 1912) 197 Fed. 580, it appeared that the plaintiff was an extra conductor, and on January 30, 1910, had been directed to report at Trenton the following morning for orders. On the 31st he reported, and was ordered to ride on a light engine to Trenton Junction, both points being within the state of New Jersey, where he would receive definite instructions concerning the destination and duties of a work train that was awaiting him there. While he was passing through the yard at Trenton on his way to the light engine, he was injured by a local passenger train running between Trenton and Bound Brook. It was held that he was not within the protection of this act.

**Employee on way home.**—An employee of a railroad, killed while riding to his home in the caboose of an interstate train by permission of the company, and not at the time on duty, is not within the protection of this act. *Bennett v. Lehigh Valley R. Co.*, (E. D. Pa. 1912) 197 Fed. 578.

In *Zachary v. North Carolina R. Co.*, (1911), 156 N. C. 496, 72 S. E. 858, it was held that an employee who was killed by being struck by a local switch engine while on his way to his boarding house for a purpose entirely personal to himself, was not within the provisions of this act.

A foreman of a switch engine, which is hauling cars containing merchandise destined for another state, is engaged in interstate commerce. *Seaboard Air Line Ry. v. Moore*, (1913) 228 U. S. 433, 33 S. Ct. 580, 57 U. S. (L. ed.) 907.

**Engine dispatcher.**—A person employed in dispatching engines both intrastate and interstate is not employed in interstate commerce while walking to a rest shanty. *Gray v. Chicago & N. W. R. Co.*, (1913) 153 Wis. 637, 142 N. W. 505, wherein the court said: "It appears that the plaintiff, at the time of the accident here, was walking back to his rest shanty, and was doing nothing at all in the way of dispatching engines. Now it may perhaps be correctly held (though we do not decide the question) that a man whose day is spent in dispatching engines, all of which are engaged in interstate commerce, is in legal effect employed in interstate commerce during the whole day, and including the periods of leisure or rest when he is doing nothing but waiting for the arrival of an engine; but if, on the other hand, part of the engines dispatched be engaged in interstate business and part in local or intrastate business, we are unable to see how it could be logically said that he was 'employed in interstate commerce' all day, or during his intervals of leisure."

An engineer, employed at the time of an injury in hauling cars which were being used in interstate commerce, is, of course, engaged in interstate commerce and the provisions of the act apply. *Horton v. Seaboard Air Line R. Co.*, (1911) 157 N. C. 146, 72 S. E. 958.

**Ferry-boat employee.**—The maintenance of a ferry may be within the charter powers

of a railroad company and employees may be employed in interstate commerce within the meaning of the act who are employed on a ferry boat transporting passengers from one state to another. *The Passaic*, (E. D. N. Y. 1911) 190 Fed. 644.

The fireman of an engine used in switching cars that have to move both in interstate and intrastate commerce indiscriminately is employed in interstate commerce, even at the moment when the cars being switched are part of an intrastate train. *Behrens v. Illinois Cent. R. Co.*, (E. D. La. 1911) 192 Fed. 581.

The porter on a Pullman car attached to a train engaged in interstate commerce was held, on the facts shown, to be an employee of the railroad company. *Oliver v. Northern Pac. R. Co.*, (E. D. Wash. 1912) 196 Fed. 432, wherein the court said: "Is a person employed jointly by a railway company and another company in the operation and management of a train an employee of the railway company, within the meaning of the Employers' Liability Act? In my opinion this question must be answered in the affirmative. The contract between these two companies was entered into long prior to the passage of the act in question, and was therefore not entered into for the purpose of circumventing or avoiding liabilities imposed by law. Nevertheless, if such a contract is recognized and given the effect claimed for it by the defendant, there is nothing to prevent railway companies from avoiding obligations imposed upon them by this or other laws of Congress. It was attempted in argument to draw a distinction between those positive obligations imposed upon public service corporations by law and obligations voluntarily assumed by them for the comfort and convenience of passengers and for their own profit. Such a distinction may, and in some cases does, exist, but it cannot be gained that persons employed by railway companies in performing obligations voluntarily assumed are as much employees of the company as those servants who are discharging positive duties imposed by law. Persons employed as the deceased was come within the spirit of the statute, and those dependent on them for support should not be denied the protection it affords."

**Pumpman.**—An employee engaged in pumping water used by engines engaged in interstate and intrastate commerce is within the terms of this section. *Horton v. Oregon-Washington R. & Nav. Co.*, (1913) 72 Wash. 503, 130 Pac. 897, 47 L.R.A.(N.S.) 8.

**Repairman.**—Railroad employees are within the purview of the Employers' Liability Act while engaged in the repair of engines, cars, bridges, tracks, and switches actually in use in interstate commerce. *Law v. Illinois Cent. R. Co.*, (C. C. A. 6th Cir. 1913) 208 Fed. 869.

In *Heimbach v. Lehigh Valley R. Co.*, (E. D. Pa. 1912) 197 Fed. 579, it appeared that employees of a railroad company were killed while repairing a car that had been transported from New Jersey to Pennsylvania, and

during that transit had been engaged in commerce between the states. But it appeared that the car had reached its destination and was empty, and having been found to need repairs, it was put upon a side track for that purpose. It was held that the employees so engaged were not within the protection of this act. *Compare* Northern Pac. Ry. Co. v. Maerkl, (C. C. A. 9th Cir. 1912) 198 Fed. 1.

An employee is not employed by the carrier in interstate commerce where he is engaged in constructing or repairing an appliance which may thereafter be used to facilitate intrastate or interstate transportation as occasion may require and which is intended therefor, but is not at the time the repairs in question are being made in use for the purpose of facilitating interstate transportation. *Ruck v. Chicago, M. & St. P. R. Co.*, (1913) 163 Wis. 158, 140 N. W. 1074.

A trackman repairing a railroad over which interstate passenger and freight cars and engines engaged in interstate commerce are constantly passing is engaged in interstate commerce. *Central R. Co. of New Jersey v. Colasurdo*, (C. C. A. 2d Cir. 1911) 192 Fed. 901; *Southern Ry. Co. v. Howerton*, (Ind. 1913) 101 N. E. 121. *Contra* *Charleston & W. C. R. Co. v. Anchors*, (1912) 10 Ga. App. 322, 73 S. E. 551.

A trucker engaged in loading freight into a car for transportation in interstate commerce, he being an employee of the railroad, is employed in interstate commerce. *Illinois Cent. R. Co. v. Porter*, (C. C. A. 6th Cir. 1913) 207 Fed. 311.

Watchman on dead engine hauled in interstate train.—In *Atlantic Coast Line Ry. Co. v. Jones*, (1913) 9 Ala. App. 499, 63 So. 693, it was held that the plaintiff was injured while engaged in interstate commerce under the circumstances which the court stated to be as follows: "It was shown by the evidence that the plaintiff, an employé of the defendant, was sent by the defendant from Montgomery, Ala., to Thomasville, Ga., to bring back over its railroad between those points a dead engine—that is, an engine not running under its own motive power, but pulled or hauled in a train of cars in a manner similar to that in which ordinary cars are pulled or hauled over the rails by a live engine as a means of motive power. The plaintiff's duties required him, while engaged in this employment, to ride on the dead engine from Thomasville, Ga., to Montgomery, Ala., as 'messenger' or 'watchman,' which we gather from the evidence to be an employment in this instance in the nature of a caretaker. The plaintiff was injured while engaged in the performance of his duties under this employment, as he had gone to Thomasville, Ga., and was returning to Montgomery, Ala., on the engine in a train of cars operated by the defendant over its railroad, at the time he received the injuries of which he complains, at a point in the state of Alabama, on defendant's railroad, about 20 miles, or less, distant from

Montgomery. The dead engine upon which the plaintiff was riding at the time he received the alleged injuries was part of a train operated by the defendant and engaged in carrying, in part, through freight cars with shipments of freight from points in the state of Florida, routed by way of Thomasville in the state of Georgia to destination at Montgomery, and other places in the state of Alabama. Clearly the defendant was at the time engaged in interstate commerce, and the dead engine was one of the instrumentalities ordinarily used by the defendant in carrying on its business, and the fact that this instrumentality was not being put to the precise use for which it was designed at the particular time when the injury occurred to the plaintiff does not alter the fact that the defendant was engaged in an act of interstate commerce at the time the plaintiff was injured, and that the plaintiff was in the performance of his duties in the line of his employment and was injured by the defective condition (as he claims) of one of the instrumentalities ordinarily used in that business by the defendant, but at that time temporarily removed from service.

A yard clerk whose principal duties are those of examining incoming and outgoing trains and making a record of the numbers and initials on the cars, of inspecting and making a record of the seals on the car doors, of checking the cars with the conductors' lists, and of putting cards or labels on the car to guide switching crews in breaking up incoming, and making up outgoing trains, is engaged in interstate commerce, if the traffic is both intrastate and interstate and if he is injured while engaged in such duties by being struck and fatally injured by a switch engine negligently operated by other employees in the yard, a cause of action arises under the statute. *St. Louis, S. F. & T. R. Co. v. Seale*, (1913) 229 U. S. 156, 33 S. Ct. 651, 57 U. S. (L. ed.) 1129, *reversing* (Tex. 1912) 148 S. W. 1099.

A yard switchman, employed about intrastate and interstate cars, is within the protection of this section. *Atlantic Coast Line R. Co. v. Reeves*, (C. C. A. 5th Cir. 1913) 208 Fed. 141.

Only employees of railroads are entitled to rely on this act. *Ft. Worth Belt Ry. Co. v. Perryman*, (Tex. 1913) 158 S. W. 1181.

#### IV. NEGLIGENCE AND ASSUMPTION OF RISK.

Negligence must be shown.—While it is true that the Employers' Liability Act has abrogated the fellow servant doctrine, and that the contributory negligence of the injured employee does not bar a recovery but simply diminishes the damages in proportion to the amount of negligence attributable to such employee, yet it is still necessary to show that the injury resulted in whole or in part from the negligence of the officers, agents, or employees of the carrier, or by reason of some defect or insufficiency, due to its negligence, in its cars, engines, appli-

ances, machinery, track, roadbed, works, boats, wharves, or other equipment. *Long v. Southern R. Co.*, (1913) 155 Ky. 286, 159 S. W. 779; *Helm v. Cincinnati, N. O. & T. P. R. Co.*, (1913) 156 Ky. 240, 160 S. W. 945; *Cincinnati, N. O. & T. P. R. Co. v. Goldston*, (1913) 156 Ky. 410, 161 S. W. 246.

**Contributory negligence.**—If one's death is caused solely by his own negligence, he cannot recover under the federal Employers' Liability Act. *Ellis's Adm'r v. Louisville, H. & St. L. R. Co.*, (1913) 155 Ky. 745, 160 S. W. 512.

Where the trial court holds that the sole grounds of recovery rest upon the alleged failure of the defendant to comply with the Federal Safety Appliance Act (Act of March 2, 1893, c. 196, 27 Stat. L. 531, Fed. Stat. Ann. vol. 6, p. 752), the defendant is not entitled to avail itself of plaintiff's contributory negligence for any purpose, under the proviso of section 3. *Burho v. Minneapolis & St. L. R. Co.*, (1913) 121 Minn. 326, 141 N. W. 300.

**Fellow servant rule abolished.**—A right of recovery under the statute arises if the injury is suffered while the carrier is engaged in interstate commerce and while the employee is employed by the carrier in such commerce, although the causal negligence is that of co-employee engaged in intrastate commerce. *Pedersen v. Delaware, L. & W. R. Co.*, (1913) 229 U. S. 146, 33 S. Ct. 648, 57 U. S. (L. ed.) 1125, *reversing* (C. C. A. 3d Cir. 1912) 197 Fed. 537; *Illinois Cent. R. Co. v. Porter*, (C. C. A. 6th Cir. 1913) 207 Fed. 311; *De Atley v. Chesapeake & O. R. Co.*, (1912) 147 Ky. 315, 144 S. W. 95; *Carter v. Kansas City Southern Ry. Co.*, (Tex. 1913) 155 S. W. 638.

Whether the fellow servant whose negligence caused the injury was or was not engaged in interstate commerce is immaterial. *Illinois Cent. R. Co. v. Porter*, (C. C. A. 6th Cir. 1913) 207 Fed. 311.

For the negligence of the hostler of an engine resulting in an injury to the engineer, the railroad company is liable. *Taylor v. Southern Ry. Co.*, (Ind. 1913) 101 N. E. 506.

**Assumption of risk** is a good defense to an action under this act, except when the violation by the carrier of some statute enacted for the safety of employees has contributed to the injury or death of the employee. And, when such defense is pleaded and supported by the evidence, it is the duty of the court to instruct thereon. *Barker v. Kansas City, M. & O. R. Co.*, (1913) 88 Kan. 767, 129 Pac. 1151, 43 L.R.A.(N.S.) 1121.

#### V. ACTIONS.

**Jurisdiction.**—State courts have jurisdiction to try actions arising under this act. *Atlantic Coast Line R. Co. v. Whitney*, (1912) 62 Fla. 124, 56 So. 937; *Southern Ry. Co. v. Howerton*, (Ind. 1913) 101 N. E. 121; *Illinois Cent. R. Co. v. Doherty's Adm'r*, (1913) 153 Ky. 363, 155 S. W. 1119, 47 L.R.A.(N.S.) 31; *Horton v. Seaboard Air*

*Line R. Co.*, (1911) 157 N. C. 146, 72 S. E. 958; *Fleming v. Norfolk Southern R. Co.*, (1912) 160 N. C. 196, 76 S. E. 212; *Rowlands v. Chicago & N. R. Co.*, (1912) 149 Wis. 51, 135 N. W. 156.

Jurisdiction of an action to enforce the rights arising under the employers' liability act, may not be declined by the courts of the state whose ordinary jurisdiction, as prescribed by local laws, is adequate to the occasion, on the theory that such statute is not in harmony with the policy of the state, or that the exercise of such jurisdiction would be attended by inconvenience and confusion because of the different standards of right established by the congressional act and those recognized by the laws of the state. *Missouri, K. & T. Ry. Co. v. Lenahan*, (1913) 39 Okla. 283, 135 Pac. 383.

**Time of accrual of cause of action.**—In *Bixler v. Penn. R. Co.*, (M. D. Pa. 1913) 201 Fed. 553, the court said: "Some argument was indulged regarding the exact time when the cause of action accrued, whether when the employé was injured and died or when proper parties appeared who were competent and empowered to bring suit. That the cause of action accrued when the employé died from the injuries suffered in the employer's service is not in doubt. The cause of action for damages for the death of the employé, *Bixler*, was perfected and immediately accrued when he was killed. *Dodge v. Town of North Hudson*, (C. C.) 188 Fed. 492. Hence a cause of action, if otherwise perfect, existed for such death when suit was instituted."

**Who may bring action—In General.**—As the right of action for injuries resulting in death is entirely based upon statute, no such right existing at common law, the law is well settled that such an action can only be brought in the name of the person or persons to whom the right is given by the statute under which it is sought to prosecute it, upon the well settled principle that when a statute gives the cause of action and designates the persons who may sue, they alone can sue. *Fithian v. St. Louis & S. F. Ry. Co.*, (W. D. Ark. 1911) 188 Fed. 842.

**Action by personal representative.**—A cause of action for the death of an employee must be prosecuted by a personal representative and not by the beneficiaries. *Missouri, K. & T. R. Co. v. Wulf*, (1913) 226 U. S. 570, 33 S. Ct. 135, 57 U. S. (L. ed.) 355; *St. Louis, S. F. & T. R. Co. v. Seale*, (1913) 229 U. S. 156, 33 S. Ct. 651, 57 U. S. (L. ed.) 1129.

An action brought by the parents of a deceased employee, there being no widow or children, may, if brought by them as parents, be amended by making them sue as personal representatives. *Bixler v. Penn. R. Co.*, (M. D. Pa. 1913) 201 Fed. 553, wherein the court said: "In the event of death of an employé, the cause of action shall inure 'to his or her personal representatives, for the benefit of the surviving widow, or husband, children of said employé, and, if none, then for the said employé's parents,' etc. In the

case before us the recovery, if any, is for the benefit of the parents of the deceased employé, though the action is to be prosecuted by his executor or administrator. The latter have no interest whatever in the recovery, and appear only as nominal parties in the action. The important matter is the award of damages. It is not an action for a fixed penalty for a wrong done, but an action for the recovery of the amount of damages the beneficiaries have sustained by reason of the death; and since the object of the recovery will be the same, the parents being as well the sole beneficiaries under the Pennsylvania statutes (Stewart's Purdon's Digest, vol. 3, pages 3238-3241), it may be enforced by the parents, regardless of the entitlement of the action."

**Widow.**—The federal Employers' Liability Act does not give to the widow of the deceased, as such, any right of action whatever for the death of the deceased, but gives that right of action solely to the personal representative of the deceased, and therefore, when in a suit by the widow the facts are shown to be such that the act of Congress applies, such suit cannot be maintained by her because she has, in her own right, no cause of action. *Missouri, K. & T. Ry. Co. v. Lenahan*, (1913) 39 Okla. 283, 135 Pac. 383.

**Death not instantaneous.**—If death results the personal representative of the deceased has a right of action irrespective of whether the death was or was not instantaneous. *Michigan Cent. R. Co. v. Vreeland*, (1913) 227 U. S. 59, 33 S. Ct. 192, 57 U. S. (L. ed.) 417, wherein the court said: "For the railroad company it has been argued that the fact that the injured employé survived his injuries for several hours operates to extinguish its liability for both the wrongful injury and the death which ensued. The view of counsel seems to be that the act declared a single liability and constituted a cause of action in behalf of the injured person if he survived, or, in case his death was instantaneous, a cause of action for the benefit of the specified dependent relatives surviving. This is a narrow interpretation of the act and would operate to defeat all liability unless the injured person should survive long enough to conduct his action to a recovery."

**An action for injuries does not survive to the personal representatives of a railroad employee in case of his death.** *American R. Co. of Porto Rico v. Didricksen*, (1913) 227 U. S. 145, 33 S. Ct. 224, 57 U. S. (L. ed.) 456; *Garrett v. Louisville M. R. Co.*, (C. C. A. 6th Cir. 1912) 197 Fed. 715; *Cincinnati, N. O. & T. R. Co. v. Wilson's Adm'r*, (1914) 157 Ky. 460, 163 S. W. 493.

**Beneficiaries—Pecuniary loss.**—In order to make one a dependent beneficiary under the Employers' Liability Act, he or she must have sustained some pecuniary loss on account of the death of the decedent." *Illinois Cent. R. Co. v. Doherty's Adm'r*, (1913) 163 Ky. 363, 155 S. W. 1119, 47 L.R.A.(N.S.) 31; *Carolina, C. & O. Ry. v. Shewalter*, (Tenn. 1913) 161 S. W. 1136.

*In the case of death the only action is one for the benefit of the next of kin.* *St. Louis, I. M. & S. R. Co. v. Hesterly*, (1913) 228 U. S. 702, 33 S. Ct. 703, 57 U. S. (L. ed.) 1031.

**Relatives included in act.**—This act creates a right of action against a railroad company engaged in interstate commerce, in favor of an employee employed by it in such commerce, who is injured through its neglect, or that of any of its officers or agents, and, in case of the death of such employee from such injuries before he is compensated therefor, in favor of his personal representative, "for the benefit of his surviving widow and children, if any, and, if none, then of his parents, and, if none, then of the next of kin dependent upon such employee." No right of recovery is given for the benefit of relatives other than those specified. Such a right of action did not exist prior to this enactment and the enactment itself supersedes all state laws upon the subject. . . . The right of action given to the dependent relatives by the act is independent of that given to the decedent, and does not include any damages that he might have recovered from the carrier, had he lived, but is given to them for the pecuniary loss which they may have sustained because of his untimely death. Prior to the amendment of April 5, 1910, the right of recovery given to the injured employee did not survive his death, but died with him. By that amendment the right of recovery given to decedent survives his death, but not, however, for the benefit of his estate, but of specified relatives in the order stated, and for the pecuniary loss which they may have sustained because of his death. If no such relative survives the decedent, then no right of recovery is given by the act to his personal representative." *Thomas v. Chicago & N. Ry. Co.*, (N. D. Ia. 1913) 202 Fed. 766.

**Parents.**—An action may be maintained under the federal statute in behalf of a parent when there is a reasonable expectation of pecuniary benefit from the continuance of the life of the child, although the child has not contributed to the support of the parent, but evidence of contributions by the child to the support of the parent is material and important in determining whether such reasonable expectation exists, and in the assessment of damages which may be recovered, and if such evidence is material and competent for the parent, the defendant may prove the contrary. *Dooley v. Seaboard Air Line Ry. Co.*, (1913) 163 N. C. 454, 79 S. E. 970; *Irvin v. Southern R. Co.*, (1913) 164 N. C. 5, 80 S. E. 78.

In case the employee, on account of whose death the suit is brought, left surviving him a widow and child, his parents have no cause of action for any damages they may have suffered by reason of his death. *St. Louis, S. F. & T. Ry. Co. v. Geer*, (Tex. 1912) 149 S. W. 1178.

The words "if none" clearly apply solely to the persons for whose benefit the per-

sonal representative is authorized to prosecute the action, and who, in case of a recovery, are to be the beneficiaries. *Fithian v. St. Louis & S. F. Ry. Co.*, (W. D. Ark. 1911) 188 Fed. 842.

**Complaint or petition—Allegation that defendant is common carrier.**—The complaint, under this act, in order to show jurisdiction should allege that the defendant is a common carrier, or should allege facts sufficient to justify that conclusion. *Shade v. Northern Pac. Ry. Co.*, (W. D. Wash. 1913) 206 Fed. 353.

**Necessity for alleging action under statute.**—In an action under this act it is not necessary for the plaintiff to expressly declare in his petition that his suit is based on the act if the averments of his pleading show a right to recover under its provisions. *M'Chesney v. Illinois Cent. R. Co.*, (W. D. Ky. 1912) 197 Fed. 85; *Garrett v. Louisville & N. R. Co.*, (C. C. A. 6th Cir. 1912) 197 Fed. 715; *Kelley v. Chesapeake & O. Ry. Co.*, (E. D. Ky. 1912) 201 Fed. 602; *Southern Ry. Co. v. Howerton*, (Ind. 1913) 101 N. E. 121; *Midland Valley R. Co. v. Ennis*, (Tex. 1913) 159 S. W. 214; *Rowlands v. Chicago & N. R. Co.*, (1912) 149 Wis. 51, 135 N. W. 156.

**A failure to allege pecuniary injury to the decedent's relatives if not raised by demurrer or upon the trial cannot be raised at a later stage.** *Illinois Cent. R. Co. v. Porter*, (C. C. A. 6th Cir. 1913) 207 Fed. 311.

**Allegation that decedent survived by persons having right under statute.**—The act does not allow a recovery merely to compensate the estate of the decedent for his death and the consequent destruction of his power to earn money, but provides that only those naturally or actually dependent upon the decedent shall take the benefit of the recovery. It therefore expressly limits the right of recovery to cases in which only the person or persons sustaining pecuniary loss by the decedent's death are entitled to be compensated, viz., the beneficiaries named in the order named. This being so, it necessarily follows that in an action under the act of Congress if there is no one for whom a recovery can be had there can be no recovery. Proof must therefore be made of the existence of such surviving beneficiary or beneficiaries; and, if necessary to be proved as an element essential to a recovery, it is an issuable fact that must be alleged. So if the petition in such an action fails to allege that the decedent is survived by a person or persons coming within the indicated limitation, it is bad on demurrer. *Illinois Cent. R. Co. v. Doherty's Adm'r.*, (1913) 153 Ky. 363, 155 S. W. 1119, 47 L.R.A.(N.S.) 31.

**Alleging negligence.**—The act of Congress does not undertake to prescribe the mode of procedure where the action is pending in the state courts, except in certain particulars not here involved. So that the general allegation of negligence being held sufficient in a state prior to the enactment

of the Employers' Liability Act, such a plea will be held good even when proceeding under that act. *Louisville & N. R. Co. v. Stewart's Adm'r.*, (1913) 156 Ky. 550, 161 S. W. 557.

**Insufficient petition.**—In *Thomas v. Chicago & N. Ry. Co.*, (N. D. Ia. 1913) 202 Fed. 766, the petition was held insufficient to show a cause of action arising under this Act. The court said: "The first count of the petition alleges plainly enough that the defendant, at the time of the injury to and death of the plaintiff's intestate, was engaged in interstate commerce by railroad between the states of Illinois and Iowa, and that Thomas was employed by the defendant in such commerce, and received injuries while so engaged, through defendant's neglect, which resulted in his death. But it is nowhere alleged that deceased left surviving him a widow, child, parent, or next of kin, for whose benefit the right of action given to the decedent survives, nor for whose benefit an original right of action was given for the pecuniary loss either may have sustained because of his untimely death, and for whose benefit alone the plaintiff is entitled to recover in either event. No facts are therefore alleged in this count of the petition from which it can rightly be determined that a right of action accrued to, or exists in favor of, the plaintiff as administratrix of the deceased employee under the federal act. True, there is an allegation 'that by reason of the foregoing a cause of action has accrued to plaintiff against the defendant under and by virtue of the Employer's Liability Act. But this is a conclusion only, and does not enlarge the facts previously alleged, and from which the conclusion is drawn. The court takes notice of the acts of Congress, and it is to the facts alleged in the petition that it must look to determine whether or not a cause of action is alleged thereunder; and, if they do not show a cause of action arising under some act of Congress, an averment that they do so arise avails nothing. It may be that it was intended to allege in this count of the petition a cause of action arising under the federal Employer's Liability Act. If so, essential facts are wholly wanting to show such a cause of action; the averment alone that 'the carrier and its employee were engaged in interstate commerce at the time of the injury to and death of the employee' being insufficient to show such a right. If it appeared upon the face of the petition that sufficient facts existed to show a right of action under the federal act, but were inaptly or defectively alleged, such defects could be cured by an amendment, and they might be overlooked. But when essential facts are wholly wanting, effect must be given to the petition as it is written. Besides, this count of the petition plainly alleges that it was the estate only of the deceased employee that was damaged by the alleged wrongful acts which caused his death, and recovery is asked for the benefit of his estate. The damage to the estate,

and the measure of recovery therefor, are essentially different from the pecuniary loss or injury to the dependent relatives because of the death of the employee, and the measure of recovery therefor."

**Election.**—Where a petition sets up a cause of action at common law and also under this act the plaintiff may be required to elect on which cause he will go to trial. *Louisville & N. R. Co. v. Moore*, (1914) 158 Ky. 708, 161 S. W. 1129.

**Joinder of causes of action.**—A petition may include a cause of action arising under this act and one arising under a state law, but they must be alleged in different counts. *Bankson v. Illinois Cent. R. (N. D. Ia. 1912)* 196 Fed. 171, wherein the court said: "The facts, somewhat loosely alleged, are of such character that the deceased may have lost his life while he was engaged as an employee of the defendant in interstate commerce between the states of Illinois and Iowa; or, if not so engaged, that he might be entitled to recover against the defendant under the general law of negligence, operative both in the states of Illinois and Iowa. Two causes of action are therefore attempted to be alleged in the petition; and under such circumstances it is the duty of the plaintiff to distinctly allege in separate counts of the petition the facts upon which she relies as constituting these different causes of action, and she is not permitted to allege them in a single count thereof. Code of Iowa (1897) §§ 3545-3559. If the deceased was injured through the neglect of the defendant railroad company, or some of its employees, while he was engaged in operating a train carrying interstate commerce between the states of Iowa and Illinois, then the plaintiff would be entitled to recover of the defendant only under the Employer's Liability Act of Congress for the benefit of the surviving widow and children of the deceased, if any, or, if none, then for some other dependent relative, for that act supersedes all state laws upon the subject. . . . It is not distinctly alleged in the petition that the deceased left surviving him a widow or minor children, or other dependent relatives; and, in the absence of any such relatives, the action could not be maintained by the plaintiff under the Employer's Liability Act of Congress. If the deceased received his injuries through the neglect of the defendant railroad company or some of its servants or employees while he was not engaged in interstate commerce, then the plaintiff's right of recovery for such injury, if at all, would be under the state law and for the benefit of his estate, because in that event the Employer's Liability Act of Congress would not affect the state law upon the subject. The motion to require the plaintiff to separate and divide the causes of action alleged in the single count of her petition into separate and distinct counts is therefore sustained."

In *Midland Valley R. Co. v. Ennis*, (Ark. 1913) 159 S. W. 214, it was held that facts which give the right to recover under a

state employer's law, and those which give the right to recover under the federal employer's act, constitute separate and distinct causes of action, for the federal statute is exclusive where the incident is embraced within interstate commerce service and does not apply where it is in intrastate service. The two causes of action may, however, be joined in the same complaint.

In Alabama a count seeking a recovery under the Employers' Liability Act of that state may be joined with a count seeking a recovery under the federal act. *Atlantic Coast Line Ry. Co. v. Jones*, (1913) 9 Ala. App. 499, 63 So. 693, wherein the court said: "The systems of jurisprudence of the state and of the United States together form one system which constitutes the law of the land for the state, and concurrent jurisdiction with the federal courts is conferred on the state courts by the federal act in the enforcement of rights of action accruing under it. Under the practice in vogue in this state, separate and independent causes of action arising out of the same transaction and relating to the same subject-matter may be joined in different counts of the same complaint, and one who is entitled to sue for the consequences of a wrongful or negligent act of another is not required to split up his cause of action, but may recover all the damages in one action."

**Amendment.**—In an action brought in a state court that court may, under its power to allow amendments to pleadings, amend a complaint brought under this act by alleging that there are beneficiaries, and other facts connected therewith. *Kenney v. Seaboard Air Line Ry. Co.*, (N. C. 1914) 80 S. E. 1078.

**Evidence.**—In *Irvin v. Southern R. Co.*, (1913) 164 N. C. 5, 80 S. E. 78, a mother bringing an action under this act for the death of her son was held competent to testify to the fact that the deceased contributed to her support.

**Damages.**—Under this act, as interpreted by the Supreme Court of the United States, a new and distinct right of action is given for the benefit of the dependent relatives named in the statute, and the damages recoverable are limited to such loss as results because they have been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the injured employee. The damage is limited strictly to the financial loss sustained. If there is no reasonable expectation of pecuniary benefits, or no financial loss sustained, then there can be no recovery under this act. *Michigan Cent. R. Co. v. Vreeland*, (1913) 227 U. S. 59, 33 S. Ct. 192, 57 U. S. (L. ed.) 417; *American R. Co. of Porto Rico v. Didricksen*, (1913) 227 U. S. 145, 33 S. Ct. 224, 57 U. S. (L. ed.) 456; *Garrett v. Louisville & N. R. Co.* (C. C. A. 6th Cir. 1912) 197 Fed. 715; *Cincinnati, N. O. & T. P. R. Co. v. Wilson's Adm'r*, (1914) 167 Ky. 460, 163 S. W. 493; *Dooley v. Seaboard Air Line Ry. Co.*, (1913) 163 N. C. 454, 79 S. E. 970; *Kenney v. Seaboard Air Line Ry. Co.*, (N. C. 1914)



80 S. E. 1078; *Fogarty v. Northern Pac. Ry. Co.*, (1913) 74 Wash. 397, 133 Pac. 609.

The pecuniary loss is not dependent upon any legal liability of the injured person to the beneficiary. That is not the sole test. There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived. Compensation for such loss manifestly does not include damages by way of recompense for grief or wounded feelings. *Michigan Cent. R. Co. v. Vreeland*, (1913) 227 U. S. 59, 33 S. Ct. 192, 57 U. S. (L. ed.) 417.

The statutory action of an administrator is not for the equal benefit of each of the surviving relatives for whose benefit the suit is brought. Though the judgment may be for a gross amount, the interest of each beneficiary must be measured by his or her individual pecuniary loss. That apportionment is for the jury to return. This will exclude any recovery in behalf of such as show no pecuniary loss. *Gulf, C. & S. F. R. Co., v. McGinnis*, (1913) 228 U. S. 173, 33 S. Ct. 426, 57 U. S. (L. ed.) 785; *Fogarty v. Northern Pac. R. Co.*, (1913) 74 Wash. 397, 133 Pac. 609.

The value of the attention and of the care which a wife gives a husband or a husband gives a wife is pecuniary in the last analysis, and is a thing that can be recovered for. *Vreeland v. Michigan Cent. R. Co.*, (N. D. Ohio 1910) 189 Fed. 495.

A charge to the jury on the measure of damages is erroneous, where a recovery is permitted, not only for the pecuniary loss sustained by the wife and children, but also for an excess of the decedent's earnings during his expectancy of life. *Southern R. Co. v. Hill*, (1913) 139 Ga. 549, 77 S. E. 803.

In *Cain v. Southern R. Co.*, (E. D. Tenn. 1911) 199 Fed. 211, the court said: "I also think it clear that under the Act of 1908, before the amendment of 1910, in an action brought for the statutory beneficiaries to recover damages for the death of an employee, the recovery is limited to the pecuniary injury or loss sustained by the beneficiaries from the death of the deceased, and that the measure of damages is compensation for the loss of such pecuniary benefit as could have been reasonably expected to the beneficiaries, as of legal right or otherwise, from the continued life of the deceased, excluding all consideration of punitive elements, loss of society, wounded feelings of the survivors and suffering of the deceased. . . . Thus, in *Baltimore & P. R. Co. v. Mackey*, supra [157 U. S. 72, 92, 15 S.

Ct. 491, 39 U. S. (L. ed.) 624] it was held that under a statute of the District of Columbia providing that one causing the wrongful or negligent death of another should be liable to an action of damages for such death, to be assessed 'with reference to the injury . . . resulting to the widow and next of kin of such deceased person,' it was not error to charge the jury that in estimating the damages they might take into consideration the age of the deceased, his health, strength and capacity to earn money, as disclosed by the evidence, who his family were and of what they consisted, and from all the facts and circumstances make up their minds how much the family probably lost by his death, that is, how much they had a reasonable expectation of receiving if he had not been killed. However, it would seem under the weight of authority, that the value of a father's services in attention to and care and superintendence of his children and family and in the education of his children, of which they are deprived by his death, is also to be considered as an element of pecuniary damages."

**Effect of prior suit pending for same cause.**

—Where suit is brought by an employee against his employer in a state court for injuries resulting from the negligence of the employer at common law, and subsequently, and while the suit is still pending, another suit is brought in the state court for the same injuries, but the second suit is brought under the federal Employers' Liability Act, it will not be abated on the ground that there is another suit pending for the same cause if it appears from the statement of counsel for the plaintiff at the argument that when the second suit was instituted it was at least a doubtful question whether he could secure his rights under the original declaration, or by an amendment thereof. *Tinkham v. Boston & M. R. Co.*, (N. H. 1913) 88 Atl. 709.

**Res judicata.**—The federal Employers' Liability Act supersedes state acts in conflict therewith, and it results that if a person is killed while employed in interstate commerce, and a suit brought by his widow and children under a state law is dismissed, such suit is no bar to a suit brought by the administrator under the federal law. *Troxell v. Delaware, L. & W. R. Co.*, (1913) 227 U. S. 434, 33 S. Ct. 274, 57 U. S. (L. ed.) 586, reversing (C. C. A. 3d Cir. 1912) 200 Fed. 44.

## 1909 Supp., p. 584, sec. 2.

"To his or her personal representative."—In *American R. Co. of Porto Rico v. Birch*, (1912) 224 U. S. 547, 32 S. Ct. 603, 56 U. S. (L. ed.) 879, it was contended that the words "to his or her personal representative" could not be construed to mean that it was necessary, in cases where only the husband or wife could inherit and were the

only survivors, that they be forced, in the absence of any estate belonging to the deceased other than his right to sue, to have an administrator appointed. The contention was overruled, the court saying: "But the words of the act will not yield to such a liberal construction. They are too clear to be other than strictly followed. They give

an action for damages to the person injured, or, 'in case of his death, . . . to his or her personal representative.' It is true that the recovery of the damages is not for the benefit of the estate of the deceased but for the benefit of the surviving widow or husband and children.' But this distinction between the parties to sue and the parties to be benefited by the suit makes clear the purpose of Congress. To this purpose we must yield. Even if we could say, as we cannot, that it is not a better provision than to give the cause of action to those in relation to the deceased. In the present

case it looks like a useless circumlocution to require an administration upon the deceased's estate, but in many cases it might be much the simpler plan and keep the controversy free from elements but those which relate to the cause of action. But we may presume that all contending considerations were taken into account and the purpose of Congress expressed in the language it used."

The word "possessions" includes Porto Rico. *American R. Co. of Porto Rico v. Didricksen*, (1913) 227 U. S. 145, 33 S. Ct. 224, 57 U. S. (L. ed.) 456.

### 1909 Supp., p. 585, sec. 3.

**Conformity to state procedure.**—The federal statute, being general in terms, and making no specific regulations as to the methods by which the fact of contributory negligence should be established, when the action is brought in the state court, the procedure should conform as near as may be to that of the state law applicable, including the "character of action, the order and manner of trial, the rules of pleading and evidence." *Fleming v. Norfolk Southern R. Co.*, (1912) 160 N. C. 196, 76 S. E. 212.

**Effect of contributory negligence.**—Under this section, contributory negligence on the part of the plaintiff is not a bar to a recovery; but the damages must be diminished by the jury in proportion to the amount of negligence attributable to such employee. *Cain v. Southern R. Co.*, (E. D. Tenn. 1911) 199 Fed. 211; *Neil v. Idaho & W. N. R. Co.*, (1912) 22 Idaho 74, 125 Pac. 331; *Montgomery v. Carolina & N. W. R. Co.*, (N. C. 1913) 80 S. E. 83; *Kenney v. Seaboard Air Line Ry. Co.*, (N. C. 1914) 80 S. E. 1078.

**Proportionate diminution.**—The statutory direction that the diminution shall be "in proportion to the amount of negligence attributable to such employee" means, that, where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both; the purpose being to abrogate the common law rule completely exonerating the carrier from the liability in such a case and to substitute a new rule confining the exoneration to a proportional part of the damages corresponding to the amount of negligence attributable to the employee. *Norfolk & W. R. Co. v. Earnest*, (1913) 229 U. S. 114, 33 S. Ct. 654, 57 U. S. (L. ed.) 1096.

**Nonsuit not directed.**—The court is forbidden to direct a nonsuit upon the ground that there is evidence of contributory negligence shown by the plaintiff's testimony because the statute provides that, though the plaintiff may have been guilty of contributory negligence, it shall not bar a recovery. *Horton v. Seaboard Air Line R. Co.*, (1911) 157 N. C. 146, 72 S. E. 958.

**No right conferred by change in the law.**—The change in the law as to contributory negligence confers no right, and is operative only to withdraw from the railroad company a defense theretofore existing, and the same may be said as to changes in the doctrine as to the negligence of a fellow servant, and of assumption of risk. *Burnett v. Atlantic Coast Line R. Co.*, (1913) 163 N. C. 156, 79 S. E. 414.

**The defense of contributory negligence is for the jury.**—*Sandidge v. Atchison, T. & S. F. Ry. Co.*, (C. C. A. 9th Cir. 1912) 193 Fed. 867; *Missouri, K. & T. Ry. Co. v. Rentz*, (Tex. 1913) 162 S. W. 959.

**Instructions.**—In an action prosecuted under this act where negligence on the part of the employer has been shown and the fact of the employee's contributory negligence when available under such statute has been properly established, the judge should direct the jury in general terms that such fact is no bar to recovery by the employee, but the same shall be considered in diminution of damages, and such allowance made therefor in reduction of plaintiff's claim as they may deem right and proper. *Fleming v. Norfolk Southern R. Co.*, (1912) 160 N. C. 196, 76 S. E. 212.

In view of the provisions of this section a jury should not be instructed that a finding of contributory negligence on the part of the employee, killed while on a train engaged in interstate commerce, should be followed by a verdict for the defendant, as contributory negligence does not bar recovery, but only diminishes damages proportionately. *Chicago Great Western R. Co. v. McCormick*, (C. C. A. 8th Cir. 1912) 200 Fed. 375.

If in one sentence an instruction to the jury plainly states that the statute requires, where the plaintiff has been guilty of contributory negligence, that "the damages shall be diminished by the jury" it is not a good ground for exception that the next sentence contains a statement that such negligence "goes by way of diminution of damages." as the second statement is but a mere repetition of the statutory requirement in somewhat different words, its purpose being to give effect merely to what goes before, and not to qualify that statement. *Norfolk &*

*W. R. Co. v. Earnest*, (1913) 229 U. S. 114, 33 S. Ct. 654, 57 U. S. (L. ed.) 1096.

It is not error to instruct the jury that, if both the plaintiff's intestate and the railway company by their negligence contributed to the former's death, the plaintiff nevertheless would be entitled to recover damages, though the damages would be diminished in proportion to the negligence attributable to the decedent. *Southern R. Co. v. Hill*, (1913) 139 Ga. 549, 77 S. E. 803.

### 1909 Supp., p. 585, sec. 4.

**Changes effected by statute.**—It has been held that while the act provides that contributory negligence shall not bar a recovery, but only mitigate the damages, it makes no change in the rule as to assumed risks except as to the safety of appliances provided for by the act of Congress. *Glenn v. Cincinnati, N. O. & T. P. R. Co.*, (1914) 157 Ky. 453, 163 S. W. 461; *Freeman v. Powell*, (Tex. 1912) 144 S. W. 1033.

This section does not apply to an action for a death caused by the alleged negligence of a railroad in having its tracks too near together. *Central Vermont Ry. Co. v. Bethune*, (C. C. A. 1st Cir. 1913) 206 Fed. 868.

But in *Horton v. Seaboard Air Line R. Co.*, (1913) 162 N. C. 424, 78 S. E. 494, the court said: "The term 'any statute' in the section quoted means any federal statute, and that the assumption of risk is to be applied by a construction of the whole statute and under the rules laid down by the Supreme Court of the United States. Statutes should receive such a construction as will accord with the legislative intention as gathered from the whole act, and when the act under consideration is so construed, it is at least debatable whether assumption of risk should be admitted as a defense in any action brought under its provisions. It says that contributory negligence on the part of the employee (that is, negligence which proximately causes the injury, because no other negligence is contributory) 'shall not bar a recovery,' and it would appear to be incongruous to admit as a defense assumption of risk which is based upon the fiction that the employee has assented to assume the risk of the particular injury, and when the facts relied on to prove assumption of risk generally enter into and are a part, but not all, of those necessary to sustain a plea of contributory negligence." See also *Southern Ry. Co. v. Cadd*, (C. C. A. 6th Cir. 1913) 207 Fed. 277; *Atlantic Coast Line R. Co. v. Whitney*, (Fla. 1913) 61 So. 179.

**Negligence of employees.**—Under this statute there can be no assumption of a risk arising from the negligence of the officers, agents, or employees of the carrier. *Wright v. Yazoo & M. V. R. Co.* (W. D. Tenn. 1912) 197 Fed. 94, wherein the court said: "Should it be said that one of the ordinary dangers of deceased's employment was that the carrier violated its own rule, requiring that

Assuming the negligence of the plaintiff to be equal to or greater than the negligence of the defendant, an instruction to the jury that nominal damages only could be recovered would be improper. *Louisville & N. R. Co. v. Wene*, (C. C. A. 7th Cir. 1913) 202 Fed. 887.

This section is cited in *Grand Trunk Western Ry. Co. v. Lindsay*, (C. C. A. 7th Cir. 1912) 201 Fed. 836; *La Mere v. Railway Transfer Co.*, (Minn. 1914) 145 N. W. 1068.

cars left on sidings be placed in the clear so habitually that the servant knew or should have known of it, and by remaining in the service of the company assumed the risk incident thereto? What was the purpose of Congress in passing the Employers' Liability Act? If plain words are to be taken in their ordinary meaning, it was to make common carriers by railroad, while engaged in interstate commerce, liable in damages to any of its employees for injury or death suffered while he is employed by such carrier in such commerce, resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier etc., and to provide, that, although the employee may have been guilty of contributory negligence, that shall not bar a recovery, but shall go in reduction of damages, except that no employee shall be held to have been guilty of contributory negligence, or to have assumed the risk of his employment in any case where the violation by the common carrier of any statute enacted for the safety of employees contributed to the injury of such employee. It is conceded that the common-law rule that contributory negligence barred the right of recovery has been abolished by the act. Shall the courts destroy the effect of the act in this particular by holding that common carriers are not liable to their servants for injury or death inflicted as a result of the negligence of their officers, agents, or employees, upon the ground that the servant assumes the risk incident to the negligence of the officers, agents, or employees of the carrier? In view of the first section of the act, which provides that such common carrier shall be liable in damages to its employee, resulting in whole or in part from the negligence of any of its officers, agents, or employees, it is not permissible in my judgment to hold that the employee assumes the risk of his employment which arises from the negligence of the officers, agents, or employees of the carrier. It is insisted that since the act provides that he shall not be held to have assumed such risk in cases only where the violation by the common carrier of any statute enacted for the safety of employees contributed to the injury, the maxim, 'Expressio unius est exclusio alterius,' applies. I do not think this insistence is sound or that it should be sustained. As I construe the act, the risk that the employee now assumes is

the ordinary dangers incident to his employment, which does not include since the passage of this act, the assumption of the risk incident to the negligence of the carrier's officers, agents, or employees, or any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

The negligence of a fellow servant is the negligence of the master under this section. *Pennsylvania R. Co. v. Goughnour*, (C. C. A. 3d Cir. 1913) 208 Fed. 961.

The negligence of the coservant of the intestate is not an ordinary risk which can

be in any way covered by the rule as to assumption of risk, unless possibly where there is evidence that the coservants are usually negligent in a certain specified way, with which fact the party injured was acquainted. *Boston & M. R. Co. v. Benson*, (C. C. A. 1st Cir. 1913) 205 Fed. 876.

This section was held applicable to the facts shown in *Opsahl v. Northern Pac. Ry. Co.*, (Wash. 1914) 138 Pac. 681.

This section is cited in *LaMere v. Railway Transfer Co.*, (Minn. 1914) 145 N. W. 1068; *Missouri, K. & T. Ry. Co. v. Scott*, (Tex. 1913) 160 S. W. 432.

## 1909 Supp., p. 585, sec. 5.

**Constitutionality.**—Since Congress possessed the power to impose the liability, provided for in this act, it also possessed the power to insure its efficacy by prohibiting any contract, rule, regulation or device in evasion of it. *Philadelphia, B. & W. R. Co. v. Schubert*, (1912) 224 U. S. 603, 32 S. Ct. 589, 56 U. S. (L. ed.) 911.

**Existing agreements.**—"That the provisions of § 5 were intended to apply as well to existing as to future contracts and regulations of the described character cannot be doubted. The words, 'the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act,' do not refer simply to an actual intent of the parties to circumvent the statute. The 'purpose or intent' of the contracts and regulations, within the meaning of the section, is to be found in their necessary operation and effect in defeating the liability which the statute was designed to enforce. Only by such general application could the statute accomplish the object which it is plain that Congress had in view. Nor can the further contention be sustained that, if so construed, the section is invalid. The power of Congress, in its regulation of interstate commerce, and of commerce in the District of Columbia and in the Territories, to impose this liability, was not fettered by the necessity of maintaining existing arrangements and stipulations which would conflict with the execution of its policy. To subordinate the exercise of the federal authority to the continuing operation of previous contracts, would be to place, to this extent, the regulation of interstate commerce in the hands of private individuals and to withdraw from the control of Congress so much of the field as they might choose by prophetic discernment to bring within the range of their agreements. The Constitution recognizes no such limitation. It is of the essence of the delegated power of regulation that, within its sphere, Congress should be able to establish uniform rules, immediately obligatory, which as to future action should transcend all inconsistent provisions. Prior arrangements were necessarily subject to this paramount authority." *Philadelphia, B. & W. R. Co. v.*

*Schubert*, (1912) 224 U. S. 603, 32 S. Ct. 589, 56 U. S. (L. ed.) 911.

**Acceptance of benefits of relief department.**—The proviso indicates the intent to include within the statute stipulations which make the acceptance of benefits under contracts of membership in relief departments equivalent to a release from liability. Necessarily the liability must survive the acceptance of the benefits, or there could be no recovery and hence no occasion for set-off as provided in the statute. *Philadelphia, B. & W. R. Co. v. Schubert*, (1912) 224 U. S. 603, 32 S. Ct. 589, 56 U. S. (L. ed.) 911.

In an action to recover for injuries received while working as a brakeman, it appeared that when the plaintiff entered the employ of the defendant he became a contributory member of a relief department. The regulations of this department, which the plaintiff signed, provided that benefits were not payable until the person injured had first filed a release from all claims against the railroad company. After the plaintiff was injured he elected to and did receive benefits from the relief department and signed a release from all claims for damages. It was held that the release was void within this section. *Baltimore & O. R. Co. v. Gawinske*, (C. C. A. 3d Cir. 1912) 197 Fed. 31.

In *Rodell v. Relief Department of Chicago, B. & Q. R. Co.*, (1912) 118 Minn. 449, 137 N. W. 174, it appeared that the plaintiff's deceased husband held a membership certificate in the relief department of defendant, under which, in the event of his death, defendant agreed to pay a certain sum to plaintiff. The husband was injured while in defendant's employ as engineer, running a train engaged in interstate commerce between a point in Wisconsin and a point in Illinois. He received his injuries in Illinois and died there. The certificate provided that no money thereunder should become due till all claims against defendant arising out of his death should be released. It was held that the plaintiff was entitled to recover, without furnishing defendant with release from the personal representative of her deceased husband, since under this section the

terms of the membership certificate to the extent that the same provided for releases

from all claims on account of wrongful death were void.

## 1909 Supp., p. 585, sec. 6.

**Necessity for pleading statute.**—This section is a statute of limitation and the defendant cannot avail itself of its protections unless it is pleaded. *Burnett v. Atlantic Coast Line R. Co.*, (1913) 163 N. C. 186, 79 S. E. 414.

An amendment to the plaintiff's pleading, making a change in form rather than in substance, is not equivalent to the commencement of a new action so as to render it subject to the two years' limitation. *Missouri, K. & T. R. Co. v. Wulf*, (1913) 226 U. S. 570, 33 S. Ct. 135, 57 U. S. (L. ed.) 355.

## 1912 Supp., p. 335, sec. 1. [Act of April 5, 1910.]

**Constitutionality.**—This provision is purely remedial and is couched in plain language. Congress was clearly acting within its constitutional power when it passed the amendment. While section 2 of article 3 of the Constitution declares that the judicial power shall extend to all cases arising under that instrument and the laws of the United States, as also, among others, to cases "between citizens of different states," yet it was long ago settled that, as to courts inferior to the Supreme Court, their jurisdiction in every case must depend upon some act of Congress. *Teel v. Chesapeake & O. Ry. Co.*, (C. C. A. 6th Cir. 1913) 204 Fed. 918, 47 L.R.A. (N.S.) 21.

**Not retroactive.**—The section has no application to actions brought prior to its passage. *Ft. Smith & W. R. Co. v. Blevins*, (Okla. 1913) 130 Pac. 525.

A state court has jurisdiction of an action under this section. *Golligher v. Pennsylvania R. Co.*, (1912) 237 Pa. St. 152, 85 Atl. 129; *Gulf, C. & S. F. Ry. Co. v. Lester*, (Tex. 1912) 149 S. W. 841.

**Waiver of right to proceed in state court.**—Where an action is brought in a state court under this act and is afterwards removed to a federal court without objection by the plaintiff who afterwards invokes the interposition of such court, he thereby waives his right to have the case tried in the state court as authorized by this section. *Stephens v. Chicago, M. & P. S. Ry. Co.*, (N. D. Idaho 1913) 206 Fed. 854.

**Removal prohibited for any cause.**—This section prevents the removal of a case under the *Employers' Liability Act* from a state court to a federal court on any ground whatever. *Symonds v. St. Louis & S. Ry. Co.*, (W. D. Ark. 1911) 192 Fed. 353; *Strauser v. Chicago, B. & Q. R. Co.*, (D. C. Neb. 1912) 193 Fed. 293; *Saiek v. Pennsylvania R. Co.*, (E. D. N. Y. 1911) 193 Fed. 303; *Hulac v. Chicago & N. W. Ry. Co.*, (D. C. Neb. 1912) 194 Fed. 747; *Teel v. Chesapeake & O. Ry. Co.*, (C. C. A. 6th Cir. 1913) 204 Fed. 918, 47 L.R.A. (N.S.) 21; *De Atley v. Chesapeake & O. R. Co.*, (1912) 147 Ky. 315, 144 S. W. 95; *Lloyd v. North Carolina R. Co.*, (1913) 162 N. C. 485, 78 S. E. 489. Compare *Van Brimmer v. Texas & P. Ry. Co.*, (E. D. Tex. 1911) 190 Fed. 394.

In *Hulac v. Chicago & N. W. Ry. Co.*, (D. C. Neb. 1912) 194 Fed. 747, the court said:

"The prohibitory clause was added as an amendment in the Senate of the United States, and accepted with very little debate. It is not conceivable that Congress did not understand the full import of the words of the amendment, and that no exception was expressed. That Congress did intend to forbid the removal of cases arising under the *Employers' Liability Act*, upon any ground, appears from the fact that the same Congress, at the following session, again forbade the removal of cases in section 28 of the Judicial Code, and this was by an amendment immediately following the re-enactment and codification of the law covering the whole subject of the right of removal.

"It is a well-recognized fact in judicial history that plaintiffs, in actions brought by employees against railway companies for damages resulting from personal injuries, have quite generally and for many years sought to bring and retain their actions in the state courts, and the fact is well attested by the multitude of applications to remand such cases which have been constantly presented to the federal courts. The expense of trials and of appeals in the federal courts have been deterrents, and the variance in the rules of law in such cases as applied in the state and federal courts has also been well understood. Congress has recognized, by the *Employers' Liability Act*, as well as by the *Safety Appliance Acts*, that these rules of law should be made more favorable to the injured servant. The purpose of Congress in the enactment of the *Employers' Liability Act* was the granting of additional rights to the servant, and the removal of existing defenses by the master in actions by injured employees against railway companies. One of the rights which Congress had in mind was the right of the servant to choose the forum in which his action should be litigated. The amendatory act of Congress gives concurrent jurisdiction to the courts of the United States with the courts of the states, and increases the number of districts in which the plaintiff may sue in the United States courts, and while thus enlarging the rights of the plaintiff, and in harmony with the general scope of the act, cuts down the rights of the railway company by forbidding a removal of the case upon any ground."

**Diverse citizenship.**—By virtue of this section and section 28 of the Judicial Code,

(Fed. Stat. Annot. Supp. 1912, p. 144) a suit brought under the Employers' Liability Act cannot be removed from a state to a federal court even on the ground of diverse citizenship. *Lee v. Toledo, St. L. & W. Ry. Co.*, (E. D. Ill. 1912) 193 Fed. 685; *Ullrich v. New York, N. H. & H. R. Co.*, (S. D. N. Y. 1912) 193 Fed. 768; *De Atley v. Chesapeake & O. Ry. Co.*, (E. D. Ky. 1912) 201 Fed. 591; *Kelley v. Chesapeake & O. Ry. Co.*, (E. D. Ky. 1912) 201 Fed. 602; *Stafford v. Norfolk & W. Ry. Co.*, (E. D. Ky. 1913) 202 Fed. 605; *Teel v. Chesapeake & O. Ry. Co.*, (C. C. A. 6th Cir. 1913) 204 Fed. 918, 47 L.R.A. (N.S.) 21; *Patton v. Cincinnati, N. O. & T. P. Ry.*, (E. D. Tenn. 1913) 208 Fed. 29; *Kansas City Southern R. Co. v. Cook*, (1911) 100 Ark. 467, 140 S. W. 579; *McCulloch, C. J. in St. Louis & S. F. R. Co. v. Conarty*, (Ark. 1913) 155 S. W. 93; *Missouri, K. & T. G. Ry. Co. v. Bunkley*, (Tex. 1913) 153 S. W. 937.

In *Patton v. Cincinnati, N. O. & T. P. Ry.*, (E. D. Tenn. 1913) 208 Fed. 29, the court said: "The provision in the amendatory Act of April 5, 1910, that no case arising under the Employers' Liability Act shall be removed from any state court of competent jurisdiction to any federal court, and reenacted in section 28 of the Judicial Code, is not merely a personal privilege or exemption in favor of the plaintiff in respect to the jurisdiction of the particular District Court to which the case has been removed, which he may waive after the removal by appearance or consent, but is a provision limiting the jurisdiction of the federal courts as a class, and entirely withholding from them jurisdiction, through removal proceedings, of cases arising under the Employers' Liability Act which have been previously commenced in state courts of competent jurisdiction. This distinction is emphasized by the contrast between the language of the first sentence in section 6 of the Employers' Liability Act, as amended by the Act of 1910, in reference to the particular district in which a suit 'may' be brought under that Act, and that in the second sentence of the same section, which provides that 'no case' arising under the Act and brought in any state court of competent jurisdiction 'shall be removed to any court of the United States.' It is also the necessary result of the proviso, framed in substantially the same language, contained in section 28 of the Judicial Code. 'The office of a proviso, generally, is, either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it, as extending to cases not intended by the legislature to be brought within its purview.' . . . Applying this rule of construction, I think it clear that the effect of the proviso in section 28 of the Code is to except cases arising under the Employers' Liability Act and pending in state courts from the classes of cases whose removal to the federal courts is authorized under the preceding provisos of the section, and to so qualify the broad language used

in the preceding portions of this section as to exclude from its provisions any and all cases of this character. In other words, in my opinion, the effect of this proviso is the same as if the preceding enacting provisions of the section had expressly excepted from each class of cases which might be removed to the federal courts all cases arising under the Employers' Liability Act and pending in the state courts."

In *Kelley v. Chesapeake & O. Ry. Co.*, (E. D. Ky. 1912) 201 Fed. 602, the court said: "In the case of *Van Brimer v. T. & P. R. R. Co.*, (C. C.) 190 Fed. 394, which arose before the new Judicial Code went into effect, it was held that a case arising under the Employers' Liability Act was removable where diversity of citizenship existed. In a number of cases arising both before and after that Code went into effect, it has been held otherwise. . . . This case arose since the Code went into effect. The law is stronger against removability since then than before. But I think such a case was not removable before. Congress said that 'no case arising under this act' should be removed, and it should be taken to have meant what it said. It is urged that to so construe the act renders it unconstitutional, in that it makes an unjust discrimination between such cases—i. e., cases arising under the Employers' Liability Act, where diversity of citizenship exists—and cases of like character not arising thereunder in such contingency; i. e., that there is no reasonable basis for not making the same rule as to removability applicable to both classes of cases. This point was not made in any of the above cases, except the last one, and in that case Judge Evans held that the point was not well taken. In this opinion I concur. The creation of the liability by Congress was in the exercise of its power under the interstate commerce clause of the federal Constitution. The prohibition of the removal of cases arising under the statute was in the exercise of the power granted to it by the third article of that Constitution, by which Congress is empowered to legislate as to the judicial power of such inferior courts as it may establish. I understand that within the limit of the second section of that article Congress may do as it pleases in the exercise of the power thereby conferred."

**Remanding case to state court.**—Where the plaintiff's cause of action has not been stated in any pleading filed by the plaintiff and the petition for removal is silent as to the nature of the cause of action, the case should be subsequently remanded to the state court, if at any time it affirmatively appears, either from the pleadings filed by the plaintiff or in any other appropriate manner, that the suit is in fact one coming within the excepting clause and hence withheld from the jurisdiction of the federal courts through removal proceedings. *Patton v. Cincinnati, N. O. & T. P. Ry.*, (E. D. Tenn. 1913) 208 Fed. 29, wherein the court said: "This view finds direct support in

*Barney v. Latham*, (1880) 103 U. S. 205, 216, 26 U. S. (L. ed.) 514, in which it was said that if after removal of a case to the federal court it should, upon a reformation of the pleadings, appear that the case did not really and substantially involve a dispute or controversy within the jurisdiction of the court, it could then under the 5th section of the Act of March 3, 1875, the provisions of which were carried into section 37 of the Judicial Code, be remanded

to the state court. Certainly if the case be one in which jurisdiction is expressly withheld from this court through removal proceedings, and in which jurisdiction cannot be conferred either by waiver or express consent of the plaintiff after the removal, it follows, a fortiori, that jurisdiction cannot be conferred simply by the negligence or default of the plaintiff in failing to file his declaration in the state court within the proper time."

## 1912 Supp., p. 335, sec. 2.

**This amendment is not retroactive.**—*St. Louis, I. M. & S. R. Co. v. Hesterly*, (1913) 228 U. S. 702, 33 S. Ct. 703, 57 U. S. (L. ed.) 1031; *Cain v. Southern R. Co.*, (E. D. Tenn. 1911) 199 Fed. 211.

**Only applicable to Employers' Liability Act.**—This amendment does not purport to deal with any causes of action except those given by section 1 of the original act (Fed. Stat. Annot. Supp. 1909, p. 584). *Dooley v. Seaboard Air Line Ry. Co.*, (1913) 163 N. C. 454, 79 S. E. 970.

**Reason for amendment.**—The federal statute as originally enacted gave a cause of action, first, to the injured employee, which, of course, included as elements of damage pain and suffering endured as well as pecuniary injury resulting from loss of earnings; and, next, to the widow and next of kin in the event of the death of such injured employee, the measure of damages being the pecuniary loss sustained by such widow and next of kin on account of such death. It was held that the cause of action given to the injured person did not survive his death, but died with him, and that a new cause of action then arose in favor of the personal representative for the benefit of the widow and next of kin. The result was that, if the injured person died after bringing suit, his personal representative could not be substituted to prosecute the suit for the benefit of the widow and next of kin, but had to bring a new action for that purpose, and the pain and suffering endured by the injured person was not an element of recoverable damages sustained by the widow and next of kin, and could not be recovered for their benefit. To change this condition of the law, Congress enacted this amendatory statute. The statute as thus amended forbids the prosecution of more than one action, and permits only one recovery; but the action is prosecuted, after the death of the injured person, for the benefit of the widow and next of kin, and may include compensation for the pain and suffering endured by the injured person as well as for pecuniary loss of earnings and contributions; in other words, compensation for all of the damages resulting from the injury for which the statute provides a remedy inures after the death of the injured person to the benefit of the widow and next of kin, but must be recovered in one action. *Northern Pac. Ry. Co.*

*v. Maerkl*, (C. C. A. 9th Cir. 1912) 198 Fed. 1; *St. Louis & S. F. R. Co. v. Conarty*, (Ark. 1913) 155 S. W. 93; *Carolina, C. & O. Ry. v. Shewalter*, (Tenn. 1913) 161 S. W. 1136.

**Cause of action in personal representative only.**—By this amendment the right of action given the injured employee was made to survive to his personal representative for the benefit of the same relatives for whose pecuniary loss recovery is provided by section 2 of the act. *Illinois Cent. R. Co. v. Porter*, (C. C. A. 6th Cir. 1913) 207 Fed. 311; *Gulf, C. & S. F. Ry. Co. v. Lester*, (Tex. 1912) 149 S. W. 841; *Kansas, M. & O. Ry. Co. v. Pope*, (Tex. 1912) 152 S. W. 185.

**Necessity for allegation that decedent left dependents.**—There is no basis for a presumption that one dying leaves a husband, widow, child, parent, or next of kin dependent upon him. Absence of allegation to that effect cannot therefore be supplied by presumption. It must appear in the complaint that such a person there was, or there is a failure to state a cause of action. *Farley v. New York, N. H. & H. R. Co.*, (Conn. 1913) 87 Atl. 990.

**Measure of damages.**—The damages recoverable are not such as will compensate the estate of the deceased employee for the destruction of his power to earn money, but such as will compensate his surviving relatives for the actual pecuniary loss resulting by reason of his death to the particular person or persons for whose benefit the statutory right of action is given. *Chesapeake & O. R. Co. v. Dwyer's Adm'r*, (1914) 157 Ky. 590, 163 S. W. 752, disapproving *Louisville & N. R. Co. v. Stewart's Adm'r*, (1913) 156 Ky. 550, 161 S. W. 557. *Compare Gulf, C. & S. F. Ry. Co. v. McGinnis*, (Tex. 1912) 147 S. W. 1188.

The statute, in so far as it provides for recovery for death, follows the lines of Lord Campbell's Act in England, and in its distinguishing features is identical with that act. It creates a right of action where there was none at common law, and one which is entirely independent of any which the deceased may have had in life, and which comes originally to the personal representative by the operation of the statute, and not by the process of survival. It is one for the exclusive benefit of certain specified persons, and the damages recoverable are such as result to them by reason of their

having been deprived, through the wrongful death of the deceased, of a reasonable expectation of pecuniary benefits attendant upon his continuance in life. *Farley v. New York, N. H. & H. R. Co.*, (Conn. 1913) 87 Atl. 990.

Right of administration solely for purpose of enforcing claim.—A cause of action is property and an asset of the estate, and, being property and an asset of the estate, the right to administration would, of necessity, follow. "The enactment of a statute giv-

ing an action for death and requiring that it shall be brought by a personal representative should be regarded as a conclusive recognition of the right of administration to enforce such a claim. If a statute designates the personal representative of the deceased as the proper plaintiff, to limit the right to cases in which the deceased left assets other than the right of action would introduce an unreasonable and arbitrary distinction." *Gulf, C. & S. F. Ry. Co. v. Beasley*, (Tex. 1913) 153 S. W. 651.

#### 1912 Supp., p. 336, sec. 4.

The proviso was intended by Congress to give the proper construction to the act of 1893. *Galveston, H. & S. A. Ry. Co. v. United States*, (C. C. A. 5th Cir. 1912) 199 Fed. 891.

Proviso without retroactive effect.—The proviso of this section is inapplicable to of-

fenses committed before its passage, and neither that proviso nor the other provisions of the act relating to that subject operate retrospectively. *United States v. Colorado Midland Ry. Co.*, (C. C. A. 8th Cir. 1912) 202 Fed. 732.

#### 1912 Supp., p. 337, sec. 1.

Authority of states.—Concurrent authority is, by this section, given to states to make investigations and report. *Gulf, C. & S. F. R. Co. v. State*, (1912) 33 Okla. 378, 125 Pac. 1103.

#### 1912 Supp., p. 339, sec. 1.

State statutes in conflict with this act are superseded by it. *Louisville & N. R. Co. v. Hughes*, (S. D. Ohio 1912) 201 Fed. 727.

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## REVENUE MARINE—REVENUE-CUTTER SERVICE.

#### 1909 Supp., p. 597, sec. 5.

Advanced in grade after retirement.—A retired officer, who after his retirement is advanced one grade in rank but without any advance in pay by reason of that advancement, is not included in the provisions of this section. *United States v. Mason*, (1913) 227 U. S. 486, 33 S. Ct. 374, 57 U. S. (L. ed.) 607, wherein the court said: "The act obviously meant to provide that

every revenue-cutter officer then on the active list should upon retirement advance one step in grade with three-fourths of the duty pay of the advanced grade. The same benefit was also extended to officers already on the retired list. But in both cases the advance in grade is to be based upon that held at the date of retirement with three-fourths of the pay of the advanced grade."

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## RIVERS, HARBORS, AND CANALS.

#### Vol. VI, p. 787, sec. 2476.

The intention of Congress.—Congress, in making distinction between streams navi-

gable and those not navigable, intended to provide that the common law rules of ri-



parian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams

should be deemed to be, and remain, public highways. *Scott v. Lattig*, (1913) 227 U. S. 229, 33 S. Ct. 242, 57 U. S. (L. ed.) 490, 44 L.R.A. (N.S.) 107.

## Vol. VI, p. 805, sec. 9.

**Necessity for affirmative authorization of Congress.**—Among the changes effected by the act of 1899 was to require the affirmative authorization by Congress to create any obstruction to the navigable waters of the United States, except that bridges, dams, dikes, and causeways in or across waters the navigable portions of which lie wholly within the limits of a single state were permitted if authorized by state legislation and the location and plans of such structures were approved by the Chief of Engineers and of the Secretary of War. In re *Seattle*, (1911) 66 Wash. 277, 119 Pac. 798. See also *Mauldin v. Central of Georgia R. Co.* (Ala. 1913) 61 So. 947.

**Power of state after approval of plans.**—An approval of the plan of a bridge by the Secretary of War is tantamount to a declaration by the federal government that the bridge is not an unlawful structure so far as navigation is concerned. It follows that no state authority or court can declare it unlawful or abate it as a nuisance on the ground that it unlawfully obstructs navigation. The declaration of the federal government is conclusive and final on that subject. *Milwaukee-Western Fuel Co. v. Milwaukee*, (1913) 152 Wis. 247, 139 N. W. 540.

This section is cited in *United States v. Jamaica & R. Turnpike Co.*, (C. C. A. 2d Cir. 1913) 204 Fed. 759.

## Vol. VI, p. 813, sec. 10.

**Changes in law made by this act.**—As the law stood immediately before this act was passed, the initial authorization of the Congress to create obstructions to the navigable capacity of an intrastate water was not necessary if state legislative authority for such construction had been obtained, and the building of wharves and other structures mentioned in the first part of section 7 of the act of 1890, [6 Fed. Stat. Annot. 806 note] in any United States navigable water, was only prohibited without the permission of the Secretary of War, if they obstructed or impaired navigation, commerce, or anchorage. The erection of bridges and their appurtenances over intrastate waters was permitted without the need of the approval of the Secretary of War, if authorized by law before the passage of said act. The excavating, filling, altering, etc., the channel of navigable waters was permitted if approved and authorized by the Secretary of War. Among the changes effected by this act was to require the affirmative authorization by Congress to create any obstruction to the navigable waters of the United States, except that bridges, dams, dikes, and causeways in or across waters the navigable portions of which lie wholly within the limits of a single state was permitted if authorized by state legislation and the location and plans of such structure were approved by the chief of engineers and of the Secretary of War. A present reading of the law in the light of the history of its enactment evinces a legislative purpose to require affirmative action on the part of Congress before a crossing of interstate streams shall be permitted, and that only when such congressional action shall have been taken can the powers delegated to the Secretary of War be put into operation. *Hubbard v. Fort*, (C. C. N. J. 1911) 188 Fed. 987.

**Affirmative authorization.**—"What is affirmative authorization? Affirmative is the antithesis of negative. The use of the word 'affirmatively' with 'authorized' would be difficult to understand except for the use of the word 'authorize' in the latter part of this section where the building of certain structures and the performing of certain works are forbidden without the authority of the Secretary of War. This section 'does not provide that it shall be lawful for the Secretary of War to authorize the excavation of land in the channel of any navigable water of the United States, but only that it shall not be lawful to do the work without the authorization of the Secretary and before beginning the work.' In view of the context, the word 'affirmatively' was legislatively used to distinguish the two kinds of authority referred to, and to make it plain that the initial authorization to create an obstruction was not to rest on implied, but express—affirmative—congressional authority." *Hubbard v. Fort*, (C. C. N. J. 1911) 188 Fed. 987.

**Character of obstruction.**—It is for Congress to decide what shall or shall not be deemed in judgment of law an obstruction of navigation. *Philadelphia Co. v. Stimson*, (1912) 223 U. S. 605, 32 S. Ct. 340, 56 U. S. (L. ed.) 570.

The intent of the statute was against the construction of structures of a more or less permanent nature and of the description of those particularized, unless authorized as prescribed. *Phenix Const. Co. v. Cornell Steamboat Co.*, (1913) 210 N. Y. 113, 103 N. E. 891.

Manifestly bridges, dams, dikes, and causeways are not the only structures that obstruct the navigable capacity of waters, and the prohibition with which this section begins would be utterly unnecessary and mean-

ingless if the same were limited to the character of structures dealt with in the preceding section. The remainder of this section shows other structures and works, any of which may prove an obstruction to the navigable capacity of such waters. *Hubbard v. Fort*, (C. C. N. J. 1911) 188 Fed. 987.

**Not confined to interstate waters.**—There is nothing in this section that restricts it to interstate waters. The first part which prohibits "the creation of any obstruction not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States" not only comprehends the kind of structures specifically referred

to by section 9 of the act, but all others that may be an obstruction to the navigable capacity of the waters of the United States, regardless of whether they are interstate or intrastate. *Hubbard v. Fort*, (C. C. N. J. 1911) 188 Fed. 987.

**Revocation of permit.**—Where obstructions are placed in a navigable stream by private parties under a revocable permit issued by the Secretary of War, the permit may be revoked by Congress without entitling the parties to damages. *United States v. Chandler-Dunbar Water Power Co.*, (1913) 229 U. S. 53, 33 S. Ct. 667, 57 U. S. (L. ed.) 1063.

## Vol. VI, p. 815, sec. 11.

**The absolute power of Congress.**—Congress, in its regulation of commerce, may establish harbor lines or limits beyond which deposits shall not be made or structures built in navigable waters. *Philadelphia Co. v. Stimson*, (1912) 223 U. S. 605, 32 S. Ct. 340, 56 U. S. (L. ed.) 570.

**Authority of secretary of war.**—The Secretary of War does not, by establishing harbor lines, exhaust his authority in the matter, but may change them in order more fully to preserve the harbor from obstruction. *Philadelphia Co. v. Stimson*, (1912)

223 U. S. 605, 32 S. Ct. 340, 56 U. S. (L. ed.) 570.

**Power of states.**—The act of 1899 was not intended to and did not operate to paralyze all state power concerning structures of every character in navigable waters within their borders, and to destroy automatically all vested rights of property in such works, even although acquired prior to the act of 1899 under the sanction of state authority. *Gring v. Ives*, (1912) 222 U. S. 365, 32 S. Ct. 167, 56 U. S. (L. ed.) 235.

## Vol. VI, p. 816, sec. 14.

**Uncompleted levee being constructed by private contractor.**—In *Houck v. United States*, (C. C. A. 8th Cir. 1912) 201 Fed. 862, it was urged that the statute only applies to a completed work and has no application to cases of defacing, injuring, and obstructing levees that are in process of construction simply. But the court said: "This objection is equally untenable. The work, though but partially completed, nevertheless was a levee within the meaning of the statute. Surely Congress did not intend that the government, in prosecuting such a public work, could be obstructed or have the work defaced or destroyed before being fully completed, and the offender not be amenable to the provisions of the statute. The prohibition clearly includes a levee in process of construction as well as a completed one, for otherwise the government might never be permitted to complete the work. It is also said that, as the work was being constructed by a private contractor, though under the supervision and direction of the Secretary of War, it was not a work of the United States within the meaning of the statute. The mere fact that the physical work was being done by a private contractor for the United States did not take from it its character as a levee built by the United States. It was as much a work of the United States, though built by contract under the direction and supervision of an engineer detailed by the Secretary of War for that purpose, as if it had been done by day laborers employed by the Secretary of War."

A levee two miles from the water is within the meaning of the statute. *Houck v. United States*, (C. C. A. 8th Cir. 1912) 201 Fed. 862, wherein the court said: "The purpose of the statute in question, in providing for the construction of levees, was twofold: First, to improve the navigability of the river; second, to provide against destruction by overflows. If it be conceded that the main and primary purpose was to improve the navigation of the river, we do not think, even then, it was essential or necessary that the levees follow the bank of the river in all of its meanderings. The evidence shows that at the point in question there was a sharp bend in the river, which formed a sort of a narrow peninsula, and that the levee was constructed across the base, so as to prevent the flooding of the country during high water. To follow along the bank of the river in all of its meanderings would cause a useless and unnecessary expense. Of course, the act contemplated that much of the way and probably the principal part of the levee work would be along the water bank of the river, and as to such places the prohibition against 'fastening vessels thereto, or otherwise or in any manner whatever impairing the usefulness of any sea wall, bulkhead, jetty, dike, levee, wharf, pier,' etc., is applicable; but that is not the only prohibition. The prohibition is against 'any person or persons to take possession of or make use of for any purpose, or building upon, alter, deface, destroy, move, injure, obstruct . . . or in

any manner whatever impair the usefulness . . . of such work under the control of the United States, in whole or in part, for the preservation and improvement of any of its navigable waters, or to prevent floods, or as boundary marks,' etc. The statute we think very much broader than the construction given to it by counsel. Before the acts complained of, Congress had provided for a commission to mature such plan or plans and estimates as would correct, permanently locate, and deepen the channel, and protect the banks of the Mississippi river, improve and give safety and ease to the navigation thereof, prevent destructive floods, promote and facilitate commerce, trade, and the postal service, and the Sec-

retary of War was authorized to proceed in the construction of such work. Much discretion in the location of the levee was left to the Secretary of War, as Congress might do. . . . We do not think it should be said that the Secretary of War, in executing the great project contemplated by Congress, not only to improve the navigation of the river but to prevent destructive floods by overflow, was not authorized in many instances to shorten the work and thereby greatly reduce the expense, by departing from the meanderings of the river in places where the purposes contemplated by the act would be accomplished by constructing the levee across the base of little peninsulas formed by bends in the river."

### Vol. VI, p. 817, sec. 15.

**Construction.**—"The true meaning of the act, the court thinks, is that under it the duty is not negatively, but affirmatively and positively, imposed upon vessels coming to anchor in navigable channels, to see that they do not under any circumstances, accidents excepted, 'prevent or obstruct the passage of other vessels or craft;' not, of course, that they shall not anchor in such channels at all, but that when they anchor therein, outside of an established anchorage ground, they shall so anchor, and in such method, as not to close, or unduly or unreasonably prevent and obstruct, the passage of other vessels or craft. This would cause no hardship on any one, and is the fair and reasonable meaning of the law, since its purpose and intent, manifestly, was in aid and furtherance of the ends of commerce; that is, to keep open, and not to close up, the rivers and watercourses of the country. Ships 'must go on' in their business, and, while they of necessity frequently stop or tie up, when so doing they have as a rule many choices of location, and they can deliberately set about either to find such place as will within itself be secure, or adopt such method of protection as will save them from all harm, always having in view that the path of commerce should be kept open, and that those unnecessarily or unduly obstructing it do so at their peril, and subject themselves to the penalties of possible fine and imprisonment." *The Margaret J. Sanford*, (E. D. Va. 1913) 203 Fed. 331.

This section does not absolutely forbid anchoring in navigable waters "except only at such places as the location of the vessel would necessarily prevent the passage of other vessels, or obstruct them in passing to such an extent as to make the effort to do so a dangerous maneuver. If a vessel an-

chors at a point in a channel where, notwithstanding such anchorage, other vessels, navigated with the care the situation requires, can safely pass, then she has neither violated the statute, nor rendered herself liable under the general rules applicable to navigation, even though to a certain extent she has obstructed the channel." *The Grand Manan*, (D. C. Me. 1913) 208 Fed. 583.

The question whether a vessel is anchored in such manner as to prevent or obstruct the passage of other vessels must be determined by looking not alone to the chart and to the geography of the situation but also to weather conditions and to the usual course of vessels using the thoroughfare. *The Georgia*, (D. C. R. I. 1913) 208 Fed. 635.

An ocean-going vessel may lawfully lie at anchor in the nighttime in the deep channel of a navigable river, if not so placed as to prevent or obstruct the passage of other vessels. *The Europe*, (C. C. A. 9th Cir. 1911) 190 Fed. 475.

**"Owner."**—One in possession of a vessel that sinks is an "owner" within the meaning of this statute. *Second Pool Coal Co. v. People's Coal Co.*, (C. C. A. 3d Cir. 1911) 188 Fed. 892.

State regulations not in conflict with this section are valid. *The Margaret J. Sanford*, (E. D. Va. 1913) 203 Fed. 331.

The words "prevent or obstruct," in this statute, are positive words indicative of limited restraint and of legislative intent not to interfere with the right use of waterways by imposing an absolute or unreasonable prohibition. *The Europe*, (C. C. A. 9th Cir. 1911) 190 Fed. 475.

The provision as to tying up or anchoring vessels is declaratory of the general maritime law upon the subject. *The Grand Manan*, (D. C. Me. 1913) 208 Fed. 583.

### Vol. VI, p. 818, sec. 17.

**Bridge built by authority of previous act.**—The statute is inapplicable to a bridge built by authority of a previous act of Congress which contained no express reservation of

right to alter or amend the act. *United States v. Baltimore & O. R. Co.*, (1913) 229 U. S. 244, 33 S. Ct. 850, 57 U. S. (L. ed.) 1169.

## Vol. VI, p. 831, sec. 1.

**Power of Congress.**—The plenary power of the United States to legislate for the benefit of navigation on the Mississippi river, and to construct such works as are appropriate to

that end, is well settled. *Jackson v. United States*, (1913) 230 U. S. 1, 33 S. Ct. 1011, 57 U. S. (L. ed.) 1363.

## 1909 Supp., p. 600, sec. 1.

**Navigable waters within state limits.**—This statute has no application to the construction of bridges across navigable waters

which lie wholly within the limits of a single state. In re *Seattle*, (1911) 66 Wash. 277, 119 Pac. 798.

## 1909 Supp., p. 601, sec. 4.

This section is relied on in *O'Keefe v. Staples Coal Co.*, (D. C. Mass. 1910), 201 Fed. 131.

## SEAMEN.

## Vol. VI, p. 864, sec. 4527.

**Coastwise voyage.**—This section is applicable to a coastwise voyage from Seattle to Alaska. *Wilson v. Manhattan Canning Co.*, (W. D. Wash. 1913) 205 Fed. 996.

## Vol. VI, p. 873, sec. 4535.

**Seaman as record owner.**—A seaman, who is also the record owner of a boat, although merely for the accommodation of the real

owner, has no right to a lien for wages as against other lienholders. *The Samuel Little*, (E. D. N. Y. 1913) 206 Fed. 686.

## Vol. VI, p. 878, sec. 4544.

The obvious purpose of the statute is to provide a brief, informal, and summary method of disposing of the money and effects of the class to which it relates, where they do not exceed in value the amount specified, in such manner as to reach those eventually entitled thereto, with the greatest expedition and the least expense, without the necessity of formal administration; and the provision of the treaty is in keeping with

this purpose. In re *Holmberg's Estate*, (N. D. Cal. 1912) 193 Fed. 260.

**Exclusive right of applicant to administer unnecessary.**—It is not necessary, to meet the requirements of this section, that the applicant shall appear to have the exclusive right to administer, but only that he shall be eligible to "take out letters." In re *Holmberg's Estate*, (N. D. Cal. 1912) 193 Fed. 260.

## Vol. VI, p. 879, sec. 4547.

**Wages after arrest of vessel.**—An engineer on a vessel, which is arrested in admiralty by a marshal and taken out of the owner's control, cannot claim a lien against the vessel for wages accruing after its arrest. *The Philomena*, (D. C. Mass. 1912)

200 Fed. 873; *The Bethulia*, (D. C. Mass. 1912) 200 Fed. 876.

The captain has no lien on the vessel for wages due him, but only a claim against the owner. *The Bethulia*, (D. C. Mass. 1912) 200 Fed. 876.

## Vol. VI, p. 893, sec. 4568.

A release for wages merely has no reference to the additional allowance authorized by this section for failure to furnish good and sufficient food. *Billings v. Bausback*,

(C. C. A. 9th Cir. 1912) 200 Fed. 523, where in the court said: "The error of appellant's argument is in regarding the release involved as extending beyond wages proper

due to those who signed for their services on the voyage. There is no reference whatsoever in the release to claims on account of reduction of allowance of provisions or for bad quality of food; and, although claims for such compensation to which seamen are entitled are recoverable as wages, still they are not compensation for services on board a vessel, but, as expressly defined, are allowances by way of compensation to be paid in addition to wages. In providing that such compensation shall be recoverable as wages, the statute has provided a convenient

and inexpensive manner, by which a seaman may avail himself of the benefits of the law. No bond is required of a seaman who sues for his wages in an admiralty court, although generally a bond for costs is required before a libel can be filed in such court. It is thus apparent that the purpose of the statute was to enable the seaman to recover compensation for short allowance or bad provisions, by just such a single process as he employs to recover for services performed during the voyage."

## Vol. VI, p. 930, sec. 4612.

The captain of a scow or barge, who does the work of a deckhand, and does not have the right to control the vessel's movements or employment, and can act only as agent in the sense that any sailor might act under specific direction of his captain, is not a master. *The A. H. Chamberlain*, (E. D. N. Y. 1913) 206 Fed. 996.

No formal demand on the master for the schedule given in this section is necessary in order to render the ship liable, when such demand would be without avail for the reason that the necessary supplies are not on the boat. *Billings v. Bausback*, (C. C. A. 9th Cir. 1912) 200 Fed. 523, wherein the court said: "The primary right of the seaman is to have provisions as called for by the scale. The law was plainly enacted for the purpose of assuring to the seaman a kind and quality of food well adapted for the preservation of his health, and the requirements of a seaman's life. But he may choose to accept such fare as the master may provide. The duty of the master, therefore, is to provide in accordance with the schedule, unless the seaman elects to accept the fare the master may provide. However, before the seaman can exercise an option as between the fare provided by the master and that included within the scale of provisions fixed by the statute, he must have opportunity of selecting an alternative diet; that is to say, the option can be exercised only where it can be fairly said the seaman has had an opportunity for choice. Under the evidence in the record, the libelants herein never were offered any choice. Noth-

ing was ever said to them about such a thing. They had no option, nor an opportunity to make effective a formal demand for the government schedule. The articles called for in the government schedule were not on the ship. The master, of course, knew this: hence a formal demand would have availed nothing. The seamen did complain at different times, telling the master that the food was not fit to eat, and that there was not enough food. One of the witnesses testified that the captain knew that he picked weevils out of the pudding which was before them. They told him that there was not enough sugar, that the meat was not good, and that they wanted the sugar weighed, if they could not get 'full and plenty.' The master knew of the justice of these complaints, and while, when made, they were not accompanied with formal demand for the government scale, they were so plain in expressing disgust at the food the master was providing that by every reasonable intendment he should have treated them as demands for the regular scale. Under the circumstances it would be very unjust to hold that the seamen, by eating such as they could of the food provided by the master, exercised the option to accept it. The real situation simply required libelants to accept what was provided by the master or to go without food."

**Food allowance.**—For evidence showing a violation of the provisions of this section regarding food allowance, see *Billings v. Bausback*, (C. C. A. 9th Cir. 1912) 200 Fed. 523.

## SHIPPING AND NAVIGATION.

### Vol. VII, p. 16, sec. 4141.

An artificial situs for purposes of taxation is not acquired by enrollment nor by the marking of the name upon the stern. *Southern Pac. Co. v. Commonwealth of Kentucky*,

(1911) 222 U. S. 63, 32 S. Ct. 13, 56 U. S. (L. ed.) 96, wherein the court said: "Sections 4141 and 4178, Revised Statutes, as amended by the act of June 23, 1874, 18

Stat. 252, c. 467, give to an owner the right to mark upon the stern of his vessel either the name of the place of enrollment, the place where the vessel was built, or the place where the owner resides. As the place of enrollment is not of itself determinative of the place of taxation, it is obvious that the right to select a place to be marked upon the stern as a place of hail or home port, does not confer the arbitrary right

upon the owner of selecting a place for the taxation of his vessel. To give to the statute this construction, said this court in *Ayer & Lord Tie Co. v. Kentucky*, [202 U. S. 409] 'would be simply to hold that its purpose was to endow the owner with the faculty of arbitrarily selecting a place for the taxation of his vessel in defiance of the law of domicile and in disregard of the principle of actual situs.'

### Vol. VII, p. 17, sec. 4143.

**When forfeiture takes effect.**—A forfeiture under this section dates from the time of seizure of the vessel. *The Fredericka Schepp*, (D. C. R. I. 1912) 195 Fed. 623.

### Vol. VII, p. 31, sec. 4163.

**When forfeiture takes effect.**—A forfeiture under this section dates from the time of seizure of the vessel. *The Fredericka Schepp*, (D. C. R. I. 1912) 195 Fed. 623.

### Vol. VII, p. 37, sec. 4179.

The object of this section is plainly to mark and preserve the identity of any named vessel. As long as the vessel is the same the

name must be the same unless changed pursuant to other statutes. *United States v. Blair*, (S. D. N. Y. 1911) 190 Fed. 372.

### Vol. VII, p. 41, sec. 4189.

**When forfeiture takes effect.**—To the same effect as the first paragraph of the original note, see *The Fredericka Schepp*, (D. C. R. I. 1912) 195 Fed. 623.

### Vol. VII, p. 42, sec. 4192.

**Purpose of section.**—This section is a mere registry act, intended to prevent mortgages and other conveyances of vessels from having any effect against persons other than the grantor or mortgagor, and those claiming under them, or having actual knowledge thereof, unless recorded as therein provided. It manifests no intention to confer upon the mortgagee any new right, or to make the mortgage a maritime contract, or the lien created thereby a maritime lien, or in any way to interfere with maritime contracts or liens, or with the jurisdiction and procedure in admiralty. *Carpenter v. Gruendler Mach. Co.*, (1911) 162 Mo. App. 296, 141 S. W. 1147.

**Construction.**—This statute is remedial and should be liberally construed to attain the object intended, viz., the avoidance of secret liens and the consequent frauds at-

tendant upon them. *Benner v. Scandinavian American Bank*, (1913) 73 Wash. 488, 131 Pac. 1149.

**General creditors.**—The term "any person" as used in this section, does not mean a stranger to the transfer, or an individual who has no interest at all in property of the vendor. These are not affected by the disposition made of the vendor's property. But it is broad enough to include the general creditors of the vendor, and especially those who have subsequent to the execution of the bill of sale, but prior to its recording and in ignorance thereof, advanced large sums to the vendor on the faith of its representations that the title to the property was unchanged and clear of incumbrances. *Benner v. Scandinavian American Bank*, (1913) 73 Wash. 488, 131 Pac. 1149.

### Vol. VII, p. 97, sec. 4251.

**Canal boat defined.**—In *The A. H. Chamberlain*, (E. D. N. Y. 1913) 206 Fed. 996, it appeared that the boat in question was a square-built scow without motive power or masts, and that she had been used both in the canals and in waters around New York, going as far as New Haven and through the Sound, up the Hudson, and through the canals and rivers to Philadelphia. The court

said: "The fact that she is used like a 'canal boat' does not make her a 'canal boat' from the standpoint of ship's architecture, as the word conveys a definite meaning which has attached to boats of a particular shape, and which are distinguishable from scows, even if both carry cargo in similar waters and are drawn by similar motive power. But when we consider the

statute, it is apparent that its use of the words 'canal boat' is intended to mean a cargo boat of the sort described, used or to be used on the rivers or the canals during the voyage or service under consideration, and would include all boats used as cargo carriers and towed as 'canal boats' through the canals and rivers. The statute adds to the words 'canal boat' 'without masts or steam power, which is required to be registered, licensed, or enrolled and licensed.' A scow-built boat, operating the canals for the same use as a canal boat, would have to be registered, and would be (for all purposes covered by the statute) treated as a canal boat. Any reason (arising from the relationship of the owners or other parties to a boat) for exempting it from liens for wages would apply to any boat capable of

registry and use as a canal boat; and the section would therefore seem both in language and purpose to apply to such a boat as the Chamberlain, if liable to registry and use upon voyages through the canals during a large part of the period in which the libellant's claim for wages has accrued. The Chamberlain has actually been in the service of carrying cargo through the canals of this state and other states, and it is difficult to see how he could support his claim for a general lien for services rendered while the boat was in fact a 'canal boat' under the statute. On the other hand, if she was not registered or used as a canal boat, she would not be subject to the provisions of this statute when on a trip up the Sound or around the harbor."

## 1912 Supp., p. 352, sec. 1.

**State laws.**—This statute supersedes all state laws regarding maritime liens and controls all cases whether relating to foreign or domestic vessels. *The Ha Ha*, (S. D. Ala. 1912) 195 Fed. 1013.

**New legal liability created.**—Prior to the enactment of this act, there was no lien given by the general maritime law on a domestic vessel for repairs, supplies, or other necessities furnished her in her home port. But that act created a new legal liability giving such lien. No lien was given by the general maritime law to materialmen for supplies, etc., furnished a vessel in her home port, because in that case, according to the generally accepted theory, the presumption was that credit was given to the owner and not to the ship itself. *The Lucille*, (S. D. Ala. 1913) 208 Fed. 424.

**Admissibility of proof as to whom credit was furnished.**—The statutory provision that it shall not be necessary to allege or prove that credit was given to the vessel does not bar proof that whatever was furnished, was furnished on the credit of the owner and in no sense on the credit of the vessel. An agreement or understanding as to whom credit was given may be inferred from acts and circumstances as well as from express language, as is ordinarily true with reference to all alleged contracts where it must be shown that the minds of the parties met. *The Lucille*, (S. D. Ala. 1913) 208 Fed. 424. *Compare The City of Milford*, (D. C. Md. 1912) 199 Fed. 956.

**Priority of lien over mortgages.**—In *The Easby*, (D. C. Md. 1912) 201 Fed. 585, a maritime lien was given precedence over a mortgage in existence at the time the lien was created.

**A claim arising in 1907 is not covered by this act.** *The Saratoga*, (C. C. A. 2d Cir. 1913) 204 Fed. 952.

**The terms "supplies" and "other necessities" refer to fuel and such furnishings generally as are of use after a vessel is completed and fit to proceed on a trip or voyage. They do not include lifeboats, life rafts, life**

preservers, and releasing hooks for lifeboats furnished as a part of the original equipment. *The United Shores*, (W. D. N. Y. 1912) 193 Fed. 552.

**Towage is not a necessary within the meaning of this act.** *The J. Doherty*, (S. D. N. Y. 1913) 207 Fed. 997, wherein the court said: "In the broad sense of the term everything is necessary for a ship which tends to facilitate her use as such or to save her from danger. In that sense seaman's wages, salvage, and towage are necessary. But such is not the ordinary meaning of the word when used in connection with supplies and repairs. It means merely such things of that general nature as are fit and proper for the use of a ship. As a technical term it is not properly used in as broad a sense as its colloquial meaning would imply. . . . Moreover, the evils which the act of 1910 sought to remedy had no application to towage. Statutes relating to repairs, supplies, and other necessities were enacted by the states and were enforced by the federal courts in consequence of the declaration of the Supreme Court in the case of *The General Smith*, (1819) 4 Wheat. 438, 4 U. S. (L. ed.) 609, that the general maritime law provided no lien for such necessities when furnished in the home port. But the Supreme Court has never suggested that the general maritime law gave no lien for towage or similar services rendered in the home port of the vessel, and therefore the necessity for a municipal law upon the subject, as in the case of maritime necessities, did not exist."

**Property leased to boat.**—In *The Geisha*, (D. C. Mass. 1912) 200 Fed. 865, a claim was set up under this act for the value of a seine purser furnished to the steamer libeled. The claimant alleged that the owners of the steamer hired the machine, and paid rent up to the time the steamer was taken into custody by the marshal and that the machine was afterwards sold with the steamer. The court said: "It is neither alleged nor claimed that Lantz intended to sell, or that the owner of the steamer intended to buy, the seine

acted Act June 23, 1910, c. 373, 36 Stat. at L. 604, giving such a lien and superseding all state laws on the subject."

The section does not enlarge the scope of the act, which is limited to maritime liens arising out of contracts for supplies or other

necessaries furnished to vessels already completed in structure and equipment to transact the business for which they were built. The United Shores, (W. D. N. Y. 1912) 193 Fed. 352.

## 1912 Supp., p. 353, sec. 1. [*Radio communication.*]

**Who are passengers.**—In United States v. Jones, (D. C. Md. 1912) 195 Fed. 860, the defendant set up as a defense to an indictment for violation of this section two special pleas that the vessel did not carry passengers. The first of these pleas alleged that the vessel was engaged in the business of transporting freight between Liverpool and Baltimore, and not in the carriage of passengers. It said that the four persons whom the indictment alleged were passengers were friends of the defendant. The defendant desired to have them as his guests on the voyage. For that purpose he invited them to become part of the crew of the vessel. They thereupon entered into a written contract or agreement of hiring and for services. By this agreement one of the persons in question agreed to serve upon the ship as surgeon, another as purser, another as assistant purser, and another as supercargo, for the compensation of one shilling a month each. The hiring of these persons in the capacities mentioned and for the compensation named, it was alleged, was duly approved by the British consul at Baltimore. The plea expressly admitted that none of the persons named were ever called upon by the defendant to perform, nor did they or any of them perform, any service under said contract of employment, nor did any of them demand or receive any of the compensation stipulated for in the said contract. It was said that they were willing to perform the services if they had been asked to do so, and the defendant was willing to pay them a shilling if they had asked for it. It was asserted that no one of them either paid or contracted or agreed to pay the defendant, or to any of the officers, agents, or servants of the corporation owning and operating the vessel, anything of value as a consideration for their transportation, but that, as the voyage was never less than 12 days, and may sometimes be 15 days, in length, such persons, desiring to be more comfortably provided for than the usual fare and accommodations of the ship would permit, decided to supply themselves with certain extra accommodations for the voyage in the nature of extra food and provisions. To that end they subscribed among themselves the sum of \$200. Such sum was delivered to one of the servants or agents of the said corporation

with the understanding that it would be used for the purpose of supplying the said persons with extra accommodations in the way of food and provisions on the voyage. By a second special plea the defendant alleged that the persons in question were invited by him to accompany him on the vessel as his guests. They performed no services on the vessel and received no compensation. They remained thereon solely as his guests. They paid nothing for passage or transportation. The only expense incurred by them was the total sum of \$200, contributed by the four in equal proportions, which sum was paid by them to one of the officers and agents of the vessel, with the understanding that the same was to be expended solely for the purpose of food and provisions for them. In sustaining demurrers to these pleas the court said: "Whether the persons in question were passengers or not does not necessarily depend upon what kind of papers they signed, or by what names in such papers they called themselves or were called. It is not conclusively settled by the description given of the arrangement by which they each paid \$50 to one of the officers of the vessel. Whether they were or were not passengers was a question to be determined upon all the facts and circumstances recited in those pleas, or which might be proved in evidence, and upon the inferences which a jury might properly draw from them. Every substantive fact alleged in either of the special pleas might be true. Yet from these facts, and others which might be proved by the government, a jury might be well entitled to hold that the persons in question were passengers. The jury might think, and be justified in thinking, that shipping such persons as members of the crew, and designating them as holding positions which they were not expected to fill, and did not fill, and providing for the payment to them of a nominal compensation which they did not expect to receive, and did not receive, and which nobody ever intended to pay them, and the payment by them of what the jury might have thought was the equivalent of passage money in the form of a special subscription to supply themselves with extra provisions and comforts, were devices intended to evade the laws, or regulations having the force of law, of this country, or of the United Kingdom, or both."



## SPONGES.

1909 Supp., p. 628. [*Act of June 20, 1906.*]

**Constitutionality.**—In *The Abby Dodge*, (1912) 223 U. S. 166, 32 S. Ct. 310, 56 U. S. (L. ed.) 390, this act was construed not to apply to sponges taken in waters within the territorial limits of states, and with this construction given to the act it was held to be constitutional. The court said: "While it is true that it would be possible to interpret the statute as applying to sponges taken in local waters, it is equally certain that it is susceptible of being confined to sponges taken

outside of such waters. In view of the clear distinction between state and national power on the subject, long settled at the time that act was passed and the rule of construction just stated, we are of opinion that its provisions must be construed as alone applicable to the subject within the authority of Congress to regulate, and, therefore, be held not to embrace that which was not within such power."

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## STATES.

Vol. VII, p. 121. [*North Dakota, South Dakota, Montana, and Washington.*]

This act is construed in *Ex parte Moore*, (1911) 28 S. D. 339, 133 N. W. 817.

1909 Supp., p. 639, sec. 9.

This act is cited in *Haskell v. Haydon*, (1912) 33 Okla. 518, 126 Pac. 232.

1909 Supp., p. 642, sec. 16.

**State subrogated to the rights of the United States.**—Under the provisions of this act the state of Oklahoma became subrogated to all rights, powers, and privileges of the United States in all the cases that were properly transferred from the United States courts of the Indian Territory to the courts of the state of Oklahoma, and espe-

cially to the rights of the original obligee in criminal appearance bonds. *Southern Surety Co. v. State*, (1912) 34 Okla. 781, 127 Pac. 409.

This section is cited in *Phillips v. United States*, (C. C. A. 8th Cir. 1912) 201 Fed. 259.

1909 Supp., p. 645, sec. 21.

This section is cited in *Meloy v. Woodward*, (1912) 7 Okla. Crim. 16, 120 Pac. 1119.

1912 Supp., p. 357, sec. 2, cl. first.

**Introduction of liquors into Indian country.**—The Pueblo Indians of New Mexico hold their lands by unconditional patents from the United States, issued in recognition of titles granted them by the government of Spain centuries ago. As to such Indians holding their lands under such tenure, it was not within the power of Congress, in admitting New Mexico as a state, to declare

such lands Indian country, or to reserve to the federal government the power to regulate the liquor traffic with such Indians; the latter being a part of the police power, which necessarily went to the state upon its admission. The provisions of this act, designed to the results last named, are void. *United States v. Sandoval*, (D. C. N. M. 1912) 198 Fed. 539.

## 1912 Supp., p. 360, sec. 5.

"County officer."—In *Territory v. Witt*, (1911) 16 N. M. 335, 117 Pac. 860, it was held that a "county officer" did not include a justice of the peace.

## 1912 Supp., p. 365, sec. 15.

**Effect of section.**—In *United States v. Alamagordo Lumber Co.*, (C. C. A. 8th Cir. 1912) 202 Fed. 700, a decree was rendered in one of the district courts of the territory of New Mexico on December 22, 1911, a writ of error was issued to review it on January 5, 1912, the state of New Mexico was admitted to the Union on January 6, 1912, and the court which rendered the judgment then ceased to exist. The case was such that, if begun in a state, it would have fallen within the concurrent, and not within the exclusive, jurisdiction of a Circuit or District Court of the United States, and the jurisdiction of the court which rendered the decree over it was transferred to the proper state court by the enabling act. The writ of error was not filed or lodged with the latter court or its clerk, nor was it filed or lodged with the court which rendered the decree before it ceased to exist, no application to remove the case to the United States District Court in the state as prescribed by the enabling act was ever made, but the files and records in the case were taken to that court pursuant to its order. It was held that, in so far as the order of the United States District Court in the state directed the transfer, or was intended to transfer, jurisdiction of the case, or of its files or records, to that court, it was ineffectual in the face of timely objection, and the jurisdiction of that court never attached to it or them. The writ of error was never brought because it was never filed or lodged with the district court of the territory while it existed, nor with the proper court of the state to which the jurisdiction of the former over the case, its files and records, was transferred. In the state of facts relative to the transfer of the case to the United States District Court in the state of New Mexico, stated above, an appeal was prayed of, and allowed by, that court on June 20, 1912, from the decree of the district court of the sixth judicial district of the territory of New Mexico rendered on December 22, 1911. It was held that the allowance of the appeal by the District Court of the United States in the state was *ultra vires*, that the application of the United States to it for the appeal was idle because its jurisdiction had not attached to the case, and that the appeal must be dismissed. The court said: "The conclusion that the jurisdiction of this case and of its files and records, which was vested in the United States District Court of the Sixth Judicial District of the Territory of New Mexico at the time of the admission of the state of New Mexico, was transferred to the proper state court, and that it could not be transferred against timely objection to the United States District Court in the state

without the customary application for removal from state court to federal court, has not been reached without a thoughtful study and consideration of the exhaustive review of the history of the congressional and territorial legislation relating to the courts in the territory of New Mexico with which counsel for the United States have favored us (Act of Sept. 9, 1850, c. 49, 9 Stat. 449, sec. 10; Act June 14, 1858, c. 166, 11 Stat. 366; Revised Stat. sec. 1874; Session laws of New Mexico 1859, chs. 6, 10), and of their argument that the provisions of section 15, relative to the distribution of cases pending in the courts of the territory other than the Supreme Court at the time of the admission of the state, should be so construed as to include within their effect only cases pending in the United States District Courts of the counties in the territory at that time, and so as to except from their operation and effect all cases pending in the United States District Courts of the judicial districts. But the act of Congress clearly and without any ambiguity expresses the intention of Congress that the jurisdiction of all cases pending in all of the courts of the territory other than the Supreme Court which, if begun within a state, would have fallen within the concurrent jurisdiction of the state and the federal court, should be transferred to and vested in the proper state court, and that the jurisdiction of the United States District Court in the state should never attach to any of them unless some party thereto instituted and prosecuted an application and proceeded to remove it to that court in the way customarily employed to remove cases from the state courts to the federal courts. Construction and interpretation have no place or office when the language of a statute is unambiguous and its meaning evident. In such a case arguments from the history of legislation, from the possible, or even probable, evil effects of a statute and from the inconvenience of complying with it, and attempted judicial construction of its terms, serve only to create doubt and to confuse the judgment. They tend to obscure, rather than to elucidate, the meaning of the statute. . . . There is in such a case a conclusive legal presumption that the legislative body intended what it declared, the statute must be held to mean what it clearly expresses, and no room is left for construction. Again, this act of Congress expressly transfers the jurisdiction of all the courts of the territory other than the Supreme Court over all cases pending therein which, if begun in a state, would have fallen within the concurrent jurisdiction of the state courts and the federal courts to the proper state court. It contains no exception from this

general transfer of cases of this nature pending in the United States District Courts of the judicial districts of the territory. And where a legislative body has included in a statute by general language many subjects, persons, corporations, or cases, and made no exception, the legal presumption is that it intended to make none, and it is not the

province of the courts to do so. . . . In the light of these incontrovertible rules of law, the forceful argument of counsel for the government in favor of the insertion in the act of Congress of the exception they advocate has failed to convince that it is our duty to make it, and the court is constrained to leave the statute as the Congress enacted it."

### 1912 Supp., p. 371, sec. 23.

**Qualifications for holding county office.**— Under Arizona Const. art. 7, § 2, prescribing the qualifications of an elector, and section 15 requiring every officer to be a qualified elector of the county to hold office in the county, a qualified elector of the county un-

der the Constitution is eligible to hold a county office, though he does not possess the qualifications prescribed by this act, which, in prescribing qualifications to hold office, is superseded by the Constitution. *Steeves v. Wilson*, (1912) 14 Ariz. 288, 127 Pac. 717.

### 1912 Supp., p. 377, sec. 33.

**Homicide.**— An appeal from a conviction of the crime of murder committed on an Indian reservation by a person not an Indian, the victim also not being an Indian, the prosecution being by the United States, and which was pending on appeal in the Supreme

Court of the territory of Arizona at the time it was admitted to the Union, was transferred by the proviso of this section to the Circuit Court of Appeals for the Ninth Circuit. *Goodwin v. United States*, (C. C. A. 9th Cir. 1912) 200 Fed. 121.

## STATUTES.

### Vol. VII, p. 134, sec. 3.

**Sunken vessel.**— Where it appeared that a vessel, engaged in the coastwise trade, struck a rock and sunk, and after several unsuccessful attempts to raise her, was abandoned by her owners to the underwriters, who sold her, and the purchaser succeeded in raising her about a year and a half after she had sunk, the court held that she was still

a vessel and subject to admiralty jurisdiction. *The George W. Elder*, (C. C. A. 9th Cir. 1913) 206 Fed. 268.

A barge or lighter employed in transporting stone used in the construction of a breakwater is a "vessel." *Commonwealth v. Breakwater Co.*, (1913) 214 Mass. 10, 100 N. E. 1034.

### Vol. VII, p. 140, sec. 5595.

**Construction of sections.**— In *United States v. Nelson*, (D. C. Idaho 1912) 199 Fed. 464, the court said: "Under a fair construction of these two sections [sections 5595 and 5596] it should, I think, be held that they did not repeal any act of a general and permanent nature, no part of which is embraced in the revision. Section 5595, standing alone, would operate to repeal all prior statutes, and would make the revision the sole and exclusive evidence of existing law. But section 5596 was doubtless added for the purpose, among others, of rescuing from repeal general provisions of law wholly overlooked or inadvertently omitted by the commissioners. But it must be borne in mind that the precaution manifested in the latter section is against oversight alone, and if, as is picturesquely stated in one of the briefs, 'the

compilers left their footprints upon an act, that portion not carried into the revision is repealed.' Furthermore, as was said by the Supreme Court, in *Dwight v. Merritt*, 140 U. S. 213, 11 Sup. Ct. 768, 35 L. ed. 450: 'The Revised Statutes are not a mere compilation and consolidation of the laws of Congress in force on the 1st of December, 1873. The object of that revision was to simplify and bring together all statutes and parts of statutes which, from similarity of subject, ought to be brought together, to expunge redundant and obsolete enactments, and to make such alterations as might be necessary to reconcile contradictions and amend imperfections in the original text of the pre-existing statutes. All those statutes were abrogated by section 5596, which provides that 'all acts of Congress passed prior to said

first day of December, one thousand eight hundred and seventy-three, any portion of which is embraced in any section of said re-

vision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof."

## STEAM VESSELS.

### Vol. VII, p. 162, sec. 4401.

For a history of this section, see *Anderson v. Pacific Coast Steamship Co.*, (1912) 225 U. S. 187, 32 S. Ct. 626, 56 U. S. (L. ed.) 1047.

### Vol. VII, p. 164, sec. 4405.

**Right to pilot license.**—"The right to a license as pilot is not an inherent right in the citizen. Here Congress has acted and has required that pilots in the coastwise commerce of the United States shall have a license granted by the inspectors of the

United States, and has also provided that the board of supervising inspectors are to make rules and regulations which shall have the force of law when approved by the secretary of the treasury." *Williams v. Molther*, (N. D. N. Y. 1911) 189 Fed. 700.

### Vol. VII, p. 174, sec. 4427.

**Steam vessels.**—This section applies only to vessels propelled in whole or in part by steam. *Commonwealth v. Breakwater Co.*, (1913) 214 Mass. 10, 100 N. E. 1034.

### Vol. VII, p. 197, sec. 4499.

**Libel against a steam vessel for carrying more passengers than the law allowed.**—See *The City of Lowell*, (C. C. A. 2d Cir. 1913) 204 Fed. 271.

### 1909 Supp., p. 655, sec. 10.

**"Sea-going barge."**—In *Commonwealth v. Breakwater Co.*, (1913) 214 Mass. 10, 100 N. E. 1034, the court said: "Barge is a word of somewhat comprehensive signification, and easily may include a vessel of this description. It is a matter of indifference whether it has any means of self-propulsion or can go only in tow. . . . The point of difficulty is whether it was 'sea-going.' No exact definition of this word has been given. In this connection we think it means a barge, which from its design and construction with fair reason, in the light of all the history of ocean-going vessels, may be expected to encounter and ride out the ordinary perils of the sea, and which in fact does go to sea. If a vessel is not designed upon such a plan or constructed of such materials or with such skill as to warrant a reasonable belief that she is staunch enough to venture upon the high seas, the mere fact that by selecting smooth water and fair weather she is able upon occasion to go there without mishap would not warrant the description of sea-going. But want of means of self-propulsion is not a conclusive test. She may still be seagoing if she is adapted to go by tow, and does so go upon the high seas."

**Inspection of boilers.**—The term "equipment" as used in this section includes boilers. *Commonwealth v. Breakwater Co.*, (1913) 214 Mass. 10, 100 N. E. 1034, where in the court said: "It is argued that the 'equipment' which is to be inspected under this section refers only to those 'appliances' with which under section 11 of the same act 'every such barge shall be equipped,' viz., 'at least one life boat, at least one anchor with suitable chain and cable, and at least one life-preserver for each person on board,' and hence does not include boilers for moving the cargo. But this seems to us too cramped a construction. The duty imposed by section 10 upon the steamboat inspectors is not only to examine the hull and equipment, but also to certify that the barge may be used in navigation with safety to life. Navigation may include a vessel at anchor or at dock under certain circumstances, as well as in motion. . . . The evident aim of the federal statute is to promote the safety of those on shipboard, and it should be given a broad rather than a restricted scope in order to effectuate its purpose. The safety of those upon other vessels may be involved as well as those upon the one to be

inspected. While it might be possible to construe the federal statute of 1908 as covering only the matters definitely mentioned, it seems to us more consonant with its general scope to interpret it as empowering the local steamboat inspectors to examine everything connected with the barge which may affect the safety of life. It needs no argument to demonstrate that boilers come within this class of barge equipment."

A state statute providing for the inspection of boilers over which the United States has not assumed jurisdiction, is valid. Com-

monwealth v. Breakwater Co., (1913) 214 Mass. 10, 100 N. E. 1034, wherein the court said: "The power granted by the United States Constitution to the federal government is extensive as to navigable waters and vessels engaged thereon in foreign and domestic commerce. Its power to regulate navigation is ample and indisputable. . . . But it is not exclusive as to the entire subject until Congress has acted. While Congress is silent there is a wide range in which the states may exercise their reserved and inherent powers."

## TELEGRAPH, TELEPHONE, CABLE AND. ELECTRIC LINES.

### Vol. VII, p. 205, sec. 5263.

**Interstate commerce.**—However it may be in the case of a telegraph company doing a purely private business, confined, for all purposes, within the limits of a state, there can be no doubt that in the case of a company engaged in transmitting interstate, international, and government messages, the legislation of Congress, so far as it has gone, is supreme, because of the powers possessed by Congress to regulate for the whole nation its commerce between the states and with foreign nations, and also the operation of the national postal service. *New England Telegraph Co. of Massachusetts v. Essex*, (D. C. Mass. 1913) 206 Fed. 926.

**Right to take private property not granted.**—To the same effect as the original note, see *Western Union Tel. Co. v. Richmond*, (1912) 224 U. S. 160, 32 S. Ct. 449, 56 U. S. (L. ed.) 710; *Louisville & N. R. Co. v. Western Union Tel. Co.*, (C. C. A. 6th Cir. 1913) 207 Fed. 1; *Western Union Telegraph Co. v. South & N. A. R. Co.*, (Ala. 1913) 62 So. 788.

**State control.**—A telegraph company engaged in interstate commerce under this act, by virtue of its written acceptance of the provisions, restrictions, and obligations imposed by that act, has a right to operate lines of telegraph through and over the public or post roads of any county in the state and to occupy these roads with its telegraph poles, this right to be enjoyed in subordination to the public use of such roads, and subject to any lawful exercise of the police power of the state or county, so that travel should not be unreasonably obstructed, or the public rights unreasonably interfered with. The state cannot by any specific statute, nor can the county by the action of any of its authorities, prevent such a corporation from placing its lines and poles along the post roads or routes, or stop the use of them after they are so placed. The limit of their

power and authority is regulation as to the manner in which the right given by Congress shall be exercised by such a corporation. *New England Telegraph Co. of Massachusetts v. Essex*, (D. C. Mass. 1913) 206 Fed. 926; *Carver v. State*, (1912) 11 Ga. App. 22, 74 S. E. 556.

**State and municipal license taxes.**—A license tax by a state, on the doing of business within the state, including the transmission of government messages, by a telegraph company which has accepted the terms of this act, can be lawfully imposed. *Western Union Telegraph Co. v. Troy*, (1913) 7 Ala. App. 315, 61 So. 488.

**State taxation.**—The privilege given under terms of the act to use the military and post roads of the United States for the poles and wires of the company is to be regarded as permissive in character and not as creating corporate rights and privileges to carry on the business of telegraphy, which are derived from the laws of the state incorporating the company, and this permissive grant does not prevent the state from taxing the real or personal property belonging to the company within its borders or from imposing a license tax upon the right to do a local business within the state. *Williams v. Talladega*, (1912) 226 U. S. 404, 33 S. Ct. 116, 57 U. S. (L. ed.) 275; *Ferguson v. McDonald*, (Fla. 1913) 63 Mo. 915.

The taxes imposed, however, must not be of a character, nor the methods of collecting them such, as to effect the exclusion of the company from the state or the stoppage of its business. The regulations must not be arbitrary, unreasonable, nor such as have the effect of excluding the company from the state or forbidding it to carry on its business therein. *New England Telegraph Co. of Massachusetts v. Essex*, (D. C. Mass. 1913) 206 Fed. 926.

**Right of state to compensation.**—Notwithstanding this section a telegraph or telephone company cannot appropriate to its exclusive use portions of highways without being subject to charges on behalf of the state by way of compensation for such use. *Sunset Telephone & Telegraph Co. v. Pasadena*, (1911) 161 Cal. 265, 118 Pac. 796; *Springfield v. Postal Telegraph-Cable Co.*, (1912) 253 Ill. 346, 97 N. E. 672.

**Use of city streets.**—The city may impose, under its police power, reasonable requirements on the company as to the manner

of construction and maintenance of its line. *Mackay Tel. & Cable Co. v. City of Texas*, (W. D. Ark. 1912) 199 Fed. 347.

**Post roads.**—The term "post roads" as used in this section means the same as the term "post routes" in the act of March 1, 1884, ch. 9, 23 Stat. L. 3, 5 Fed. Stat. Annot. 901, and consequently includes all public roads and highways while kept up and maintained as such. *New England Telegraph Co. of Massachusetts v. Essex*, (D. C. Mass. 1913) 206 Fed. 926.

## TERRITORIAL COURTS.

### Vol. VII, p. 224, sec. 1865.

**Jurisdiction of territorial courts.**—It is established that the courts of the Territories may have such jurisdiction of cases arising under the Constitution and laws of the United States as is vested in the circuit and dis-

trict courts, but this does not make them circuit and district courts of the United States. *Summers v. United States*, (1913) 231 U. S. 92, 34 S. Ct. 38.

### Vol. VII, p. 227, sec. 1869.

The Congress had plenary power to legislate for the Territories in the manner shown by this section. *Andrade v. Andrade*, (1912) 14 Ariz. 379, 128 Pac. 813.

## TERRITORIES.

### Vol. VII, p. 254, sec. 1850.

The acquiescence of Congress resulting from its failure to disapprove a territorial act will not make valid an otherwise invalid law.

*Berryman v. Board of Trustees of Whitman College*, (1912) 222 U. S. 334, 32 S. Ct. 147, 56 U. S. (L. ed.) 225.

### Vol. VII, p. 257, sec. 1857.

**General limitation.**—This section expresses a general limitation of the powers of the Territory by the Constitution and laws of the

*United States. Clason v. Matko*, (1913) 223 U. S. 646, 32 S. Ct. 392, 56 U. S. (L. ed.) 588.

### Vol. VII, p. 262, sec. 1889.

"Special privileges" include a contract exempting an existing educational institution from taxation. *Berryman v. Board of Trus-*

*tees of Whitman College*, (1912) 222 U. S. 334, 32 S. Ct. 147, 56 U. S. (L. ed.) 225.

### Vol. VII, p. 264, sec. 1.

**Local or special law.**—An act applicable to a particular class, not local, but existing throughout the Territory, is not a "local or

special law." *State v. Smart*, (Wyo. 1913) 136 Pac. 452.

## Vol. VII, p. 267, sec. 4.

**Territorial laws.**—Section 478, Wilson's Rev. & Ann. St. of Oklahoma 1903, which provides that it shall be unlawful for any city council to incur any indebtedness against any of the city's funds in excess of 80 per cent. of the tax levied for such fund for such year, is not repugnant to this sec-

tion, which provides that none of the Territories of the United States shall incur an indebtedness beyond 4 per cent. of the taxable property of such Territory as shown by the previous year's assessment. *Haskins v. Oklahoma City*, (Okla. 1912) 126 Pac. 204.

## Vol. VII, p. 271, sec. 1891.

**Alaska**, being a Territory, is affected by this section. *Nagle v. United States*, (C. C. A. 9th Cir. 1911) 191 Fed. 141.

## TIMBER LANDS AND FOREST RESERVES.

## Vol. VII, p. 297, sec. 1.

This act is cited in *United States v. Belts*, (C. C. Ore. 1911) 192 Fed. 708.

## Vol. VII, p. 301, sec. 2.

**In general.**—The law has become well settled that this act does not in any respect limit the dominion which the purchaser has over the land after its purchase from the government, or restrict in the slightest his power of alienation; that all that it denounces is a prior agreement, the acting for another in the purchase; that, if when the title passes from the government no one save the purchaser has any claim upon it, or any contract or agreement for it, the act is satisfied; and that an applicant is not required, after he has made his preliminary sworn statement concerning the bona fides of his application and the absence of any contract or agreement in respect to the title, additionally to swear to such facts on final proof. *United States v. Kettenbach*, (C. C. A. 9th Cir. 1913) 208 Fed. 209.

**Who are bona fide purchasers.**—A person or corporation desiring to acquire title to a large body of timber lands of the United States under the timber and stone act may express that desire to another, and may enter into an agreement with him to buy the lands upon his obtaining title thereto, may loan him the money with which to acquire title, and may inspect and select the lands, and such person or corporation is not bound to inquire into the method by which the other party to the contract acquires title, and is not chargeable with knowledge of any fraud upon the land laws that he may resort to, and in taking titles based upon the issuance of final receiver's receipts to the entrymen

without actual knowledge of such fraud or facts sufficient to put one upon inquiry, such person or corporation is an innocent purchaser of the lands. *United States v. Barber Lumber Co.*, (C. C. A. 9th Cir. 1912) 194 Fed. 24.

The first applicant gets an equitable right to the land applied for although a later applicant by mistake of the land office secures the first patent. Such patent is not absolutely void, however, and the first applicant should bring an action against the later applicant to establish his equitable title to the land, and he cannot bring an action to set aside the patent. *United States v. Wesley*, (C. C. Minn. 1911) 189 Fed. 276.

**Alienation of entryman's interest.**—The rule is well settled that the Timber and Stone Act does not forbid an entryman who has in good faith acquired a holding under the act to alienate his interest in the lands prior to the issuing of final certificate. All the act denounces is a prior agreement by which the entryman acts for another in the purchase. *Worden v. United States*, (C. C. A. 6th Cir. 1913) 204 Fed. 1.

**Right to mandamus against Secretary of Interior.**—A rejection by the Secretary of the Interior of an application, for a reason not arbitrary or capricious, but based upon a construction of this section, does not entitle the applicant to a writ of mandamus to review the Secretary's action. *United States v. Fisher*, (1913) 223 U. S. 683, 32 S. Ct. 356, 56 U. S. (L. ed.) 610.

## Vol. VII, p. 306, sec. 8.

This section is cited in *United States v. Hamaker*, (D. C. Ore. 1912) 199 Fed. 644.

## Vol. VII, p. 310, sec. 24.

Temporary withdrawal of lands from entry and sale may be proper under this section. *United States v. Chicago, M. & St. P. Ry. Co.*, (N. D. Idaho 1913) 207 Fed. 164, where in the court said: "Intelligently to exercise this authority and to give effect to the expressed will of Congress, it became necessary to make preliminary investigations, including surveys, for the purpose of determining whether or not the lands in any given locality were of such character that they fell within the terms of the act, and of preparing a proper description for their identification. Now it cannot be doubted that while this preliminary work is going on the lands under investigation must be held exempt from private entry, for otherwise, upon its becoming known that the creation of a forest reserve is in contemplation, the project may be greatly hampered, if not wholly frustrated,

by the initiation, through private entry, of claims to valuable and salient portions thereof. Hence the temporary withdrawal here was in aid of and incidental to the permanent reservation which the President was empowered to make, and it should therefore be held that the power to proclaim the reservation necessarily implied the authority to declare the withdrawal. It thus appears, and the consideration is emphasized, that here the withdrawal was not made merely or primarily to prevent private entry, but for the ultimate purpose of enabling the President fully to accomplish the object of a statute to which it was his duty to give practical effect; the action was taken, not capriciously or arbitrarily, but 'in furtherance of a public purpose committed by Congress to the Executive to effectuate.'"

Vol. VII, p. 312. [*Purpose of forest reservations.*]

This paragraph was cited in *United States v. Lavenson*, (W. D. Wash. 1913) 206 Fed. 755.

Vol. VII, p. 314. [*Rights of settlers — Selection of lieu lands.*]

Right of selection an offer by the government merely. — The right of selection of lieu land given under the act of June 4, 1897, is in the first instance but an offer by the government to exchange lands. It is based upon no valuable consideration actually received. It attaches to no specific lands, nor to lands within any defined limits. It does not attach upon the mere presentation of the requisite papers. It attaches only when the authorized officers of the government accept

the offer to exchange. Nor is it true that the filing of the lieu selection papers and the acceptance of the same by the local land office segregates the land upon which the filing is made, so as to cut off intervening and subsequent rights as against the lieu selectors. *Daniels v. Wagner*, (C. C. A. 9th Cir. 1913) 205 Fed. 235, affirming 194 Fed. 973. Compare *Sawyer v. Gray*, (W. D. Wash. 1913) 205 Fed. 160.

Vol. VII, p. 315. [*Restoration to public domain, etc.*]

This paragraph was cited in *United States v. Lavenson*, (W. D. Wash. 1913) 206 Fed. 755.

## Vol. X, p. 405, sec. 4.

Executive approval of creation of irrigation enterprises. — In *United States v. Henrylyn Irr. Co.*, (D. C. Colo. 1912) 205 Fed. 970, the court, having before it the question whether the approval of the executive branch of the government was necessary to acquire a right of way over a forest reserve for an irrigation project, said: "It seems evident from the course of legislation affecting forest reserves that executive approval is necessary to the creation of irrigation enterprises thereon. Indeed, defendants tacitly admit this, in that they have applied for such ap-

proval. It does not seem necessary to quote or review in detail the various acts which converge to this result. Beginning with the act of March 3, 1891 (26 Stat. 1095, c. 561), and extending to that of February 1, 1905 (33 Stat. 628, c. 288), the legislative intent is manifest that as to these reserves, created as they are for a special purpose, no occupancy nor use thereof by private parties shall be permitted save upon the exercise of a discretion by the proper department as to whether such use will interfere with the purposes of such reserve."

## 1909 Supp., p. 662, sec. 1.

This section is cited in *United States v. Nelson*, (D. C. Idaho, 1912) 199 Fed. 464.



## TRADEMARKS.

### Vol. VII, p. 331, sec. 7.

**Test of infringement.**—It is not necessary, to constitute infringement, that every element of a trademark be appropriated, nor that the trademark be completely copied. A proper test is whether, taking into account the resemblances and differences, the former are so marked that the ordinary purchaser is likely to be deceived thereby. *De Voe Snuff Co. v. Wolff*, (C. C. A. 6th Cir. 1913) 206 Fed. 420.

**Infringement of common law trademarks.**—In an action to restrain the use of the plaintiff's common law trademark it is immaterial that the defendant was not shown to have known of the plaintiff's trademark and thus not shown to have intended to pirate it. *De Voe Snuff Co. v. Wolff*, (C. C. A. 6th Cir. 1913) 206 Fed. 420.

### Vol. X, p. 408, sec. 1.

**Affixing trademark.**—This section contemplates that the trademark is to be affixed to the goods which are used in the commerce specified, as it requires the applicant in his application for a trademark, to give not only a description of the trademark itself but "a statement of the mode in which the same is applied and affixed to goods." *Diederich v. W. Schneider Wholesale Wine & Liquor Co.*, (C. C. A. 8th Cir. 1912) 195 Fed. 35, wherein the court, after citing several authorities said: "We think it clear, from the foregoing authorities, that a trademark is only valid when attached to the article or wrapper, or in some manner physically connected with the article itself. Such being the case, it is very clear that complainant could have no trademark in a sign, placed upon a building, containing the figures '905,' and if complainant had no trademark in such a sign upon a building, because the validity of the trademark owes its existence to the fact that it is in some manner at-

tached to the article of commerce itself, we are unable to perceive how it can be said that such a sign placed by defendant upon the building in which he transacted his business was an infringement of complainant's trademark. It is a self-evident proposition that what is not and cannot be a trademark is not and cannot be infringed as a trademark."

**Use must antedate registration.**—A trademark is acquired by use, and the use must antedate registration. Without it registration cannot be had. By this section the owner of a trademark domiciled in this country is entitled to have the same registered and by section 2, in order to procure registration, he must show that such trademark is used in commerce among the several states or within foreign countries. So that registration comes only after acquirement of the right to a trademark by use. *G. Heileman Brewing Co. v. Independent Brewing Co.*, (C. C. A. 9th Cir. 1911) 191 Fed. 489.

### Vol. X, p. 410, sec. 5 (b).

**Constitutionality.**—This section, which in effect merely gives a conclusive presumption of secondary meaning to a trademark in actual and exclusive use for a period of ten years, is not discriminatory or based on an arbitrary classification, but upon a reasonable and sound distinction. *Coca-Cola Co. v. Nashville Syrup Co.*, (D. C. Tenn. 1912) 200 Fed. 153.

**Effect of proviso.**—The effect of the last proviso of this section was to make a name subject to registry as a valid trademark, through such prior use, even although the words were originally merely descriptive and not the subject of a valid trademark. *Coca-Cola Co. v. Nashville Syrup Co.*, (D. C. Tenn. 1912) 200 Fed. 153. See also *Hughes*

*v. Alfred H. Smith Co.*, (S. D. N. Y. 1913) 205 Fed. 302.

This section does not confer merely the right to the use of the registered mark as a mark in the precise form in which it has been previously used, but by registration of the mark after ten years prior exclusive use, such mark is thereafter given effect as a valid statutory trademark in all respects, entitling it to protection as any other statutory trademark, and not merely to protection as a mark in the precise form of its former use. *Coca-Cola Co. v. Nashville Syrup Co.*, (D. C. Tenn. 1912) 200 Fed. 157, wherein the court said: "In the present case I think it clear that the 'mark' which had been in prior use by the complainant for ten

years, and which became a valid trademark by registration under the Act of 1905, was the compound word or words constituting the name 'Coca-Cola,' and not merely the particular script form in which this word was used as a label. In its application, registered January 31, 1893, the complainant applied for a trademark on 'the word or words "Coca-Cola,"' and in its application, registered October 1, 1905, it again described the trademark as consisting 'of the words "Coca-Cola," without limiting the trademark in either application to any particular form of script or use. The term trademark 'generally speaking, means a distinctive mark of authenticity,' and 'may consist in any symbol or form of words.' . . . And a particular combination of words designating certain merchandise may be protected as a trademark. . . . And so in the present case, I am of opinion that the mark which the complainant had used and which it registered under the Act of 1905, consists, as shown by its two applications, in its essence, in the particular combination or form of words constituting the name 'Coca-Cola,' and not in any particular script form of this name."

**Geographical names cannot be appropriated as a trademark.** *British-American Tobacco Co. v. British-American Cigar Stores Co.*, (S. D. N. Y. 1913) 206 Fed. 189.

"Nubia" is a geographical name and may not be registered by virtue of this section which denies registration to marks which consist of "merely a geographical name or term." Not only is it incapable of official registration, but it may not be exclusively appropriated by any one. *Apollo v. Perkins*, (C. C. A. 3d Cir. 1913) 207 Fed. 530.

A wholesale concern cannot enjoin a retail concern from using certain geographical names in its company name that are in the company name of the wholesale concern where there is no allegation that the words have acquired a secondary signification in connection with the complainant's products, and that the defendant is by using them selling its goods as the complainant's and getting the benefit of the complainant's business. *British-American Tobacco Co. v. Brit-*

*ish-American Cigar Stores Co.*, (S. D. N. Y. 1913) 206 Fed. 189.

**"Keystone" as trademark.**—Where it appeared that the plaintiff had adopted the trade name of "Keystone Lubricating Company" and had a registered trademark, the essential feature of which was the keystone of an arch, it was held that a corporation which had the word Keystone in its corporate name should be enjoined from using that name on goods similar to those made by the plaintiff, where it was shown that the similarity of the names led buyers to purchase the defendants' goods when they intended to purchase the goods manufactured by the plaintiff. *Buzby v. Keystone Oil & Mfg. Co.*, (N. D. Ill. 1913) 206 Fed. 136.

The word "Abricotine" is a coined word and not descriptive of a kind of liquor, and may be registered as a trademark. *Garnier v. Rossmann*, (E. D. Mo. 1912) 195 Fed. 175.

**Coca-Cola.**—The descriptive words "Coca-Cola" were held to be entitled to registration under the last proviso of this section. *Coca-Cola v. Deacon Brown Bottling Co.*, (N. D. Ala. 1912) 200 Fed. 105; *Coca-Cola v. Nashville Syrup Co.*, (D. C. Tenn. 1912) 200 Fed. 153; *Coca-Cola Co. v. Nashville Syrup Co.*, (D. C. Tenn. 1912) 200 Fed. 157.

**Part of fabric as trademark.**—When an arbitrary mark, not naturally part of the fabric, is in any wise impressed upon it, it may be a trademark, if so intended and used, but no spot made on or color imparted to a fabric as the inevitable or natural result of using the material of which the fabric is made can be the basis of a trademark, for the reason that the making of the spots thereon or the impartation of the color thereto by the use of appropriate raw material is open to the public generally, and may not be exclusively appropriated by anybody. *Samson Cordage Works v. Puritan Cordage Mills*, (W. D. Ky. 1912) 194 Fed. 573.

**Registered trademark of periodical.**—Where the name of a periodical is registered as a trademark the trademark protects only against something in the nature of a periodical publication of the same class. *Atlas Mfg. Co. v. Street*, (C. C. A. 8th Cir. 1913) 204 Fed. 398, 47 L.R.A.(N.S.) 1002.

## Vol. X, p. 413, sec. 16.

An *ex parte* registration affords a *prima facie* presumption of ownership of the trademark, but such presumption is overcome by a judgment rendered against the person registering the trademark long before application for registration was made. *W. A. Gaines & Co. v. Rock Spring Distilling Co.*, (W. D. Ky. 1913) 202 Fed. 989.

**What constitutes infringement.**—When a name is used as a trademark, the use of a similar name likely to deceive the purchasing public is an infringement which will be enjoined as a violation of the trademark, though the defendant's label is in other respects different. Duplicity or exact imita-

tion is not necessary to the infringement of a trademark. *Coca-Cola Co. v. Nashville Syrup Co.*, (D. C. Tenn. 1912) 200 Fed. 157.

The addition of an infringer's name to a trademark in place of the owner's does not render the unauthorized use of it the less an infringement. *Coca-Cola Co. v. Nashville Syrup Co.*, (D. C. Tenn. 1912) 200 Fed. 153.

**Illegal combination as defense.**—Alleged invalidity and illegality of a manufacturer's contract, because of the Sherman Anti-Trust Act, is no ground for denying the complainant protection against an infringement of its trademark, since awarding such relief does not involve the enforcement of the

alleged illegal contract. *Coca-Cola v. Deacon Brown Bottling Co.*, (N. D. Ala. 1912) 200

Fed. 105; *Coca-Cola v. Nashville Syrup Co.*, (D. C. Tenn. 1912) 200 Fed. 153.

## Vol. X, p. 414, sec. 18.

The effect of this section is to prevent the taking of trademark cases from the Circuit Court of Appeals to the Supreme Court by writ of error or appeal. *Street v. Atlas Mfg. Co.*, (1913) 231 U. S. 348, 34 S. Ct. 73, wherein the court said: "In placing such trademark cases upon the same footing as cases arising under the patent laws, as respects the remedy by certiorari, Congress undoubtedly intended that this remedy should have the same attributes in the one class of cases as in the other."

The Circuit Court of Appeals act to which this section makes reference, has been superseded by being incorporated with the judicial Code, Fed. Stat. Annot. Supp. 1912, p. 195, sec. 128. But the section has not lost any of its original effect, for section 292 of the Code, Fed. Stat. Annot. Supp. 1912, p. 249, requires the reference to be construed as if naming the very sections of the Code into which the Circuit Courts of Appeals act has been carried. *Street v. Atlas Mfg. Co.*, (1913) 231 U. S. 348, 34 S. Ct. 73.

## Vol. X, p. 414, sec. 19.

**Injunction bond.**—On granting a preliminary injunction for infringing a trademark, as an injunction bond, conditioned in the ordinary form to pay such damages as the defendant may suffer by the issuance of an injunction, would not be a real protection, since, although damages to the defendant would probably be serious and genuine, they would be largely or wholly incapable of proof, the court may condition the bond for the payment of a certain sum as liquidated damages if it is finally determined that there is no infringement, and also for all such damages in excess of the sum fixed as may be assessed by the court in favor of the defendant. *Coca-Cola v. Nashville Syrup Co.*, (D. C. Tenn. 1912) 200 Fed. 153.

*Coca-Cola.*—It has been held that the trademark "Coca-Cola" is *prima facie* infringed by the use of the words "Extract of Coca and Kola" so as to entitle the complainant to a preliminary injunction. *Coca-Cola v. American Druggists' Syndicate*, (S. D. N. Y. 1912) 200 Fed. 107.

**Defenses.**—In an action to restrain the infringement of a registered trademark on a proprietary medicine it is no defense that

the medicine is made from drugs which might be injurious if erroneously prescribed or administered. *United Drug Co. v. Theodore Rectanus Co.*, (W. D. Ky. 1913) 206 Fed. 570.

**Damages.**—In strict trademark cases the infringer is held to account for profits accruing because of the unauthorized use of the property right. *Wolf Bros. & Co. v. Hamilton-Brown Shoe Co.*, (C. C. A. 8th Cir. 1913) 206 Fed. 611.

**Judgment.**—Where, in a suit for infringement of a registered trademark, it appeared that the infringing trademark was used in a different part of the country from that in which the registered trademark was used, and that until shortly before the action was brought neither of the parties interested knew of what the other was doing, it was held that, while an injunction against the future use of the infringing trademark must be granted, yet no accounting for profits nor any assessment of damages for unfair trade would be allowed. *United Drug Co. v. Theodore Rectanus Co.*, (W. D. Ky. 1913) 206 Fed. 570.

## Vol. X, p. 415, sec. 28.

**Manner of notice.**—This section imposes the duty upon the registrant to give notice to the public of registration by affixing upon the registered trademark the words of abbreviation therein mentioned, and it provides that no damages shall be recovered in any suit for infringement by a party failing to

give such notice as provided, except on proof that the defendant was duly notified of infringement and continued the same after such notice. *G. Heileman Brewing Co. v. Independent Brewing Co.*, (C. C. A. 9th Cir. 1911) 191 Fed. 489.

## 1909 Supp., p. 674, sec. 1.

**Flag of foreign nation.**—In *De Nobili v. Scanda*, (W. D. Pa. 1912) 198 Fed. 341, it was held that a design could not be registered as

a trademark, because it comprised a flag of a foreign nation.

# TRADE UNIONS AND COMBINATIONS AND TRUSTS.

Vol. VII, p. 336, sec. 1.

**Constitutionality.**—The criminal part of this act is constitutional notwithstanding the fact that the crime defined by the statute contains in the definition an element of degree as to which estimates may differ. *Nash v. United States*, (1913) 229 U. S. 373, 33 S. Ct. 780, 57 U. S. (L. ed.) 1232, wherein the court said: "The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death." See also *United States v. Patterson*, (S. D. Ohio 1912) 201 Fed. 697.

**Purpose of act.**—The act is intended to reach combinations and conspiracies which restrain freedom of action in interstate trade and commerce and unduly suppress or restrict the play of competition in the conduct thereof. *United States v. Union Pac. R. Co.*, (1912) 226 U. S. 61, 33 S. Ct. 53, 57 U. S. (L. ed.) 124.

**Reasonableness of restraint as test.**—Whether the restraint of trade imposed by a combination is reasonable or unreasonable is material. *Union Castle Mail Steamship Co. v. Thomsen*, (C. C. A. 2d Cir. 1911) 190 Fed. 536.

The test to determine whether or not a given contract or combination is in restraint of interstate trade and commerce is the standard of reason as applied to like contracts or combinations at common law. *United Shoe Machinery Co. v. La Chapelle*, (1912) 212 Mass. 467, 99 N. E. 289, Ann. Cas. 1913D 715.

**State and interstate commerce distinguished.**—To bring a case within the prohibition of this act the pleadings must show that the defendants are doing or contemplating an interstate business. *United States v. Patten*, (1913) 226 U. S. 525, 33 S. Ct. 141, 57 U. S. (L. ed.) 333, 44 L.R.A.(N.S.) 325; *Home Tel. Co. v. Michigan Railroad Commission*, (1913) 174 Mich. 219, 140 N. W. 496.

**Combination to obtain increased prices.**—A combination or an agreement is within the condemnation of the act which places the power in the hands of a controlling or selling company to fix the prices to consumers and dealers of the commodity produced by those in the combination, and who had theretofore been competitors, and to sell or not to sell at all such production, and also fix or determine the class or classes of persons who shall

be permitted to purchase and sell or deal in such commodity. The exercise of such a power would clearly interfere with and restrict the "free flow of interstate commerce." *O'Halloran v. American Sea Green Slate Co.*, (N. D. N. Y. 1913) 207 Fed. 187.

**Direct or indirect effect of contract, etc.**—To the same effect as the original note, see *United States v. Patten*, (1913) 226 U. S. 525, 33 S. Ct. 141, 57 U. S. (L. ed.) 333, 44 L.R.A.(N.S.) 325; *United States v. Patterson*, (S. D. Ohio 1912) 201 Fed. 697; *United Shoe Machinery Co. v. La Chapelle*, (1912) 212 Mass. 467, 99 N. E. 289, Ann. Cas. 1913D 715; *First Nat. Bank of Jeannette, Pa. v. Missouri Glass Co.*, (1912) 169 Mo. App. 374, 152 S. W. 378.

**Restrictions on sale of business.**—While the sale of a business and the surrender of the good will pertaining thereto, and an agreement thereunder, within reasonable limitations as to time and territory, not to enter into competition with the purchaser, when made as part of the sale of a business, and not as a device to control commerce, is not within the Federal Anti-Trust Law, the imposition of a restraint greater than necessary to afford fair protection to the legitimate interests of the purchaser, or contractor, constitutes an unreasonable restraint under the Sherman act. *United States v. Great Lakes Towing Co.*, (N. D. Ohio 1913) 208 Fed. 733.

A combination of retail lumber dealers in order the better to acquire and distribute knowledge about the business methods of wholesale dealers, with the purpose of discriminating against wholesale dealers who sell direct to the consumer, is in violation of the act. *United States v. Eastern States Retail Lumber Co.*, (S. D. N. Y. 1912) 201 Fed. 581.

**Contracts made outside United States.**—"As the contract directly and materially affects the foreign commerce of this country by being put into effect here, it is immaterial where it was entered into or by what vessels it was to be, or has been, performed. Citizen of foreign countries are not free to restrain or monopolize the foreign commerce of this country by entering into combinations abroad nor by employing foreign vessels to effect their purpose. Such combinations are to be tested by the same standard as similar combinations entered into here by citizens of this country. The vital question in all cases is the same: Is the combination to so oper-

ate in this country as to directly and materially affect our foreign commerce?" *United States v. Hamburg-Amer. P. F. A. Gesellschaft*, (S. D. N. Y. 1911) 200 Fed. 806.

**Interstate railroads.**—The act applies to interstate railroads as carriers conducting interstate commerce, and one of the principal instrumentalities thereof. *United States v. Union Pac. R. Co.*, (1912) 226 U. S. 61, 33 S. Ct. 470, 57 U. S. (L. ed.) 124.

**Railroad acquiring control of stock of competing road.**—The consolidation of two great competing systems of railroad engaged in interstate commerce by a transfer to one of a dominating stock interest in the other creates a combination which restrains interstate commerce within the meaning of the statute, because in destroying or greatly abridging the free operation of competition theretofore existing, it tends to higher rates. It directly tends to less activity in furnishing the public with prompt and efficient service in carrying and handling freight and in carrying passengers, and in attention to and prompt adjustment of the demands of patrons for losses, and in these respects puts interstate commerce under restraint. Nor does it make any difference that rates for the time being may not be raised and much money be spent in improvements after the combination is effected. It is the scope of such combinations and their power to suppress or stifle competition or create monopoly which determines the applicability of the act. *United States v. Union Pac. R. Co.*, (1912) 226 U. S. 61, 33 S. Ct. 53, 57 U. S. (L. ed.) 124.

**Railroads engaged in mining and transporting coal** were enjoined from performing contracts between them which were in restraint of trade in *United States v. Lake Shore & M. S. Ry. Co.*, (S. D. Ohio 1912) 203 Fed. 295.

**Transportation between the United States and Alaska** is subject to control under this act. *United States v. Pacific & A. Ry. & Nav. Co.*, (1913) 228 U. S. 87, 33 S. Ct. 443, 57 U. S. (L. ed.) 742.

**Selection of connections by carrier.**—The right of a carrier to select its connections must be admitted, but it cannot, in consequence of such right, enter into agreement for connections not from natural trade reasons but to restrain trade by preventing and destroying competition. *United States v. Pacific & A. Ry. & Nav. Co.*, (1913) 228 U. S. 87, 33 S. Ct. 443, 57 U. S. (L. ed.) 742.

**The unification of terminal facilities in St. Louis** was held, under the circumstances, to be in restraint of trade and in violation of the Anti-Trust Act. *United States v. Terminal R. Ass'n of St. Louis*, (1912) 224 U. S. 383, 32 S. Ct. 507, 56 U. S. (L. ed.) 810, wherein the court said: "It is not contended that the unification of the terminal facilities of a great city where many railroad systems center is, under all circumstances and conditions, a combination in restraint of trade or commerce. Whether it is a facility in aid of interstate commerce or an unreasonable restraint forbidden by the act of

Congress, as construed and applied by this court in the cases of *Standard Oil Co. of New Jersey v. United States*, (1911) 221 U. S. 1, and *United States v. American Tobacco Co.*, (1911) 221 U. S. 106, will depend upon the intent to be inferred from the extent of the control thereby secured over instrumentalities which such commerce is under compulsion to use, the method by which such control has been brought about and the manner in which that control has been exerted.

... If, as we have already said, the combination of two or more mere terminal companies into a single system does not violate the prohibition of the statute against contracts and combinations in restraint of interstate commerce, it is because such a combination may be of the greatest public utility. But when, as here, the inherent conditions are such as to prohibit any other reasonable means of entering the city, the combination of every such facility under the exclusive ownership and control of less than all of the companies under compulsion to use them violates both the first and second sections of the act, in that it constitutes a contract or combination in restraint of commerce among the states and an attempt to monopolize commerce among the states which must pass through the gateway at St. Louis."

**Passenger transportation business.**—Whether the statute be broadly or narrowly construed, it is clear that it prohibits combinations and conspiracies to restrain the business of transporting passengers when accompanied with acts of oppression and attempts to monopolize. *United States v. Hamburg-Amer. P. F. A. Gesellschaft*, (S. D. N. Y. 1911) 200 Fed. 806.

**Illegal control as defense to suit.**—It was the intention of the anti-trust act and the acts amendatory thereto, that the courts should not be used to enforce any agreement or contract entered into in violation of that law. *Patterson v. Imperial Window Glass Co.*, (1914) 91 Kan. 201, 137 Pac. 955.

"The purchaser of property from an illegal combination is bound to pay the purchase price, and so is one who receives property from it upon a contract to sell same for it at certain prices by a certain date, or account to it for those prices at that time, if not then sold. No reason can be given why the latter obligation is not as much enforceable as that to pay the purchase price in case of a purchase. Indeed, it is well settled that, if an agent of another has in the prosecution of an illegal enterprise of his principal received property belonging to the principal, he is bound to account to him therefor, and cannot shield himself from liability on the ground of illegality of the enterprise." *International Harvester Co. of America v. Oliver*, (E. D. Ky. 1911) 192 Fed. 59.

**Intent.**—Whether a particular act, contract or agreement is a reasonable and normal method in furtherance of trade and commerce may, in doubtful cases, turn upon the intent to be inferred from the extent of the control thereby secured over the commerce affected, as well as by the method which was

used. Of course, if the necessary result is materially to restrain trade between the states, the intent with which the thing was done is of no consequence. But when there is only a probability, the intent to produce the consequences may become important. *United States v. Reading Co.*, (1912) 226 U. S. 324, 33 S. Ct. 90, 57 U. S. (L. ed.) 243.

**Construction by state courts.**—In *First Nat. Bank of Jeannette, Pa. v. Missouri Glass Co.*, (1912) 169 Mo. App. 374, 152 S. W. 378, it was held that the court had the right to pass on the issue raised in the pleadings, namely, that the cause of action was founded on an agreement that was illegal because in violation of the Sherman Anti-Trust Act, and was conclusive as to its jurisdiction.

**The degree of restraint is immaterial.**—It is sufficient if the contract is of such a character, as, with wrongful purpose, to directly affect trade, or if it only tends to do so. If the purpose of the agreement or conspiracy is to restrain trade within the meaning of the act, it can make no difference if in a particular case it only affected a very small part of that trade. *United States v. Patterson*, (S. D. Ohio 1912) 201 Fed. 697.

**Patents.**—Rights conferred by patents while definite and extensive do not give any more than other rights an universal license against the positive prohibition of the Sherman Act. *Standard Sanitary Mfg. Co. v. United States*, (1912) 226 U. S. 20, 33 S. Ct. 9, 57 U. S. (L. ed.) 107.

**Does not change patent law.**—All men know that Congress never intended when it passed the Sherman act to change the patent law. It did not do so. The patentee may, in spite of that law, monopolize for the term of his patent the thing which he or his assignor invented. But neither at common law nor in this country by statute has he ever had a right to monopolize anything else. As to everything not validly claimed in his patent he is as other men. If by the common law or the statutes of the state or by the enactments of Congress men are forbidden to restrain trade or to monopolize it, a patentee may not restrain trade or attempt to monopolize it in anything except that which is covered by his patent. *United States v. Standard Sanitary Mfg. Co.*, (C. C. Md. 1911) 191 Fed. 172; *United States v. Patterson*, (S. D. Ohio 1913) 205 Fed. 292.

"Protection by patent is established by Congress. It is not a constitutional guaranty, but depends wholly on the statutes. An act of Congress directed against evils which were assumed to arise from the monopolistic combination of those engaged in interstate commerce comes from the same source and carries the same obligation of enforcement as do the patent laws. No word or phrase in the Sherman anti-trust act reveals an intent to exempt the owners of patents from its sweeping provisions against monopolistic combination. We are unable to perceive any underlying reason for supposing that by implication growing out of economic or business conditions such

an exemption was intended. There appears to be no inherent natural distinction between owners of patents and owners of oil which would justify the application of the statute to one and not to the other. The conclusion seems to follow that the comprehensive condemnation of the act against every person who monopolizes interstate commerce by combination with others includes holders of patents as well as others." *United Shoe Machinery Co. v. La Chapelle*, (1912) 212 Mass. 467, 99 N. E. 289, Ann. Cas. 1913D 715.

The statute does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. *Henry v. A. B. Dick Co.*, (1912) 224 U. S. 1, 32 S. Ct. 364, 56 U. S. (L. ed.) 645, Ann. Cas. 1913D 880.

Only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade. *Nash v. United States*, (1913) 229 U. S. 373, 33 S. Ct. 780, 57 U. S. (L. ed.) 1232.

**Persons entering combination already initiated.**—The phrase "engage in such combination or conspiracy" is used in a broad sense, and includes not only such persons as initiate a conspiracy, but also those who afterwards engage therein. *United States v. New Departure Mfg. Co.*, (W. D. N. Y. 1913) 204 Fed. 107.

An agreement between a labor union and a manufacturer whereby the parties concerned amicably adjusted their differences by executing writings containing expressions of mutual friendship and consideration, and provisions that the company would not sue because of past controversies, that it would establish union wages, hours of labor, and conditions of employment, and that the labor organizations on their part commended the product of the company to their members, sympathizers, and friends, is not unlawful as restricting competition and tending to create a monopoly in favor of members of the union, to the exclusion of all others seeking employment. *Post v. Buck's Stove & Range Co.*, (C. C. A. 8th Cir. 1912) 200 Fed. 918.

**"Restraint of trade."**—It is now well settled that the words "restraint of trade" in the act are to be construed as including "restraint of competition." Full, free, and untrammelled competition in all branches of interstate commerce is the desideratum to be secured. *United States v. Eastern States Retail Lumber Dealers' Ass'n*, (S. D. N. Y. 1912) 201 Fed. 581.

This act "does not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose; the words 'restraint of trade' should be given a meaning

which would not destroy the individual right of contract, and render difficult if not impossible any movement of trade in the character of interstate commerce, the free movement of which it was the purpose of the statute to protect." *United States v. Reading Co.*, (1912) 226 U. S. 324, 33 S. Ct. 90, 57 U. S. (L. ed.) 243.

**Instrumentalities of interstate commerce.**—Tugs employed in the business of towing, into and out of harbors and between ports, vessels engaged in interstate commerce, and in the lightering and wrecking of vessels so engaged, are themselves instrumentalities of interstate commerce. *United States v. Great Lakes Towing Co.*, (N. D. Ohio 1913) 208 Fed. 733.

**Involuntary restraints.**—This section of the act is not confined to voluntary restraints, as where persons engaged in interstate trade or commerce agree to suppress competition among themselves, but includes as well involuntary restraints, as where persons not so engaged conspire to compel action by others, or to create artificial conditions, which necessarily impede or burden the due course of such trade or commerce or restrict the common liberty to engage therein. *United States v. Patten*, (1913) 226 U. S. 525, 33 S. Ct. 141, 57 U. S. (L. ed.) 333, 44 L.R.A.(N.S.) 325.

**Cornering the market.**—A conspiracy to "run a corner" in the available supply of a staple commodity, such as cotton, normally a subject of trade and commerce among the states, and thereby to enhance artificially its price throughout the country and to compel all who have occasion to obtain it to pay the enhanced price or else to leave their needs unsatisfied, is within the terms of this section. *United States v. Patten*, (1913) 226 U. S. 525, 33 S. Ct. 141, 57 U. S. (L. ed.) 333, 44 L.R.A.(N.S.) 325.

**Necessity for action by Interstate Commerce Commission.**—The conduct of the carrier is not subject to judicial review in a criminal or civil case until it has been submitted to and passed upon by the Interstate Commerce Commission. *United States v. Pacific & A. Ry. & Nav. Co.*, (1913) 228 U. S. 87, 33 S. Ct. 443, 57 U. S. (L. ed.) 742.

**Contracts affecting production, transportation and sale of coal.**—In *United States v. Reading Co.*, (1912) 226 U. S. 324, 33 S. Ct. 90, 57 U. S. (L. ed.) 243, the court with reference to certain contracts affecting the production, transportation and sale of coal, between railroads and coal mining companies, said: "It is not essential that these contracts considered singly be unlawful as in restraint of trade. So considered, they may be wholly innocent. Even acts absolutely lawful may be steps in a criminal plot. But a series of such contracts, if the result of a concerted plan or plot between the defendants to thereby secure control of the sale of the independent coal in the markets of other states, and thereby suppress competition in prices between their own output and that of the independent operators, would come plainly within the terms of the statute, and as

parts of the scheme or plot would be unlawful."

**Agreement regarding sale of copyrighted books.**—This statute is applicable to an agreement in restraint of trade regarding the sale of copyrighted books whereby the retailer is compelled to sell to purchasers at a price fixed by the publisher. *Straus v. American Publishers' Ass'n*, (1913) 231 U. S. 222, 34 S. Ct. 84.

**Combination for efficiency.**—A combination which is simply an effort after greater efficiency is not in violation of the act. *United States v. Winslow*, (1913) 227 U. S. 202, 33 S. Ct. 253, 57 U. S. (L. ed.) 481.

**Single shipment.**—There may be a conspiracy under the act with reference to a single shipment. *Steers v. United States*, (C. C. A. 6th Cir. 1911) 192 Fed. 1.

"A single contract for the employment in labor of one person is far away from interstate commerce. But when it is alleged that it is one among others with ninety per cent. of all those skilled in a particular manufacture, and that that kind of manufacture is controlled by a combination formed of many previously competing persons which monopolizes all or substantially all interstate commerce of that kind, the single contract for labor loses its individual aspect in the larger relation it bears to the monopoly in interstate commerce. As a single incident it may be harmless. As an integral part of an unlawful scheme for monopolizing commerce between the states which cannot be perpetuated successfully without contracts of like tenor with all practicing a similar craft, it partakes of the illegality of the scheme." *United Shoe Machinery Co. v. La Chapelle*, (1912) 212 Mass. 467, 99 N. E. 289, Ann. Cas. 1913D 716.

A combination of citizens to enforce an ordinance, though the ordinance is invalid because in violation of the commerce clause, is not a combination prohibited by this act where the citizens act in good faith under the belief that the ordinance is valid. *Citizens' Wholesale Supply Co. v. Snyder*, (C. C. A. 3d Cir. 1913) 201 Fed. 907, wherein the court said: "Of course, an ordinance that conflicts with the commerce clause must ultimately give way; but we cannot assent to the proposition that two persons cannot combine in good faith to take action in the courts under such an ordinance without being exposed to the sanctions of the Anti-Trust Act. A citizen has a right to act in good faith upon the belief that a law or an ordinance passed by constituted authority is valid. *Prima facie* it is valid, and although his belief may no doubt be erroneous now and then, and he may have his labor and cost for his pains, we think it clear that even then he is not to be treated as a deliberate wrongdoer. We cannot suppose that the general words of the Anti-Trust Act were intended to include an agreement in good faith to test a municipal ordinance in the courts. Such a construction would impose an extraordinary burden upon the citizen, and could only be justified by unmistakable language.

It would require very plain speaking to make us believe that Congress had said, in effect, that citizens while acting in good faith to redress the violation of an ordinance *prima facie* valid, or even of fairly doubtful validity, must anticipate the decision of some ultimate tribunal, and must do so at the risk of being fined or imprisoned if their forecast should be wrong. The policy of the law encourages the peaceful settlement of disputes, and we see nothing in the conduct of the merchants' association that was deserving of blame. In good faith and on plausible grounds they believed the law to be with them, and they had a right to try out such a controversy in the courts, although the litigation might be expensive for their antagonist as well as for themselves. No precedent has been cited that supports the plaintiff's position; but on the analogous subject of false imprisonment there are numerous cases to the contrary. Plaintiffs have often been denied the right to recover damages, although they have been actually imprisoned for violating an invalid law or ordinance."

**Combination of transatlantic lines.**—An agreement between certain steamship companies for the formation of an association relating to the carriage of steerage passengers between the United States and Europe which contemplates the solicitation of business, the making of contracts of carriage, the taking on board of passengers, and the actual commencement of transportation within the territory of the United States and which shows a division of traffic into stated percentages, contains stipulations for the pooling of receipts, and embraces provisions to secure its enforcement, and operates to give the parties to the agreement a virtual monopoly of that part of the foreign commerce of the United States within the scope of the combination, is within the prohibition of this act. *United States v. Hamburg-Amer. P. F. A. Gesellschaft*. (S. D. N. Y. 1911) 200 Fed. 806.

**Contract to refrain from selling to an individual or class.**—A contract between many engaged in the same business to refrain from selling to an individual or a class would be an illegal restraint of trade under the Sherman Act, unenforceable at law and subjecting the participants to a criminal prosecution thereunder. Such a contract might be express or implied, or consist of a mere combination or conspiracy to accomplish that end. No definite form of agreement is required. *United States v. Southern Wholesale Grocers' Ass'n*, (N. D. Ala. 1913) 207 Fed. 434.

**Necessity of overt act.**—This act punishes the conspiracies at which it is aimed on the common law footing—that is to say, it does not make the doing of any act other than the act of conspiring a condition of liability. The decisions as to the relations of a subsequent overt act to crimes under Rev. Stat., § 5440 (2 Fed. Stat. Annot. 247), in *Hyde v. United States*, (1912) 225 U. S. 347, 32 S. Ct. 793, 56 U. S. (L. ed.) 1114, and *Brown v. Elliott*, (1912) 225 U. S. 392, 32 S. Ct. 812, 56 U. S. (L. ed.) 1136, have no

bearing upon a statute that does not contain the requirement found in that section. *Nash v. United States*, (1913) 229 U. S. 373, 33 S. Ct. 780, 57 U. S. (L. ed.) 1232.

**Pleading and evidence.**—In a prosecution for conspiracy it is not necessary to allege or prove that the conspirators themselves were all traders. *Nash v. United States*, (1913) 229 U. S. 373, 33 S. Ct. 780, 57 U. S. (L. ed.) 1232.

The disintegration aimed at by the statute does not extend to reducing all manufacture to isolated units of the lowest degree. *United States v. Winslow*, (1913) 227 U. S. 292, 33 S. Ct. 253, 57 U. S. (L. ed.) 481.

**Order of bringing civil and criminal actions.**—This act provides for a criminal proceeding to punish violations and suits in equity to restrain such violations, and the suits may be brought simultaneously or successively. The order of their bringing must depend upon the Government; the dependence of their trials cannot be fixed by a hard and fast rule or made imperatively to turn upon the character of the suit. Circumstances may determine and are for the consideration of the court. An imperative rule that the civil suit must wait the trial of the criminal action might result in injustice or take from the statute a great deal of its power. *Standard Sanitary Mfg. Co. v. United States*. (1912) 226 U. S. 20, 33 S. Ct. 9, 57 U. S. (L. ed.) 107.

**Indictment.**—The offense under this section permits in one count an allegation of only a single transaction—that is, an allegation of making one contract, or engaging in one combination or conspiracy—so that while by virtue of the decisions of the Supreme Court in *United States v. Kissel*, (1910) 218 U. S. 601, 607, 31 Sup. Ct. 124, 54 L. ed. 1168, and *United States v. Barber*, (1911) 219 U. S. 72, 78, 31 Sup. Ct. 209, 55 L. ed. 99, such a combination or conspiracy, when once effected, may be continuous, yet only one contract or one conspiracy can properly be alleged in any one count. *United States v. Winslow*, (D. C. Mass. 1912) 195 Fed. 573.

As to the sufficiency of an indictment, see *United States v. New Departure Mfg. Co.* (W. D. N. Y. 1913) 204 Fed. 107; *Corey v. Independent Ice Co.*, (D. C. Mass. 1913) 207 Fed. 459.

This act is cited in *Winfree v. Riverside Cotton Mills*, (1912) 113 Va. 717, 75 S. E. 309.

**Combination controlling ninety per cent of a necessity.**—"The earlier conception of a monopoly was a grant of an exclusive right from the sovereign power. This still defines with accuracy that which an inventor receives under the patent laws. But in a wider sense monopoly denotes a combination, organization or entity so extensive, exclusive and unified, that its tendency is to prevent competition in its comprehensive sense, with the consequent power to control prices to the public harm. . . . But whatever may be the precise definition of the word 'monopoly' as used in this statute, a business device by which a considerable number of



competing corporations are welded into a single corporate entity, which controls from 90 to 95 per cent. of the commerce of the country in a particular branch required for

the economical production of a necessity of mankind, is a monopoly." *United Shoe Machinery Co. v. La Chapelle*, (1912) 212 Mass. 467, 99 N. E. 289, Ann. Cas. 1913D 715.

## Vol. VII, p. 340, sec. 2.

Three distinct offenses.—In this section are found three distinct offenses, perhaps four: Monopolizing, attempting to monopolize, and combining or conspiring to monopolize. Monopolization and attempting to monopolize are held to be distinct offenses. And the charge of monopolizing will support a verdict of attempting to monopolize. A conspiracy to monopolize trade is one thing, and it is very like a conspiracy in restraint of trade; but the monopoly is the result of the conspiracy. It is the accomplished thing. But the statute makes the act of monopolizing also an offense. *United States v. Patterson*, (S. D. Ohio 1912) 201 Fed. 697.

Indictment.—This section impliedly permits an indictment for building up a monopoly, as well as inaugurating it or maintaining it, and therefore may relate to a series of acts following each other, all covered into one indictment or count, without the indictment or count being chargeable with duplicity. *United States v. Winslow*, (D. C. Mass. 1912) 195 Fed. 578.

An indictment was held not bad for duplicity in *United States v. Patterson*, (S. D. Ohio 1912) 201 Fed. 697. The court said: "The offenses charged grow out of the same transactions, are of the same class, and each count charges a separate and distinct offense. They may be joined in one indictment. Rev. Stat. U. S. § 1024. It is true that the offense of monopolizing charged in the third count is committed every day during the continuance of the monopoly, and no count may contain more than one offense; but it is the same monopoly, the continuance of which during the three years is complained of, and in reality there is but one offense, brought about through the conspiracy and illegal acts the defendants are charged with prior to the three years. But the defendants are not charged with continuing a monopoly. They are charged with monopolizing by continuing to carry on the business of the National Cash Register Company augmented prior to the three years by the illegal means set forth in the first count. The illegal acts complained of have resulted in only one monopoly. A monopoly, when established, is in its very nature a continuous offense. It is here that Justice Holmes' remarks in *United States v. Kissel*, 218 U. S. 601, 607, 31 Sup. Ct. 124, 126 (54 L. ed. 1168), are applicable. He says: 'But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous co-operation of the conspirators to keep it up, and there is such continuous co-operation, it is a perversion of natural thought and of natural language to call such continuous co-operation a cinematographic series of distinct conspiracies, rather than to call it a single

one.' It is true he was speaking of conspiracies, but the reasoning which proves a continued conspiracy to be only one rather than a series of distinct conspiracies would demonstrate the unity of a continued monopoly."

When there is a general charge of restraint of all trade in a certain commodity, and the specific facts alleged show that, if true, the defendants have restrained a part of that trade, an offense against the laws of the United States has been alleged. *United States v. Patterson*, (S. D. Ohio 1912) 201 Fed. 697.

In *United States v. Patterson*, (S. D. Ohio 1912) 201 Fed. 697, the court, having before it the sufficiency of an indictment charging conspiracy in restraining trade in cash registers, said: "The defendants claim that there is really no charge of conspiracy to do the things set forth in the indictment, but that the charge amounts to nothing more or less than that the defendants did the things described in the indictment; that is to say, the indictment charges that in carrying on their business the defendants did the things charged with intent to restrain the free flow of interstate commerce, but does not charge that the defendants agreed, or combined, by concerted action to accomplish an unlawful purpose, and that it charges the concerted action, or the 'concurrent action,' as being the conspiracy itself. There seems to be no merit in this claim, for the reason that the defendants are distinctly charged with conspiracy in the direct restraint of trade in cash registers, and particularly the trade in cash registers carried on by the several cash register companies other than the National Cash Register Company named, and that they adopted a plan which involved the doing of certain things which were done all with the intent to restrain the free flow of interstate trade as carried on by the other concerns named. The indictment clearly charges the defendants with devising a scheme involving the doing of certain things in restraint of trade through a concerted plan adopted for the purpose and carried on through concerted action and continuous endeavor. It does not specifically allege the agreement to do the unlawful acts complained of, but the acts alleged necessarily involve a continuing agreement to do them. The 'plan' is set forth and the way it was carried out is alleged. Justice Holmes says: 'A conspiracy in restraint of trade is different from and more than a contract in restraint of trade. A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract but a result of it.' *United States*

v. Kissel, 218 U. S. 601, 608, 31 Sup. Ct. 124, 128 (54 L. ed. 1168). This is sufficient in the law to meet the requirements of an indictment under this statute."

Under this act no overt act is necessary to the commission of the offense of conspiracy in restraint of trade or commerce. *United States v. Patterson*, (S. D. Ohio 1912) 201 Fed. 697.

### Vol. VII, p. 344, sec. 3.

**Oklahoma.**—When Oklahoma and Indian Territories became transformed into the state of Oklahoma, this section ceased to have force within the boundaries of the state. By the provisions of the Enabling Act and

The anti-trust act is one of generic terms, and it is not sufficient to charge a crime in the general language of such a statute; but the specific acts constituting the offense must be set forth with reasonable particularity of time, place, and circumstance. *United States v. Patterson*, (S. D. Ohio 1912) 201 Fed. 697.

the Constitution the Territorial Anti-Trust Act alone was adopted and continued in force in the state of Oklahoma. *State v. Coyle*, (1912) 7 Okla. Crim. 50, 122 Pac. 243.

### Vol. VII, p. 344, sec. 4.

**Suit in state courts.**—Whether an original action can be maintained in the state courts seeking an injunction and to recover damages under the Sherman law is raised but not decided in *Straus v. American Publishers' Ass'n*, (1913) 231 U. S. 222, 34 S. Ct. 84.

**Each case decided on own facts.**—Each case under the Sherman Act must stand upon its own facts, and decrees in other cases with dissimilar facts are not precedents to be followed. *United States v. Union Pac. R. Co.*, (1913) 220 U. S. 470, 33 S. Ct. 162, 57 U. S. (L. ed.) 306.

**Remedies afforded by statute.**—In *United States v. Union Pac. R. Co.*, (1912) 226 U. S. 61, 33 S. Ct. 53, 57 U. S. (L. ed.) 124, wherein the court reached the conclusion that the Union Pacific Railroad Company by acquiring control of the stock of the Southern Pacific Railroad Company effected a combination in restraint of trade, the court, commenting on the relief to be granted, said: "The remedies provided in the statute, generally speaking, were said by this court in the Standard Oil case, 221 U. S. 78, to be two-fold in character . . . : '1st. To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute. 2d. The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about.' In applying this general rule of relief we must deal with each case as we find it, and in the present one the object to be

attained is to restrain the operation of and effectually terminate the combination created by the transfer of the stock to the Union Pacific Company. In that view the decree to be entered in the District Court shall provide an injunction against the right to vote this stock while in the ownership or control of the Union Pacific Company, or any corporation owned by it, or while held by any corporation or person for the Union Pacific Company, and forbid any transfer or disposition thereof in such wise as to continue its control, and shall provide an injunction against the payment of dividends upon such stock while thus held, except to a receiver to be appointed by the District Court to collect and hold such dividends until disposed of by the decree of the court."

**Nature of decree.**—"The main purpose of the act is to forbid combinations and conspiracies in undue restraint of trade or tending to monopolize it, and the object of equitable proceedings is to decree, by as effectual means as a court may, the end of such unlawful combinations and conspiracies. So far as is consistent with this purpose a court of equity dealing with such combinations should conserve the property interests involved, but never in such wise as to sacrifice the object and purpose of the statute. The decree of the courts must be faithfully executed, and no form of dissolution be permitted that in substance or effect amounts to restoring the combination which it was the purpose of the decree to terminate." *United States v. Union Pac. R. Co.*, (1913) 226 U. S. 470.

This section was cited in *McKinney v. Kansas Natural Gas Co.*, (D. C. Kan. 1913) 206 Fed. 772.

### Vol. VII, p. 345, sec. 7.

**Who may sue.**—A stockholder cannot maintain a suit at law authorized by this section for injury to the business of his corporation whereby the value of his stock is impaired. The right of action created by this section is in the corporation alone, rep-

resenting all its stockholders. *Corey v. Independent Ice Co.*, (D. C. Mass. 1913) 207 Fed. 459.

**Jurisdiction.**—Under this section, without respect to the amount in controversy, an action may be brought in the district in which

the defendant resides or is found. *Strout v. United Shoe Machinery Co.*, (D. C. Mass. 1912) 195 Fed. 313.

It is essential, in order to support the jurisdiction of the court, that it shall appear somewhere on the record either in the application for the writ or accompanying its service or in the pleadings or the findings of the court that the defendant is engaged in business in the district. *Dobson v. Farbenfabriken of Elberfeld Co.*, (E. D. Pa. 1913) 206 Fed. 125.

**Limitations.**—A cause of action for damages against several persons for conspiracy to injure the plaintiff in its business by an unlawful agreement begins to run only from the time the plaintiff had knowledge of the facts giving rise to the cause. *American Tobacco Co. v. People's Tobacco Co.*, (C. C. A. 5th Cir. 1913) 204 Fed. 58.

**Pleading—Allegation of forbidden acts and consequent injury.**—The first section of this act denounces restraint of interstate trade in two ways—by contract and by a combination or conspiracy—and in the second section the monopolizing and attempt to monopolize any of such trade is denounced. To maintain an action under this act, therefore, the plaintiff must allege as well as prove that the defendant committed one of such forbidden acts, and that in consequence he was injured in his business or property. In the pleading, plaintiff must declare the forbidden acts and consequent injuries in such clear and unambiguous language, and with such reasonable certainty, that the defendants and the court may be apprised of the alleged cause of action, that it may be known by the former how to answer and prepare for trial, and by the latter what is the nature of the issue, and, if it be one of fact, to control the character of the proofs offered at the trial, and to pronounce and enforce a judgment that will settle the rights involved in such issues. *Buckeye Powder Co. v. E. I. Du Pont De Nemours Powder Co.*, (D. C. N. J. 1912) 196 Fed. 514.

**Niceties of common-law pleading unnecessary.**—To require the party injured by the conspiracy denounced by the Anti-Trust Act to set out his cause of complaint with such degree of nicety and precision in stating times, places, methods, and persons, as is required in the ordinary common-law pleading, would be to nullify the beneficent purpose of the statute. If the pleader sets out with reasonable certainty and definiteness the causes which resulted to his injury, and connects the defendant therewith, and from such allegations the defendant is apprised of the character of the accusation, and it is not apparent that he will be prejudiced in making his defense, a declaration will not be struck out, even though it may contain some statements of a general and indefinite character, and shall fail to disclose the exact times and places when some of the alleged steps in furtherance of the conspiracy were carried on, or the names of all the persons employed therein. If as to such general statements the defendant deems himself enti-

tled to more specific information, he may apply for a bill of particulars in regard thereto; but the right of the plaintiff to have his cause judicially inquired into is not to be made dependent upon his ability to state with exactness each step or each of the several parts of a step which either from the results presumably took place or which he alleges took place. He is not required to allege more than is necessary to be proven, nor is he to be unduly limited in making his allegations of steps taken because at the time of making them he is not in possession of the specific data which at the trial he will find necessary to establish such step, unless such step or steps by the very framework of his pleadings are essential to his cause of action, and it is apparent that without more definite data the defendant will be prejudiced in his defense in meeting such allegation. To insist that the plaintiff insert in his declaration only such steps as would be sufficient to maintain his action would be to unduly limit or skeletonize his pleading, a course apt to prove embarrassing, if not disastrous, at the trial, where the range of evidence may be limited by the paucity of the allegations, and one which would be antagonistic to, rather than co-operative with, the legislative purpose manifested in the Anti-Trust Act." *Buckeye Powder Co. v. E. I. Du Pont De Nemours Powder Co.*, (D. C. N. J. 1912) 196 Fed. 514.

**Necessity for allegation that action brought under Anti-Trust Act.**—In an action for damages under this section it is not necessary to state in the declaration that the action is brought under the Anti-Trust Act where the allegations plainly show that the action is under such act. *Strout v. United Shoe Machinery Co.*, (D. C. Mass. 1912) 195 Fed. 313, wherein the court said: "The doctrine of the federal courts is unquestionably that in matters of pleading inferences from equivocal and uncertain allegations cannot be followed, and that, where the question relates to jurisdiction, argumentative inferences are not sufficient to establish jurisdiction. The averments must be positive; and the court cannot retain jurisdiction over a doubtful record to say whether or not the intention was to bring the case under a specific act. The learned counsel for the defendants have called attention to the leading cases upon this subject. The court in this circuit has expressed itself clearly in *Jenkins v. York Cliffs Improvement Company*, (C. C.) 110 Fed. 807. But the declaration in this case seems to me to be perfectly clear. The averments are such as to show unequivocally that the action is brought under section 7 of the Sherman Law, even though the plaintiff did not in terms mention that statute. This was not necessary so long as the allegations were such as to preclude the defendant from being misled, and to prevent the plaintiff from urging at any later stage in the case that he intended merely to state a common-law action. Section 7 of the Sherman Law is so clear and plain in its provisions that its meaning cannot be uncertain.

It is not in its nature and substance a penal action; its vindication does not rest with the state; it has been held repeatedly to be a civil remedy for private injury, compensatory in its purpose and effect. It provides for the recovery of threefold damages sustained by the plaintiff, which are held to be exemplary damages."

*Declarations were held to be sufficient on demurrer in Cilley v. United Shoe Machinery Co., (D. C. Mass. 1913) 202 Fed. 598; Strout v. United Shoe Machinery Co., (D. C. Mass. 1913) 202 Fed. 602.*

*Amendment.*—The course of action must be complete when the suit is brought, and therefore where an action is brought under this act the plaintiff cannot amend his summons to include corporations formed after his action is begun or amend his complaint by inserting various allegations as to acts done by them. *Locker v. American Tobacco Co., (S. D. N. Y. 1912) 197 Fed. 495*, where in the court said: "The action is brought under the seventh section of the federal Anti-Trust Act July 2, 1890. Its gravamen is tortious action, and it is elementary that the cause of action must be complete when suit is brought. Until the wrong is done and the injury suffered, there is no cause of action under this section. Threatened wrong and apprehended loss are not within its provisions. To the federal government alone does the Anti-Trust Act confide the power to check future contemplated unlawful acts by injunction. The relief accorded to the individual is an action at law for treble damages when he can show that the act has been violated, and that such violation has injured him in his business or property. He cannot maintain such an action, if his complaint fails to show that at or prior to the time when the action is begun defendant had done any act in violation of the statute."

A foreign corporation "is found," for the purpose of service, where it is doing business. *Michigan Aluminum Foundry Co. v. Aluminum Castings Co., (E. D. Mich. 1911) 190 Fed. 879.*

Injury to "business and property."—A dismissal from a corporation office in pursuance of a plan of the corporation to effect a monopoly does not constitute an injury to "business and property," there being no breach of contract resulting from the dismissal. *Corey v. Boston Ice Co., (D. C. Mass. 1913) 207 Fed. 465.*

Injury must result from something forbidden or made unlawful by the act, and what is forbidden or made unlawful is expressed in sections 1 and 2. *Virtue v. Creamery Package Mfg. Co., (1913) 227 U. S. 8, 33 S. Ct. 202, 57 U. S. (L. ed.) 393.*

*Conspiracy to restrain interstate commerce.*—An action based on conspiracy to restrain interstate commerce, if damages follow from such conspiracy, may be brought under Act July 2, 1890. *Cheatham Electric Switching Device Co. v. Transit Development Co., (E. D. N. Y. 1911) 191 Fed. 727.*

*Evidence of conspiracy.*—It is rare that a conspiracy is proved by direct evidence. In a vast majority of cases circumstantial evidence is relied on. Such evidence is as efficacious as direct if it establishes the proposition that the defendants, or some of them, had a common purpose to violate the law which they succeeded in accomplishing. *Hale v. Hatch & North Coal Co., (C. C. A. 2d Cir. 1913) 204 Fed. 433.*

Conduct of conspirators subsequent to the destruction of the plaintiff's business is admissible to show conspiracy to destroy. *Buckeye Powder Co. v. Hazard Powder Co., (D. C. Conn. 1913) 205 Fed. 827.*

*Judgment as res judicata.*—A judgment for the defendants in a prior action in the federal courts to recover treble damages for alleged combination in restraint of trade, in violation of the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209) is not res judicata of plaintiffs' right to maintain a common-law action for interference with their business by false representations, threats, and malicious prosecution. *Virtue v. Creamery Package Mfg. Co., (1913) 123 Minn. 17, 142 N. W. 930.*

## TREASURY DEPARTMENT.

### Vol. VII, p. 384, sec. 8.

*Conclusiveness of finding limited to executive branch.*—"The statute, which makes the finding of the comptroller 'final and conclusive,' limits its own effect to the 'executive branch of the government.' I do not know what that means, unless it be to leave it open to the courts to re-examine the merits

and decide, regardless of the finding of the comptroller. It was no doubt to give to the treasury department an authoritative word when it chanced to differ with the other departments." *United States v. Gilmore, (S. D. N. Y. 1911) 189 Fed. 761.*

## TREATIES.

### Vol. VII, p. 603, art. I, par. 3.

**Theft or stealing.**—The offense of "theft or stealing" under the Canadian statute is comprehended within the term "larceny" as

used in this treaty. *Powell v. United States*, (C. C. A. 6th Cir. 1913) 206 Fed. 400.

### Vol. VII, p. 654, art. I.

**Conviction in contumaciam.**—For the purposes of proceedings for extradition under this treaty a conviction in contuma-

ciam will be treated only as a charge of crime. *Ex parte La Mantia*, (S. D. N. Y. 1913) 206 Fed. 330.

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## WAR DEPARTMENT AND MILITARY ESTABLISHMENT.

### Vol. VII, p. 950, sec. 1096.

This section was revived as the result of the act of June 1, 1888, 25 Stat. 165, c. 338, by virtue of which Lieutenant General Sheridan was made for life the General

of the Army. But the revival was only for the life of General Sheridan. *Wood v. United States*, (1912) 224 U. S. 132, 32 S. Ct. 461, 56 U. S. (L. ed.) 696.

### Vol. VII, p. 960, sec. 1117.

**For benefit of parent or guardian.**—This provision is for the benefit of the parent or guardian. It means simply that the government will not disturb the control of parent or guardian over his or her child without consent. It gives the right to such parent or guardian to invoke the aid of the court and secure the restoration of a minor to his or her control; but it gives no privilege to the minor. *Doane v. Burkman*, (C. C. A. 9th Cir. 1911) 190 Fed. 541.

The guardian whose written consent is required by this section is one who was such at the time of the enlistment, and who was

then entitled to the legal custody and control of the minor. This would be the proper construction of the section without its proviso, but the proviso places the matter beyond question. *Doane v. Burkman*, (C. C. A. 9th Cir. 1911) 190 Fed. 541.

**Minor held for military offense.**—The parent or guardian of a minor 16 years of age or over, who has enlisted without consent, is not entitled to his custody when held for a military offense, and not simply under his enlistment. *Ex parte Dunakin*, (E. D. Ky. 1913) 202 Fed. 290.

### Vol. VII, p. 960, sec. 1118.

**State militia.**—The enlistment of a minor in the state militia is not governed by this section. *Acker v. Bell*, (1911) 62 Fla. 108, 57 So. 356, Ann. Cas. 1913 C 1269, 39 L.R.A.(N.S.) 454.

### Vol. VII, p. 1025, sec. 1.

**Mustered out of service.**—In *United States v. Gillmore*, (S. D. N. Y. 1911) 189 Fed. 761, the court construing certain words in this statute said: "As to the Act of 1899,

which refers specifically to the volunteer service, it would seem that the words 'hereafter mustered out of the service' might more properly mean 'mustered out of the

volunteer service' than 'out of all military service.' However, by section 4 of chapter 81 of Act March 3, 1865, 13 Stat. 497, it was provided that all volunteer officers 'who shall continue in the military service to the close of the war shall be entitled to receive, upon being mustered out of said service, three months' pay proper.' Later by chapter 181 of Act July 13, 1865, 14 Stat. 94, this section was amended so as to provide that all volunteer officers 'who were in service' at a given date and who were 'honorably discharged from the service' before another

should have the allowance. It was held in *United States v. Merrill*, (1869) 9 Wall. 614, 19 U. S. (L. ed.) 664, that in these two statutes 'military service' and 'service' included any kind of service, volunteer or regular, and that where a regular officer was discharged from the volunteers, so that he resumed his former pay instant, he could not claim this allowance. I cannot think that the Act of 1869, which was drawn to meet the same situation, should be differently construed."

### 1909 Supp., p. 693, sec. 1. [*Back pay and bounty — stating balances.*]

The proviso must be read in connection with what goes before and is not to be treated as distinct and independent legislation. It therefore is only applicable to the claims

referred to in the section. *Pennington v. United States*, (1914) 231 U. S. 631, 34 S. Ct. 269.

## WATERS.

### Vol. VII, p. 1090, sec. 2339.

**Not a grant.**—This section does not purport to give title to any land but merely the right to use any land for the purpose of protecting a vested and accrued water right. *Crane Falls Power & Irrigation Co. v. Snake River Irr. Co.*, (1913) 24 Idaho 63, 133 Pac. 655.

**Riparian rights.**—The riparian rights of a patentee are determined by the law of the state wherein the patented land is situated. *Empire Water & Power Co. v. Cascade Town Co.*, (C. C. A. 8th Cir. 1913) 205 Fed. 123.

**Rights acquired by appropriation.**—By this act United States confirmed all water rights then vested in streams upon the public domain, and provided for the acquisition of similar rights therein in the future. These became private property when so acquired. *Thayer v. California Development Co.*, (1912) 164 Cal. 117, 128 Pac. 21.

**Extent and purposes of appropriation.**—"The only limitation placed upon the vested right in water appropriated under this statute is the use for which the appropriation is made. The water may not be wasted so as to prevent others from using it for legitimate purposes. The right to water must be exercised by the appropriator with reference to the general condition of the country and the necessities of the people and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual. . . . But we know of no law requiring the appropriator of water to change his system of husbandry to conform to some other system where less water is required. In other words, we know of no law requiring the defendants in this case to

cease diverting water for the irrigation of alfalfa or other forage crops heretofore grown on their land and compelling them to reduce their diversion to that required for an orchard or other use requiring less water; nor do we know of any law requiring them to reduce their appropriation of water to the quantity required for a less gravelly and porous soil simply because there is a better soil in the neighborhood requiring less water. What is required of the appropriator is that he shall not waste the water appropriated but shall put it to a beneficial use in accordance with the requirements of the husbandry in which he is engaged." *United States v. Bennett*, (C. C. A. 9th Cir. 1913) 207 Fed. 524.

**Purpose of act.**—This section was enacted by Congress to protect the appropriator and user of water. It is an act to protect rights to the use of water and not an act to protect contractors who construct ditches for an agreed compensation for those who desire to use the water. *Crane Falls Power & Irrigation Co. v. Snake River Irr. Co.*, (1913) 24 Idaho 63, 133 Pac. 655.

**Statute is enactment of existing customs.**—Primarily, any use of the water of a natural stream for a beneficial purpose is free to him who has an opportunity to take it without infringing upon the property rights of another. At least on the Pacific slope, the exigencies of mining and agriculture have established this principle since the earliest times. The general government acquiesced in its application since the first settlements under the American régime, and by this section, and in the Act of March 3, 1877. c. 108,

19 Stat. 377, 6 Fed. Stat. Annot. 392, commonly known as the "desert land act," has enunciated the doctrine in statutory form. *Caviness v. La Grande Irr. Co.*, (1911) 60 Ore. 410, 119 Pac. 731.

This statute is general and applies to all government land. *State v. Stampfly*, (1912) 69 Wash. 368, 125 Pac. 148.

**Construction of ditches.**—This section recognizes the right to construct ditches over the public domain through which is to be conveyed water for agricultural and other purposes. *Lynch v. Lower Yakima Irr. Co.*, (1913) 73 Wash. 173, 131 Pac. 829.

A ditch constructed and in actual use over and across unoccupied public land and used continually thenceforth as a conduit is a vested right within the meaning of this and the next section, as against one who is not in a position to dispute the water right and who deranged title by grant from the government. *Chicago, B. & Q. R. Co. v. McPhillamey*, (1911) 19 Wyo. 425, 118 Pac. 682, Ann. Cas. 1913E 101.

The section clearly contemplates that one who seeks the benefit of the right of way for ditches over the public lands must have some rights to the use of water which are recognized and acknowledged by the local customs, laws, and decisions of the courts of the state wherein such system is being con-

structed, before he is entitled to the right of way for the construction of ditches or canals for the purposes specified in said section. *Crane Falls Power & Irrigation Co. v. Snake River Irr. Co.*, (1913) 24 Idaho 63, 133 Pac. 655.

**Ditches for generation of electric power.**—Rights of way for ditches and canals for the generation of electric power are granted by this section. *United States v. Utah Power & Light Co.*, (D. C. Utah 1913) 208 Fed. 821, wherein the court said: "It recognizes rights to the use of water for mining, agricultural, manufacturing, or other purposes whenever they have accrued under local customs, laws, and decisions of courts, and grants a right of way for the construction of ditches and canals for these purposes. This was in the nature of a continuing offer and embraced water rights for any beneficial purpose. Its object was to promote the development of the resources of the country; and this object would be defeated by holding that it should be so strictly construed as to eliminate every purpose for which water was not then used."

Subsequent statutes of a similar nature have not repealed this section.—*United States v. Utah Power & Light Co.*, (D. C. Utah 1913) 208 Fed. 821.

## Vol. VII, p. 1096, sec. 2340.

This section is general in its application and applies to all government lands. *State v. Stampfly*, (1912) 69 Wash. 368, 125 Pac. 148.

**Patents subject to rights of way for ditches.**—This section makes patents grant-

ed by the government subject to the right to ditches used in connection with water rights. *Lynch v. Lower Yakima Irr. Co.*, (1913) 73 Wash. 173, 131 Pac. 829.

## Vol. VII, p. 1098, sec. 1.

**Circumstances leading to passage of act.**—The official reports show that, in 1902, there were in sixteen States and Territories 535,486,731 acres of public land still held by the Government and subject to entry. A large part of this land was arid, and it was estimated that 35,000,000 acres could be profitably reclaimed by the construction of irrigation works. The cost, however, was so stupendous as to make it impossible for the development to be undertaken by private enterprise, or, if so, only at the added expense of interest and profit private persons would naturally charge. With a view, therefore, of making these arid lands available for agricultural purposes by an expenditure of public money, it was proposed that the proceeds arising from the sale of all public lands in these sixteen States and Territories should constitute a trust fund to be set aside for use in the construction of irrigation works—the cost of each project to be assessed against the land irrigated, and as fast as the money was paid by the owners back into the trust, it was again to be used for the construction of other works. Thus the fund, without diminution except for small and negligible sums

not properly chargeable to any particular project, would be continually invested and reinvested in the reclamation of arid land. See H. R. Report, No. 1468, 57th Congress, 1st session. The general outline of this plan was approved by Congress, which, on June 17, 1902, passed "An act appropriating the receipts from the sale and disposal of public lands in certain states and territories to the construction of irrigation works for the reclamation of arid lands." *Swigart v. Baker*, (1913) 229 U. S. 187, 33 S. Ct. 645, 57 U. S. (L. ed.) 1143.

**Assessments to defray cost of maintenance of canal.**—The Secretary of the Interior has authority under this act to levy and collect assessments to defray the cost of maintenance of canals before payments have been made for the major portion of the lands irrigated therefrom, and before the management and operation of the irrigation works have passed to the owners of the lands irrigated thereby. *Baker v. Swigart*, (E. D. Wash. 1912) 196 Fed. 569, wherein the court said: "The argument against the authority of the Secretary is based on section 1 of the act, which authorizes the use of the reclamation

fund, in the construction and maintenance of irrigation works; on the provision of section 6 which authorizes the Secretary to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the act, and on section 4, which apparently only provides for the return to the reclamation fund of the estimated cost of the construction of the project. The question thus presented is by no means free from doubt or difficulty. I am convinced that Congress intended that the reclamation fund should remain intact, and that it should not be depleted by defraying the expenses of maintenance or otherwise. At the same time, if this authority exists in the Secretary, it rests in implication only, and it is unfortunate indeed that so vast a power should have no surer foundation. But the question is not a new one, and does not rest on the language of the act of Congress alone. The Secretary has, for a number of years, both asserted and exercised the authority he now claims with the acquiescence of other depart-

ments of the government, and has collected vast sums of money under it. His construction of the act has been approved by the Attorney General (27 Op. Atty. Gen., 360) and by the Circuit Court of Oregon in *United States v. Cantrall et al.*, (C. C.) 176 Fed. 949. The Congress itself has both expressly and impliedly recognized the existence of such authority in many later acts. I appreciate the force of the argument that the construction of a legislative act by a subsequent Legislature or by another department of the government is only controlling in doubtful cases, but I am not so far satisfied that the Secretary is acting without warrant or authority of law as to justify a court of first instance at least in denying that authority to him under the circumstances disclosed by this record."

This section is cited in *Henkel v. United States*, (C. C. A. 9th Cir. 1912) 196 Fed. 345; *Plain v. Horne*, (D. C. Idaho 1912) 196 Fed. 582.

## Vol. VII, p. 1099, sec. 4.

Reclamation fund may be used for maintenance.—*Baker v. Swigart*, (C. C. A. 9th Cir. 1912) 199 Fed. 865.

## Vol. VII, p. 1099, sec. 5.

Cost of maintenance.—The statute provides that the cost of construction of the project shall be charged against the land within the irrigable limits. The phrase is not expressly defined and being general in

its terms is not necessarily limited to building, but may include the preservation and maintenance of what has been built. *Swigart v. Baker*, (1913) 229 U. S. 187, 33 S. Ct. 645, 57 U. S. (L. ed.) 1143.

## Vol. VII, p. 1100, sec. 7.

Determination of necessity.—The legislative branch may delegate the determination of the question of necessity. The reclamation Act imposes that duty on the Secretary of the Interior. *United States v. O'Neill*, (D. C. Colo. 1912) 198 Fed. 677.

When government entitled to possession.—See *United States v. O'Neill*, (D. C. Colo. 1912) 198 Fed. 677.

What constitutes public use.—See *United States v. O'Neill*, (D. C. Colo. 1912) 198 Fed. 677.

This section is cited in *United States v. Buffalo Pitts Co.*, (C. C. A. 2d Cir. 1912) 193 Fed. 905.

## 1912 Supp., p. 418, sec. 2.

Power to make contracts.—The Secretary of the Interior has the power, by virtue of this section, to enter into contracts

with irrigation districts. *Pioneer Irr. Dist. v. Stone*, (1913) 23 Idaho 344, 130 Pac. 332.

# WHITE SLAVE TRAFFIC.

## 1912 Supp., p. 419, sec. 1.

Transportation of persons is commerce.—"Commerce among the states consists of in-

tercourse and traffic between their citizens, and includes the transportation of persons



and property. There may be, therefore, a movement of persons as well as of property; that is, a person may move or be moved in interstate commerce. And the act under consideration was drawn in view of that possibility. What the act condemns is transportation obtained or aided or transportation induced in interstate commerce for the im-

moral purposes mentioned." *Hoke v. United States*, (1913) 227 U. S. 308, 33 S. Ct. 281, 57 U. S. (L. ed.) 523, 43 L.R.A.(N.S.) 906.

State statutes affecting the transportation of women from one state to another for immoral purposes, are rendered invalid by the Mann Act. *State v. Harper*, (Mont. 1914) 138 Pac. 495.

## 1912 Supp., p. 419, sec. 2.

**Constitutionality of act.**—To the same effect as the original note, see *Hoke v. United States*, (1913) 227 U. S. 308, 33 S. Ct. 281, 57 U. S. (L. ed.) 523, 43 L.R.A.(N.S.) 906; *Athanasaw v. United States*, (1913) 227 U. S. 326, 33 S. Ct. 285, 57 U. S. (L. ed. 528; *Bennett v. United States*, (1913) 227 U. S. 333, 33 S. Ct. 288, 57 U. S. (L. ed.) 531; *Harris v. United States*, (1913) 227 U. S. 340, 33 S. Ct. 289, 57 U. S. (L. ed.) 534; *Kalem v. United States*, (C. C. A. 9th Cir. 1912) 196 Fed. 888; *Paulsen v. United States*, (C. C. A. 9th Cir. 1912) 199 Fed. 423; *United States v. Flaspoller*, (E. D. La. 1913) 205 Fed. 1006.

In *Hoke v. United States*, (1913) 227 U. S. 308, 33 S. Ct. 281, 57 U. S. (L. ed.) 523, 43 L.R.A.(N.S.) 906, the court said: "Our dual form of government has its perplexities, state and nation having different spheres of jurisdiction, as we have said, but it must be kept in mind that we are one people; and the powers reserved to the states and those conferred on the nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral. This is the effect of the decisions, and surely if the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of food and drugs, the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women, and, more insistently, of girls."

In *Bennett v. United States*, (C. C. A. 6th Cir. 1912) 194 Fed. 630, it appeared that the defendant was the keeper of a house of prostitution in Cincinnati and sent letters and telegrams to a woman in Chicago to induce her to come to Cincinnati, and finally sent tickets which the woman used to come from Chicago to Cincinnati where she became an inmate of the defendant's house. The defendant's counsel claimed that commodities only, and not persons, can be the subject of commerce; that persons cannot be prohibited from traveling from one state to another because of some intention they may have: that the woman herself was not by this act forbidden to travel; that it cannot be a criminal act to aid an unforbidden act; and that the law is an invasion of the police powers of the states. In overruling these contentions the court said: "It cannot now be doubted that transportation, of persons as well as of property, is 'commerce,' and that

Congress may regulate the interstate transportation of persons. . . . It is also settled that the constitutional power to regulate includes the power to prohibit, in cases where such prohibition is in aid of the lawful protection of the public. . . . We think it a mistake to assume that this statute does not prohibit, and so impliedly permits, the primary act and yet punishes as a crime a merely incidental wrong. The act does not undertake to prohibit the woman from traveling from one state to another of her own volition, and in the supposed exercise of her inherent personal rights, no matter what her purpose as to her future conduct may be. This conclusion is emphasized by observing that the woman traveling may be perfectly innocent of any intended immorality, and that the act cannot be intended to interfere with liberty of travel by such person. The primary thing forbidden is the inducing of a person to come into the state, with unlawful purpose by the inducer and in aid of such unlawful purpose, but without direct regard to the innate character or purpose of the person induced. It is this primary thing, and the incidental transportation by the carrier, which are forbidden and penalized. We do not find in the statute either the purpose or the effect to interfere with the police powers of the state. The law is directed only against the inducing or performing of interstate transportation; and this entire subject-matter is obviously not within the scope of the police power of any state; hence its exercise cannot be an invasion of such power. It may well be assumed that the laws of all states prohibit, as those of Ohio do, the various ultimate acts of immorality referred to in this statute, and it follows that the law in question is in aid of the complete and effective exercise by the states of their respective police powers, and is of the same class as many acts of Congress in recent years having the same general purpose."

**Transportation for purpose of engaging in illicit intercourse prohibited.**—An indictment is sufficient which sets out that the woman was persuaded to go from one state to another for the purpose of engaging in illicit intercourse, cohabitation, and concubinage with the accused, as illicit cohabitation and concubinage are immoral acts analogous to prostitution, and come well within the letter of the statute. *United States v. Flaspoller*, (E. D. La. 1913) 205 Fed. 1006.

**"Debauchery."**—"The term debauchery is not a legal or technical term. To debauch is

to corrupt in morals, or principles; to lead astray morally into dishonest and vicious practices; to corrupt; to lead into unchastity; to debauch. Debauchery, then, is an excessive indulgence of the body; licentiousness, drunkenness, corruption of innocence, taking up vicious habits. The term debauchery, as used in this statute, has an idea of sexual immorality; that is, it has the idea of a life which will lead eventually or tends to lead to sexual immorality." *Athanasaw v. United States*, (1913) 227 U. S. 326, 33 S. Ct. 285, 57 U. S. (L. ed.) 528.

**Indictment.**—In *Bennett v. United States*, (C. C. A. 8th Cir. 1912) 194 Fed. 630, in a prosecution for violation of this act, it was urged that there was a fatal variance between the indictment and proof because the indictment charged the transportation of two persons while the proof failed as to one of them. But the court said: "If we accept the claim that the proof did so fail, still we would not think the variance fatal. The violation of the statute is complete if one person is transported, and the fact that two persons are named in the same count, instead of basing a separate count upon the travel of each person, should not be fatal to a conviction. It is true that where two persons are named as the subject of the offense, and it is proved as to one of them only, there is a seeming variance, but it is really a failure of proof as to a thing which it was not

necessary to allege. The only points here, which are of substance and not of form, are, as with reference to the last matter discussed, the question of misleading the respondent and the question of protection against a future prosecution. It is clear that respondent would not be misled unless there were two occasions so as to give rise to some ambiguity, and no such thing here appears. It is true, also, that, as to the person concerning whom the proof failed, the record would show a conviction which was in so far really unauthorized, but the protection against a future prosecution would be just as perfect, and it cannot be presumed that the action of the trial court, in possession of all the facts, would be prejudicially affected in the matter of sentence. In these respects, the case is within the rule that a general conviction and sentence upon several counts will not be disturbed because all but one of the counts are bad, provided the good count supports the sentence."

**Punishment.**—A person convicted for the crime created by this section may be punished by imprisonment in a penitentiary for a longer or shorter period than one year. *United States v. Thompson*, (N. D. Cal. 1912) 202 Fed. 346.

For evidence held to be sufficient to show a violation of this act, see *Spencer v. Raylor Creek Ditch Co.*, (C. C. A. 9th Cir. 1912) 194 Fed. 634.

### 1912 Supp., p. 420, sec. 3.

**Wife as witness against husband.**—A wife, persuaded by her husband to go from one state to another with intent that she should there engage in immoral practices, may tes-

tify against the husband in a prosecution against him under this section. *United States v. Rispoli*, (E. D. Pa. 1911) 189 Fed. 271.

### 1912 Supp., p. 421, sec. 6.

**Countries co-operating for suppression of white slave traffic.**—A reference to the proclamation of the President of June 15, 1908 (35 Stat. L. p. 1979), will show that the following foreign countries are parties to the project of arrangement for the suppression of the white slave traffic, viz., Germany, Belgium, Denmark, Spain, France, Great Britain, Italy, the Netherlands, Portugal, Russia, Sweden, Norway, and the Swiss Federal Council. It is only persons harboring alien women or girls from these countries, or such other countries as may adhere to such project of arrangement, that are required to file the statement in writing with the Commissioner General of Immigration, and an indictment failing to show that a woman or girl so harbored is from one of such countries is fatally defective. *United States v. Davin*, (E. D. Wash. 1911) 189 Fed. 244.

**Not retroactive.**—It would perhaps have been competent for Congress to have required the filing of a statement by persons harboring alien women or girls at the time of the passage of the act, within a time to be fixed by Congress, but the act contains no such provision. It is therefore apparent that the act was not intended to apply to those who were harboring alien women at the date of its passage, at least where such harboring had already continued for a period of more than thirty days. *United States v. Davin*, (E. D. Wash. 1911) 189 Fed. 244.

The requirement of the statute is general, and includes all persons harboring alien women or girls of the prescribed class, and the fact that they are not also guilty of procurement is immaterial. *United States v. Davin*, (E. D. Wash. 1911) 189 Fed. 244.

## WITNESSES.

### Vol. VII, p. 1116, sec. 858.

**Transactions with decedents.**—Where an action is brought against an executor to establish a trust in property left to his testatrix the party bringing the action will not be allowed to testify to transactions with, or statements of, the testatrix, but she may testify to statements made by the person who

left the property to the testatrix, as the action is not against his executor. *Updike v. Mace*, (S. D. N. Y. 1912) 194 Fed. 1001.

**State laws as rule of decision.**—This section has no application to criminal cases. *Maxey v. United States*, (C. C. A. 8th Cir. 1913) 207 Fed. 327.

### Vol. VII, p. 1124, sec. 848.

**Voluntary attendance.**—To the same effect as the original note, see *Marks v. Merrill Paper Co.*, (C. C. A. 7th Cir. 1913) 203 Fed. 16.

"The question whether the per diem and travel fees of witnesses who attend voluntarily in a federal court, without subpoena, are taxable as part of the costs under section 848 of the Revised Statutes and earlier statutes, has been a question as to which there has been a direct conflict of opinion. . . . Prior to 1886 the weight of opinion appears to have been about evenly divided. In that year, however, it was held in *United States v. Sanborn*, (C. C. Mass. 1886) 28 Fed. 299, in a carefully prepared opinion by Gray, Circuit Justice, in which Colt, Circuit Judge, concurred, and after a full and elaborate review of the authorities, that under section 848 of the Revised Statutes the mileage of witnesses who had attended a trial without subpoena should be taxed as part of the costs. Since the publication of this opinion it appears that the case of *Lillienthal v. Southern California Ry. Co.*, (S. D. Cal. 1894) 61 Fed. 622, is the only one in which it has been held that the fees and mileage of witnesses who attend voluntarily without subpoena are not taxable as costs, and it furthermore appears that in reaching its conclusion *Ross*, District Judge, who delivered the opinion, felt constrained, without regard to his individual views, to adhere to the construction that had been previously put upon the statute by *Sawyer*, Circuit Judge, in two earlier reported cases in the same circuit. On the other hand it appears that since the publication of the opinion in the *Sanborn* case, it has been uniformly held—except in the *Lillienthal* case—that the per diems and travel fees of witnesses who attend in good faith should not be disallowed, if otherwise taxable, merely because the witnesses were not subpoenaed, but attend voluntarily at the request of one of the par-

ties." *American Bank Protection Co. v. City Nat. Bank of Johnson City*, (E. D. Tenn. 1913) 203 Fed. 715.

**Nominal defendants.**—Counsel fees may be allowed to nominal defendants who are compelled to attend by subpoena when their own interests do not make it necessary. *Marks v. Merrill Paper Co.*, (C. C. A. 7th Cir. 1913) 203 Fed. 16.

**Mileage not exceeding one hundred miles** may be taxed as mileage for witnesses from without the district. *United States v. Green*, (D. C. N. M. 1912) 196 Fed. 255, wherein the court said: "The question for decision arises upon the taxation of costs, and is whether mileage for more than 100 miles is allowable for witnesses residing without the district and more than 100 miles from the place where court is held. This question must be answered in the negative. While there is some conflict of authority, due largely to the holdings in the First Circuit, which latter follow certain early expressions from Judge Story, the weight of authority is to the effect that mileage is not taxable under such circumstances for a distance greater than 100 miles from the place of trial. The case of *Hanchett v. Humphrey* (C. C.) 93 Fed. 895, in my judgment correctly declares the law, where it says: 'The true rule upon this subject, as gleaned from all the authorities, is substantially to the effect that the acts of Congress were intended to, and do, allow mileage to witnesses to the full extent of the distance that could be legally reached by subpoena, to wit, at any place within the district or at any point without the district to the extent of 100 miles from the place where the court is held.' The only modification of this general rule is in such exceptional cases as are hinted at by Judge Shiras in *Smith v. Chicago Company* (C. C.) 38 Fed. 326, and by Judge Brown in *The Vernon* (D. C.) 36 Fed. 113, 117."

### 1909 Supp., p. 708. [Act of June 29, 1906.]

**Bankruptcy proceedings** are governed by this act. In re *Thompson*, (D. C. N. J. 1913) 205 Fed. 556.

**Section 858 as here amended is cited in** In re *Hoffman*, (D. C. N. J. 1912) 199 Fed. 448.

## 1909 Supp., p. 708. · [Act of June 30, 1906.]

**Testimony under Anti-Trust Act.**—In *Heike v. United States*, (1913) 227 U. S. 131, 33 S. Ct. 226, 57 U. S. (L. ed.) 450, the petitioner contended that, as soon as he had testified upon a matter under the Sherman Anti-Trust Act, he had an amnesty by the statute from liability for any and every offense that was connected with that matter in any degree, or at least every offense towards the discovery of which his testimony led up, even if it had no actual effect in bringing about the discovery. This contention was overruled, the court saying: "Of course there is a clear distinction between an amnesty and the constitutional protection of a party from being compelled in a criminal case to be a witness against himself. Amendment V. But the obvious purpose of the statute is to make evidence available and compulsory that otherwise could not be got. We see no reason for supposing that the act offered a gratuity to crime. It should be construed, so far as its words fairly allow the construction, as coterminous with what otherwise would have been the privilege of the person concerned. We believe its policy to be the same as that of the earlier Act of February 11, 1893, c. 83, 27 Stat. 443, 3 Fed. Stat. Annot. 855, which read 'No person shall be executed from attending and testifying,' etc. 'But no person shall be

prosecuted,' etc., as now, thus showing the correlation between constitutional right and immunity by the form. That statute was passed because an earlier one, in the language of a late case, 'was not coextensive with the constitutional privilege.' *American Lithographic Co. v. Werckmeister*, (1911) 211 U. S. 603, 611. . . . To illustrate, we think it plain that merely testifying to his own name, although the fact is relevant to the present indictment as well as to the previous investigation, was not enough to give the petitioner the benefit of the act. . . . There is no need to consider exactly how far the parallelism should be carried."

**Corporations.**—The privilege against self-incrimination is personal to a witness and cannot be availed of by a corporation so as to withhold its books, correspondence, and accounts or to close the mouths of its servants and agents as witnesses. Obviously, if corporations could do this, they would be enabled entirely to defeat investigations under the interstate commerce act and the Sherman anti-trust law. *Simon v. American Tobacco Co.*, (S. D. N. Y. 1911) 192 Fed. 662.

A person verifying a pleading is not entitled to immunity under this section. *Simon v. American Tobacco Co.*, (S. D. N. Y. 1911) 192 Fed. 662.

## YACHTS.

## 1909 Supp., p. 828, sec. 37.

**Constitutionality.**—Congress, in enacting this statute, acted within all the limitations of the Constitution regulating the exercise of the taxing power. The tax is an excise and not a direct tax. It also possesses the uniformity required by the constitutional provision. It is assessed equally on all citizens throughout the United States who own or charter foreign-built yachts. It is geographically uniform and that which the Constitution prescribes is geographical and not intrinsic uniformity. *United States v. Billings*, (S. D. N. Y. 1911) 190 Fed. 359.

**Immunity under treaty.**—The owner of a foreign-built yacht cannot acquire, under a treaty, any immunity which will exempt him from the operation of the statute. *United States v. Billings*, (S. D. N. Y. 1911) 190 Fed. 359.

**When tax leviable.**—In *United States v. Billings*, (S. D. N. Y. 1911) 190 Fed. 359, the court in considering the question whether a tax was properly leviable on a vessel, September 1, 1909, as provided in this section said: "It is urged by the defendants

that as the tax is one upon use, it ought to have some fair relation to the actual enjoyment of the privilege tax, and that it must have been the intention of Congress, in enacting the legislation just prior to the close of the year, to lay an annual tax upon future use and not to penalize past use, and that if a tax for past use be levied it should be apportioned according to the period of actual use prior to September 1, 1909. There is much force in these contentions but I think that they are not well founded. The language of the statute, speaking on August 6, 1909, is that the use of yachts 'now or hereafter owned' shall be taxed on September 1st. The section says that the use of yachts owned at the time of its passage or thereafter acquired shall be taxed, and in my opinion Congress intended that such tax should be levied on the first day of every September following the enactment of the statute. While the tax is collectible annually according to a given situation on September 1st, there is nothing in the statute to indicate that a full year's use

is a prerequisite to liability, nor is there any provision for apportionment. I, therefore, hold that the tax was properly leviable on September 1, 1909. If this construction gives the statute a retrospective operation—and I fail to see that it does—it is nevertheless adopted, because it is, in my opinion, required by the unequivocal language used."

Vessels not in use are subject to the tax.—In *United States v. Billings*, (S. D. N. Y. 1911) 190 Fed. 359, the court said: "The statute seems to distinguish between use and ownership. It imposes a novel tax—a tax on use. There is nothing by way of precedent to aid in the determination whether Congress intended that the statute should apply only in cases where owners use their yachts for yachting purposes during the year prior to the assessment of the tax, or whether it intended that the tax should cover the privilege of using. Considering the object of the statute and the reason of the matter, I think the latter interpretation the correct one, although I fully appreciate the very narrow distinction between such a tax on the privilege of using and a tax on ownership. Still, I can see no reason why Congress should distinguish between the yacht owner who chooses to put his yacht in commission and employ it as a pleasure craft, and the owner who prefers in a particular year to keep his yacht laid up. The latter has in one sense the use of his

yacht, although he does not choose to sail it. I have already held that use by the owner for any particular length of time is not necessary to the application of the statute, and I now feel constrained to further hold that no particular kind of use is required—that a yacht owner who keeps his yacht laid up is nevertheless liable to the tax."

The six months limitation is only applicable to chartered yachts. *United States v. Billings*, (S. D. N. Y. 1911) 190 Fed. 359.

"Foreign built yacht."—A "foreign-built" vessel is one originally constructed outside the United States, no matter how extensive the changes, alterations, or repairs bestowed upon her here may have been. *United States v. Blair*, (S. D. N. Y. 1911) 190 Fed. 372.

The place of taxation is, by the plain direction of the statute, the residence of the person taxed. *United States v. Blair*, (S. D. N. Y. 1911) 190 Fed. 372.

Notice.—When the act declares that a particular collector shall levy and collect the tax, it means that he must do something by way of apprising the person who is called upon to pay of the claim made. *United States v. Blair*, (S. D. N. Y. 1911) 190 Fed. 372.

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C.V.A.















